THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S REVIEW OF OHIO ADM.CODE CHAPTER 4901:1-3, CONCERNING ACCESS TO POLES, DUCTS, CONDUITS, AND RIGHT-OF-WAY.	**CASE NO. 19-834-AU-ORD**

FINDING AND ORDER

Entered in the Journal on April 7, 2021

I. SUMMARY

{¶ 1} The Commission adopts the proposed amendments to Ohio Adm.Code Chapter 4901:1-3 regarding the Commission's rules for access to poles, ducts, conduits, and right-of-way, as determined in and attached to this Finding and Order.

II. DISCUSSION

A. Applicable Law

{¶ 2} R.C. 111.15(B) and R.C. 106.03(A) require all state agencies to conduct a review of their rules every five years to determine whether the rules should be continued without change, amended, or be rescinded. The Commission has opened this docket to review the rules regarding pole attachments in Ohio Adm.Code Chapter 4901:1-3.

{¶ 3} R.C. 106.03(A) requires that the Commission determine whether the rules:

(a) Should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rules were adopted;

(b) Need amendment or rescission to give more flexibility at the local level;

(c) Need amendment or rescission to eliminate unnecessary paperwork;

(d) Incorporate a text or other material by reference and, if so, whether the citation accompanying the incorporation by reference would reasonably enable the Joint Committee on Agency Rule Review or a reasonable person to whom the rules apply to find and inspect the incorporated text or material readily and without charge and, if the rule has been exempted in whole or in part from R.C. 121.71 to 121.74 because the incorporated text or material has one or more characteristics described in R.C. 121.75(B), whether the incorporated text or material actually has any of those characteristics;

(e) Duplicate, overlap with, or conflict with other rules;

(f) Have an adverse impact on businesses, as determined under R.C. 107.52;

(g) Contain words or phrases having meanings that in contemporary usage are understood as being derogatory or offensive; and,

(h) Require liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.

{¶ 4} In accordance with R.C. 121.82, in the course of developing draft rules, the Commission must evaluate the rules against the business impact analysis (BIA). If there will be an adverse impact on businesses, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse impact. Furthermore, the Commission is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative office the draft rules and the BIA.

{¶ 5} Pursuant to R.C. 121.95(F), a state agency may not adopt a new regulatory restriction unless it simultaneously removes two or more other existing regulatory restrictions. In accordance with R.C. 121.95, and prior to January 1, 2020, the Commission

identified rules having one or more regulatory restrictions that require or prohibit an action, prepared a base inventory of these restrictions in the existing rules, and submitted this base inventory to the Joint Committee on Agency Rule Review, as well as posted this inventory on the Commission's website at https://puco.ohio.gov/wps/portal/gov/puco/documents-and-rules/resources/restrictions. With regard to the amendments discussed in this Finding and Order with respect to Ohio Adm.Code Chapter 4901:1-3, the Commission has both considered and satisfied the requirements in R.C. 121.95(F).

B. Procedural History

{¶ 6} On May 21, 2019, the Commission held a workshop in this proceeding to afford interested stakeholders an opportunity to propose revisions to the rules in Ohio Adm.Code Chapter 4901:1-3 for the Commission's consideration. The purpose of the workshop was to allow stakeholders to propose their own revisions to the rules for consideration. Approximately 21 interested stakeholders attended the workshop, and representatives from the Ohio Cable Telecommunications Association (OCTA) provided comments.

{¶ 7} Commission Staff (Staff) evaluated the rules contained in Ohio Adm.Code Chapter 4901:1-3 and, following Staff's review, proposed amendments to Ohio Adm.Code 4901:1-3-01, 4901:1-3-02, 4901:1-3-03, 4901:1-3-04, and 4901:1-3-05. The remaining rules in the chapter were, under Staff's proposal, to remain unchanged.

{¶ 8} By Entry issued on July 17, 2019, the Commission requested comments and reply comments on Staff's proposed revisions to Ohio Adm.Code Chapter 4901:1-3, and ordered that comments and reply comments be filed by August 15, 2019, and September 9, 2019, respectively.

{¶ 9} Consistent with the Entry issued on July 17, 2019, written comments were timely filed on August 15, 2019, by Sprint Corporation (Sprint), Crown Castle Fiber LLC

(Crown Castle), The Dayton Power and Light Company (DP&L), the Ohio Telecom association (OTA), Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy), OCTA, and collectively by Duke Energy Ohio, Inc. (Duke) and the Ohio Power Company (AEP), in response to Staff's proposed revision. Reply comments were then timely filed on September 9, 2019, by DP&L, Crown Castle, OTA, AT&T Ohio (AT&T), FirstEnergy, OCTA, and collectively by Duke and AEP.

III. COMMENTS ON PROPOSED REVISIONS TO OHIO ADM.CODE CHAPTER 4901:1-3

{¶ 10} Before addressing the individual rules, the Commission thanks all participants for their contributions toward the development of these rules and the insightful comments and reply comments submitted in this proceeding. In some instances, we will be making substantial changes to the structure and content of the rules proposed by Staff, often at the suggestion of the comments that we have received. However, due to the volume of materials and time constraints, we will not attempt to address every issue or suggestion raised. In certain instances, we may have incorporated suggested changes into our rules or addressed concerns without expressly acknowledging the source of the suggestion in this Finding and Order. To the extent that a comment is not specifically addressed in this Finding and Order, it has been rejected.

{¶ 11} Ohio Adm.Code 4901:1-3-01 (Definitions). Staff recommends adding a definition for overlashing as the term is used in Ohio Adm.Code 4901:1-3-03.

{¶ 12} Most commenters support Staff's recommendation to add a definition for "overlashing" to Ohio Adm.Code 4901:1-3-01, but some commenters believe that the proposed definition needs modifications. In particular, Crown Castle believes that the definition of "overlashing" should be expanded to allow strand-mounted wireless facilities to be included as equipment that can be overlashed. Crown Castle asserts that although as the Staff-proposed definition limits overlashing, in practice, varied equipment such as fiber splice cases, fiber snow shoes, cable TC amplifiers, cable TV taps, copper splitters, Wi-Fi

enclosures, and fiber to the home multi-port cases have been overlashed by attaching entities to their own strands for many years, and in some cases decades. OCTA argues that its members not only overlash fiber optic cable; they also overlash coaxial cable and other cables. Accordingly, OCTA recommends that the Commission remove the words "fiber optic" after "additional," and instead, reference different cables, such as coaxial and fiber optic, to ensure there is no dispute over what OCTA members overlash. OTA supports the Commission's proposed definition of "overlashing."

{¶ 13} AEP and Duke also recommend that the Commission revise Staff's proposed draft definition of "overlashing." Specifically, AEP and Duke argue that the phrase "similar to incidental equipment such as fiber slice closers" is vague and open ended and could be abused. AEP and Duke believe that the definition should exclude materials other than cables. Similarly, FirstEnergy suggests striking the term "similar incidental equipment" arguing that the term is not defined or specifically limited and could be susceptible to disputes over conflicting interpretations. OCTA also recommends striking the phrase "or similar incidental equipment such as fiber splice enclosures" because cable companies do not consider that example to be overlashing.

{¶ 14} In addition to the Staff-proposed addition of "overlashing" to Ohio Adm.Code Chapter 4901:1-3, Crown Castle recommends that the rules should be amended to create a definition for complex make-ready and simple make-ready. Specifically, Crown Castle represents that the Federal Communication Commission's (FCC) one-touch-make-ready process (OTMR) has been effective since May 2019, and most, if not all, of Ohio's public utility pole owners have experience implementing the process into their systems. In order to facilitate roll-out of broadband, Crown Castle believes Ohio should embrace the one-touch-make-ready process and incorporate the definitions of "complex make-ready" and "simple make-ready" within 47 C.F.R. 1.1402(p) and (q), respectively, into Ohio Adm.Code 4901:1-3-01.

{¶ 15} As a final matter, OCTA argues that the Commission should adopt a definition for "customer service drop" and recommends that the following definition be included in Ohio Adm.Code 4901:1-3-01: "Customer service drop means a pole attachment that extends from a pole directly to a customer's premises." OCTA represents that the rules make clear that a customer service drop is an attachment for rental rate purposes, but the public utility may not require an application for customer service drops. OCTA argues that this definition, if adopted, will help clarify when and for which types of equipment a pole attachment application is required.

{¶ 16} After reviewing the comments and reply comments, we agree with Crown Castle and find it appropriate to adopt definitions for the terms "complex make-ready" and "simple make-ready." Additionally, as AEP, Duke, and FirstEnergy argue, we find that the phrase "similar to incidental equipment such as fiber slice closers" within the definition of "overlashing" is vague and open ended. Accordingly, we have modified Staff's proposed language in the term "overlashing" as reflected in the draft rules attached to the Finding and Order.

{¶ 17} Ohio Adm.Code 4901:1-3-02 (Purpose and Scope). Paragraph (A) provides that each citation in Ohio Adm.Code Chapter 4901:1-3 that is made to a section of the United States Code or a regulation in the Code of Federal Regulations is intended, and shall serve, to incorporate by reference the particular version of the cited matter that was effective on July 1, 2014. To incorporate recent federal changes, Staff recommended the date in paragraph (A) be updated to October 1, 2019. Additionally, Staff recommends this rule incorporate language regarding full and partial suspension during the application for the tariff approval process as a new subsection (G).

{¶ 18} OCTA avers that the effective date of the statutes and regulations incorporated by reference should not be a future date. As drafted, Ohio Adm.Code 4901:1-3-02(B) states that any cited United States Code section or Code of Federal Regulations be the version effective on October 1, 2019. OCTA believes that by proposing a future date as a trigger

date, the parties cannot effectively consider and comment today on what impact, if any, would occur from such a change in the rules. OCTA suggests that the Commission modify Ohio Adm.Code 4901:1-3-02(A) to reflect the current date, when parties are presenting their initial comments, instead of a future date, because parties are in a position to comment effectively on the proposed change as of the date of their comment filings.

{¶ 19} FirstEnergy argues that, as proposed, Ohio Adm.Code 4901:1-3-02(G) is confusing with respect to the suspension of an application. FirstEnergy suggests that this section be rewritten to provide clarity of the intended process and that the rewritten section be circulated for additional review and comments. OCTA and OTA argue that the suspension process detailed in Ohio Adm.Code 4901:1-3-02(G) would be more appropriately located in Ohio Adm.Code 4901:1-3-04(A) because the intent of the proposal appears to involve only the applications outlined in Ohio Adm.Code 4901:1-3-04.

{¶ 20} In response to OCTA's concerns about the effective date of the statutes and regulations incorporated by reference, the Commission finds it appropriate to update the effective date to March 1, 2021, given that there has been no significant change(s) to the federal rules that would, in the Commission's opinion, impact any parties prior comments. The rule has been amended accordingly. Additionally, we adopt OTA and OCTA's recommendation to move the suspension process detailed in Ohio Adm.Code 4901:1-3-02(G) to Ohio Adm.Code 4901:1-3-04(A)(2), as opposed to FirstEnergy's proposition to rewrite the section, because the intent of the proposal involves the applications outlined in Ohio Adm.Code 4901:1-3-04. This change is reflected in the draft rules attached to the Finding and Order.

{¶ 21} Ohio Adm.Code 4901:1-3-03(A)(2) (Access to poles, ducts, conduits, and rights-of-way). Staff did not propose to amend Ohio Adm.Code 4901:1-3-03(A)(2).

{¶ 22} OCTA avers that, consistent with its previous recommendation for the Commission to adopt a definition for "customer service drop," the Commission should

clarify that a public utility should not be allowed to require an attacher to submit an application for a customer service drop within Ohio Adm.Code 4901:1-3-03(A)(2).

{¶ 23} Ohio Adm.Code 4901:1-3-03(A)(4). Staff did not propose to amend Ohio Adm.Code 4901:1-3-03(A)(4).

{¶ 24} Crown Castle argues that, in spite of the language contained in Ohio Adm.Code 4901:1-3-03(A)(4) requiring, inter alia, a public utility's denial of access to be specific, a number of public utilities persist in denying access to their poles without specific explanations. Accordingly, Crown Castle suggests that in order to clarify that denials of access must be supported by particularized, concrete support for the reasons under which the public utility is denying access, the Commission modify Ohio Adm.Code 4901:1-3-03(A)(4) to clarify that blanket prohibitions related to access do not adequately support a denial of access.

{¶ 25} Ohio Adm.Code 4901:1-3-03(A)(7). Staff recommends the implementation of overlashing language by creating a new subsection (A)(7) within this rule which pertains to the applicable procedure when dealing with an existing attaching entity.

{¶ 26} Crown Castle argues that overlashing permissions should be extended to strand-mounted wireless facilities in Staff-proposed Ohio Adm.Code 4901:1-3-03(A)(7).

{¶ 27} DP&L argues that proposed Ohio Adm.Code 4901:1-03(A)(7) should be rejected as a whole. DP&L posits that entities seeking to overlash on existing attachments should go through the same process as any other attacher. In support of its position, DP&L first argues that overlashing imposes a quantifiable increase in pole loading and references an engineering analysis depicting the effects of a typical overlash on pole loading. DP&L avers that, in order to assure safety and avoid overloading, the Commission should require an application identifying where the overlash will occur and the configuration and type of overlash facilities that will be installed and then the utility must be allowed to determine whether the proposal will overload any pole, and thus require make-ready work before it

can be authorized. DP&L recommends that, if a load study shows that the pole would be overloaded as a result of a proposed overlash, then the overlash proposal should be rejected unless the overlashing entity is willing to pay for make-ready work to replace the existing pole or poles with a stronger pole or poles.

{¶ 28} Secondly, DP&L argues that, even if overloading does not occur, the increased weight of an overlashed attachment increases the risk of mid-span sag into other facilities. DP&L recommends that a pre-approval inspection and mid-span sag analysis should be required.

{¶ 29} While it is DP&L's position that an entity seeking to overlash should be treated in a non-discriminatory manner, DP&L states that it understands its opposition may not be realistic and suggests that, at the very least, certain minimum requirements should apply to overlashing entities. To streamline the overlashing process, DP&L recommends that Ohio Adm.Code 4901:1-3-03(A)(7) be amended to: (1) clarify that an overlashing entity is required to enter into a pole attachment agreement with the pole owner; (2) include minimum requirements for what the overlashing entity should provide to the utility pole owner in the advance notice, such as type, size, and location of the overlashed facilities; (3) remove unused and obsolete attachments in connection with any proposed overlash; (4) authorize pole owners to impute default values for additional loading for overlashing as a substitute for a full load study; (5) allow additional time for very large timeline overlash build-outs; (6) charge a non-discriminatory annual fee to new overlashing entities; and (7) prohibit overlashed entities from subsidizing the cost of inspecting overlashing facilities by ratepayers.

{¶ 30} AEP and Duke support the portion of draft rule Ohio Adm.Code 4901:1-3-03(A)(7)(c) that expressly allows a pole owner to require up to 15 days' advance notice of overlashing stating that advance notice of overlashing is the only way an electric utility can determine whether the proposed overlashing meets the electric utility's engineering

standards for loading and clearance. In addition, AEP and Duke believe this advance notice will allow an electric utility to excise its right under Ohio Adm.Code 4901:1-3-03.

{¶ 31} Furthermore, AEP and Duke support the portion of draft rule Ohio Adm.Code 4901:1-3-03(A)(7)(c) that expressly provides for post-inspections and correction of code violations and equipment damage. AEP and Duke represent that post inspections are essential for electric utilities to ensure that the overlasher has performed the overlashing in the manner proposed in its advance notice and that code violations or pole damage have not resulted from the overlashing. Further, AEP and Duke believe that this rule incentivizes overlashers to perform their work properly the first time.

{¶ 32} With respect to the remaining portion of draft rule Ohio Adm.Code 4901:1-3-03(A)(7)(c), AEP and Duke recommend that the Commission adopt a modified version of proposed Ohio Adm.Code 4901:1-3-03(A)(7)(c) that: (1) prohibits overlashing onto existing violations; (2) confirms that public utilities may deny overlashing for reasons of insufficient capacity, safety, reliability, and general applicable engineering purposes; and (3) confirms that overlashers are responsible for the cost of evaluating the proposed overlashing. Additionally, AEP and Duke recommend that Ohio Adm.Code 4901:1-3-03(A) make clear that public utilities can recover the cost of performing an engineering analysis of proposed overlashing and that public utilities are not responsible for the cost of correcting code or standards violations caused by third-party attaching entities.

{¶ 33} AEP and Duke recommend that the Commission modify Ohio Adm.Code 4901:1-3-03(A)(7)(b) to require existing attachers to correct violations identified by a utility within 15 days of notice to the existing attacher of same, and providing that where the existing attacher fails to do so, the new attacher can proceed with correcting the violation at the existing attacher's sole expense. AEP and Duke believe this modification will address the delay in correcting existing violations.

{¶ 34} FirstEnergy also takes issue with Ohio Adm.Code 4901:1-3-03(A)(7), as proposed. Like DP&L, FirstEnergy believes that entities seeking to overlash on existing

attachments should go through the same process as any other attacher. FirstEnergy recommends Ohio Adm.Code 4901:1-3-03(A)(7) be amended to: (1) authorize public utilities to require pre-approval before overlashing; (2) authorize a public utility to delay an existing attaching entity from overlashing to fix preexisting violations; (3) allow a public utility to require 45 days' advance notice of planned overlashing; (4) allow pole owners, on a nondiscriminatory basis, to make the final determination where there are disputes over capacity, safety, reliability, or engineering issues; (5) allow pole owners to charge the overlashing party a fee for costs incurred by the pole owner for pole inspections.

{¶ 35} As a final matter with respect to overlashing, DP&L calls attention to "double wood," a term used to describe a circumstance in which there are two sets of poles installed next to each other when only one pole is required. DP&L avers that having two sets of poles in close proximity raises safety concerns as well as aesthetics. DP&L represents that double wood arises when either (1) an attacher fails to comply with tariff requirements to move its attachment(s) to a new pole and remove an old pole or (2) an attacher avoids make-ready work by the utility by installing its own poles. Accordingly, DP&L recommends that the Commission adopt a new sub-section (d) in Ohio Adm.Code 4901:1-3-03(B)(3) to authorize public utilities to deny access to one or more poles in a pole line if there are other poles in the same pole line that would require make-ready work and the attaching entity has declined such make-ready work, and instead, installs or seeks to install, its own poles.

{¶ 36} With respect to Ohio Adm.Code 4901:1-3-03(B)(6)(f), DP&L recommends amending this section so that it references the time periods set forth in Ohio Adm.Code 4901:1-3-03(A)(7)(c) and (e). In effect, DP&L states that, for overlash notices involving the lesser of 3,000 poles or five percent of the utility's poles in the state, the public utility may add 45 days for the initial determination of whether there is a capacity, safety, reliability, or engineering issue, and may add 45 days for the post-overlash inspection.

{¶ 37} Sprint represents that, as proposed, draft Ohio Adm.Code 4901:1-3-03(A)(7)(a)(ii), gives existing attaching entities the power to grant or withhold permission

for a third-party to overlash its own equipment, and because the proposed rule contains no prohibitions, limits, or constraints on an existing attacher's ability to withhold consent, an existing attacher could withhold consent for no other reason than to impede another carrier and obtain a competitive advantage. Sprint recommends that Ohio Adm.Code 4901:1-3-03(A)(7)(a)(ii) and Ohio Adm.Code 4901:1-3-03(A)(7)(d) be amended to require a potential overlasher to provide reasonable notice of its intention to overlash an existing attacher instead of requiring permission from the existing attaching entity.

{¶ 38} OCTA states that it fully supports the substance of the Commission's proposed overlash provisions in Ohio Adm.Code Chapter 4901:1-3 and avers that the absence of any rules governing overlashing has caused confusion. However, OCTA believes clarification is necessary with respect to Ohio Adm.Code 4901:1-3-03(A)(7). Specifically, OCTA recommends that the Commission modify subsection (b) and (c) to reflect that a public utility may not prohibit overlashing or subject an overlasher to a fee. In addition, OCTA suggests that subsection (c) of Ohio Adm.Code 4901:1-3-03(A)(7) should, at most, require identification of the location, size and type of cable, and anticipated date to conduct the overlashing. OCTA argues that this additional language are key aspects of overlashing not only in Ohio but across the country as well, and that by listing the maximum information that a utility may require in an advance notice ensures abuse will not take place. Specifically, OCTA contends that pole owners in Ohio and elsewhere are confronting OCTA members with attempts to define overlashing and the notification process so as to make the advance notification tantamount to a full application.

{¶ 39} Ohio Adm.Code 4901:1-3-03(B). Staff did not propose to amend Ohio Adm.Code 4901:1-3-03(B).

A. Make-ready

{¶ 40} Crown Castle believes that make-ready timelines for application review should be incorporated into Ohio Adm.Code 4901:1-3-03(B). Specifically, Crown Castle argues that untimely notification of an incomplete application to attach delays deployment

timelines, and under the present rules, the delay can be by as much as 45 days. Therefore, Crown Castle recommends that the Commission adopt 47 C.F.R. 1.1411(c)(1), which requires a pole owner to inform an attaching entity within ten business days of submission of an application for attachment whether the application is complete, and if the utility pole owner does not inform the attaching entity within 10 business days that its application is complete or otherwise, the application is deemed complete and the survey period begins.

{¶ 41} Of similar note, Crown Castle believes that the Commission should also shorten the make-ready timeline for complex make-ready in the communications space from 60 to 30 days in Ohio Adm.Code 4901:1-3-03(A)(7)(a)(ii).

{¶ 42} Crown Castle also recommends amending Ohio Adm.Code 4901:1-3-03(B)(2) to incorporate requirements for itemized, detailed, invoices for make-ready, consistent with 47 C.F.R. 1.1411(d). To support this recommendation, Crown Castle states that frequently, attaching entities are provided with make-ready estimates that provide no level of detail from which to determine if the costs therein are reasonable, and in order to ensure transparency and guarantee that attaching entities are bearing only the reasonable economic responsibility for make-ready, the Commission should replace a portion of Ohio Adm.Code 4901:1-3-03(B)(2) with the language of 47 C.F.R. 1.1411(d).

B. Self-help

{¶ 43} Crown Castle further argues that the FCC recently provided attaching entities with the ability to perform self-help above the communications space when the utility or other third-party attachers have not complied with their make-ready timeframes under 47 C.F.R. 1.1411(e)(2) by permitting the use of a utility-approved contractor by the attaching entity. Crown Castle urges the Commission to adopt similar self-help provisions into Ohio Adm.Code Chapter 4901:1-3.

{¶ 44} Additionally, Crown Castle argues that the Commission should incorporate 47 C.F.R. 1.1412(a) and (c)(1) through (c)(5) regarding a list of contractors for self-help

complex and make-ready work above the communications space as well as minimum qualifications for such contractors into Ohio Adm.Code 4901:1-3-03(B)(5) and (C).

{¶ 45} FirstEnergy recommends that the Commission move the phrase "[o]nly the public utility or its direct contractor may perform make ready work above the communications space" in Ohio Adm.Code 4901:1-3-03(B)(5) to subdivision (C)(2) in order to clarify that it applies to all make-ready work in the power space, and not just for wireless attachments.

{¶ 46} With respect to Ohio Adm.Code 4901:1-3-03(C), OCTA believes that greater detail and flexibility are needed with respect to contractors used for survey and make-ready work. Accordingly, OCTA recommends that, when an attacher uses "self-help" because a pole owner fails to perform survey and make-ready work in a timely manner, the attaching entity be able to choose its own qualified contractors, approved by the utility, rather than use a utility-chosen contractor. OCTA suggests modifying Ohio Adm.Code 4901:1-3-03(C) to allow an attaching entity to add contractors that meet specified minimum qualifications to the utility-provided authorized contractors list.

C. One-Touch Make-Ready

{¶ 47} Lastly, Crown Castle, AEP, and Duke believe that the Commission should incorporate the OTMR process set forth in 47 C.F.R. 1.1411(j) as an alternative make-ready process for attachment applications involving simple make-ready into Ohio Adm.Code 4901:1-1-3-03(B). AEP and Duke believe a OTMR rule would encourage competition and broadband deployment while minimally burdening electric safety and reliability. AEP and Duke refute OCTA's recommendation that the Commission should not consider OTMR rules because those rules had only recently gone into effect and state that there is little downside to implementing OTMR rules if the Commission fashions them after the FCC's so as to only apply to simple make-ready in the communications space. Lastly, AEP and Duke contend that, although there is a pending Ninth Circuit case challenging other portions of

the FCC's order that adopted the OTMR rules, the OTMR rules are not being challenged by any party on appeal.

{¶ 48} The Commission notes that, after reviewing this docket, many of the comments received related largely in part to Staff's proposal to adopt overlashing language when dealing with an existing attaching entity and the effects these suggested provisions have on other sections of this rule chapter. Many of the interested stakeholders who filed comments requested that Ohio Adm.Code 4901:1-3-03 be modified to provide more clarity to both public utilities and attaching entities, specifically with respect to time frames, make-ready, contractors, overlashing, OTMR, and self-help. In addition, several stakeholders recommended that the Commission adopt certain provisions from the FCC's regulations in order to promote efficacy and consistency within the industry since many of the interested stakeholders must already adhere to the FCC's requirements in states that do not regulate pole attachments. Rather than having two different sets of rules – federal and state – we believe that adopting certain provisions of the FCC's regulations will help alleviate some of the administrative burden public utilities and attaching entities face to reach compliance. Additionally, the adoption of federal regulations to replace certain current Commission rules eliminates redundant regulatory restrictions fulfilling the purpose underlying R.C. 121.95(F) and reduces the adverse impact on business pursuant to R.C. 107.52 by not requiring affected business stakeholders to bear the expense of complying with two different sets of regulations, i.e., federal and state.

{¶ 49} After much consideration and in response to the comments the Commission received to modify this rule, we adopt the following provisions as reflected in the draft rules attached to this Finding and Order: 47 C.F.R. 1.1403 with respect to the duty to provide access and required notifications; 47 C.F.R. 1.1411(c) with respect to the application review and survey requirements; 47 C.F.R. 1.1411(d) with respect to the make-ready estimates; 47 C.F.R. 1.411(e) with respect to the notification requirements and make-ready time periods for attachments in the communications space and above the communications space; and 47 C.F.R. 1.1411(g) and 1.411(h) with respect to the time periods in Ohio Adm.Code 4901:1-3-

03. With respect to self-help, we adopt 47 C.F.R. 1.411(i). For attachments involving simple make-ready, the Commission adopts 47 C.F.R. 1.1411(g). Specific to contractors for self-help complex make-ready and above the communications space make-ready, the Commission adopts 47 C.F.R. 1.1412(a). Relating to contractors for simple make-ready work, the Commission adopts 47 C.F.R. 1.1412(b). Lastly, with respect to overlashing, the Commission adopts 47 C.F.R. 1.1415. All time limits in this chapter are to be calculated according to Ohio Adm.Code 4901-1-07.

{¶ 50} Ohio Adm. Code 4901:1-3-04 (Rates, terms, and conditions for poles, ducts, and conduits). Staff recommends that initial tariffs or any subsequent changes in tariff rates, terms, and conditions, for access to poles, ducts, conduits, or rights-of-way filed pursuant to R.C. 4905.71 shall be filed as an application for tariff amendment and be subject to an automatic approval process. Additionally, Staff recommends that when calculating a just and reasonable rate for pole attachments and conduits, any unamortized excess accumulated deferred income tax resulting from the Tax Cut and Jobs Act of 2017 shall be deducted from the gross plant and gross pole investment total.

{¶ 51} DP&L proposes that Ohio Adm.Code 4901:1-3-04(A) be modified to address double wood and suggests that the following language be added to the end of (A):

> "A public utility tariff shall include a charge to an attaching entity of up to $100 per day per pole that is imposed if the attaching entity is under an obligation to move its attachment to a new pole and to remove the existing pole and fails to comply with such obligation within 30 days after being notified of such obligation."

{¶ 52} Crown Castle avers that Ohio Adm.Code 4901:1-3-04(E) should incorporate a prohibition on charging an attaching entity to bring poles, attachments, or existing attachers' equipment into compliance with current published, safety, reliability, and pole owner construction standards, consistent with 47 C.F.R. 1.1411(d)(4). Crown Castle states that this language will ensure that the burden to remedy pre-existing, non-compliant conditions

remains with the appropriate parties and does not prevent or burden new deployment. For example, if a pole has a pre-existing, non-compliant condition, and an attaching entity applies to attach, the new attacher should not have to pay to bring the pole into compliance with applicable stands to facilitate its attachment.

{¶ 53} OCTA recommends modifying Ohio Adm.Code 4901:1-3-04(A) to include language that tariff applications: (1) be consistent with all applicable rules in Ohio Adm.Code Chapter 4901:1-3, rather than just the stated parameters of Ohio Adm.Code 4901:1-3-03; (2) be just and reasonable; (3) be subject to a simple automatic approval process; (4) be served upon the attacher's Ohio trade association; and (5) the suspension process be removed from Ohio Adm.Code 4901:1-3-02 and placed in Ohio Adm.Code 4901:1-3-04(A).

{¶ 54} With respect to Ohio Adm.Code 4901:1-3-04(D), OCTA believes that tariff applications should be transparent, complete, and understandable. Accordingly, OCTA recommends incorporating language that provides a list of specific details on what information to include in tariff applications. Specifically, OCTA recommends that the Commission require the following information be provided in tariff applications: calculation sheet, identification of the specific sources of the formula inputs, work papers, and any company-specific records/data underlying the formula inputs including the appurtenance factor, pole height, and pole count. Additionally, OCTA suggests that the application should identity the manner in which the unamortized excess accumulated deferred income tax has been deducted and the amortization schedule(s) relied upon. As a final suggestion, OCTA recommends that the Commission adopt a new subsection (6) within Ohio Adm.Code 4901:1-3-04(D) which would require a public utility to work with and respond in good faith to timely requests for additional information in order to review the application. Lastly, OCTA states that it fully supports the proposed language in Ohio Adm.Code 4901:1-3-04(D)(1) and believes this language is consistent with Commission precedent. In effect, OCTA believes its forgoing recommendations will provide Staff and interested parties the necessary information to review, verify, and analyze a tariff proposal.

{¶ 55} We decline to adopt Crown Castle, DP&L, and OCTA's recommendations relating to Ohio Adm.Code 4901:1-3-04(A). However, we adopt specific language relating to increases to tariffed rates which require customer notice to be sent to all affected attachers concurrent with the filing of the ATA, and any objections to the ATA should be filed within 21 days from the ATA filing. The applicant will have ten days to file its reply to the stated objections. Additionally, at the suggestion of OCTA, we have moved the suspension process in this rule outlined in Ohio Adm.Code 4901:1-3-02(G) to Ohio Adm.Code 4901:1-3-04(A)(2) because the intent of the proposal involves the applications outlined in Ohio Adm.Code 4901:1-3-04. Lastly, we adopt Staff's recommendations to Ohio Adm.Code 4901:1-3-04(D)(1).

{¶ 56} Ohio Adm.Code 4901:1-3-05 (Complaints). Staff recommends that in joint use agreement complaint proceedings challenging pole attachment or conduit occupancy rates, terms, and conditions, a rebuttable presumption exists that an incumbent local exchange carrier (ILEC) should be treated as a non-utility attaching entity. To that end, Staff suggested adopting a rebuttable presumption that ILECs may be charged no higher than the rate determined in Ohio Adm.Code 4901:1-3-04(D). In such complaint cases challenging pole attachment or conduit occupancy rates established in joint use agreements, a public utility can rebut either or both of the two presumptions 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.

{¶ 57} OCTA argues that Ohio Adm.Code 4901:1-3-05(A) should be revised so that the rule cannot be interpreted as only allowing limited types of claims. OCTA avers that Ohio law does not limit the types of claims, and therefore, Ohio Adm.Code 4901:1-3-05(A) should not limit the types of claims to those filed pursuant to R.C. 4905.26 and 4927.21.

{¶ 58} OCTA and Crown Castle believe a shorter timeframe for the Commission to resolve a filed complaint is warranted. Specifically, OCTA and Crown Castle believe that

complaint resolution timelines under Ohio Adm.Code 4901:1-3-05(A) should be modified to mirror the timeline under 47 C.F.R. 1.1414(a). OCTA and Crown Castle suggest that the 360-day complaint timeline in Ohio Adm.Code 4901:1-3-05(A) should be shortened to 180 days for complaints involving a denial of access and 270 days for all other complaints filed pursuant to Ohio Adm.Code 4901:1-3-05(A), which would be consistent with 47 C.F.R. 1.1414(a).

{¶ 59} Sprint argues that the complaint process detailed in Ohio Adm.Code 4901:1-3-05 should extend to third-party overlashers. Sprint points out that the complaint process applies to "attaching entities" and that the current definition of "attaching entity" does not expressly include overlashers. Sprint believes that, if the overlashing process is to be exempt from Commission approval requirements, it should be clear that third-party overlashers have a forum to bring complaints against pole owners or existing attachers before the Commission for resolution.

{¶ 60} Crown Castle argues that the rebuttable presumption extended to ILECs in joint use agreement complaint proceedings proposed in Ohio Adm.Code 4901:1-3-05(B) should also be offered to other attaching entities filing complaints about the rates, terms, and conditions of attachment pursuant to pole attachment agreements against public utility pole owners. Crown Castle argues that extending the rebuttable presumption of non-utility status to ILEC attachers but no other attaching entities could ultimately bring about a competitive advantage for ILEC attachers over other attaching entities – Crown Castle believes this competitive advantage would be an unintended consequence of the proposed rule.

{¶ 61} DP&L, AEP, Duke, and FirstEnergy argue that Ohio Adm.Code 4901:1-3-05(B) should not be adopted by the Commission. In support of this position, DP&L argues that Ohio Adm.Code 4901:1-3-05(B) is contrary to fundamental legal principals and sound regulatory policy and should be struck. Specifically, DP&L avers that allowing ILECs to retain all of the benefits of their existing joint use agreements with public utilities while

simultaneously seeking a reduction in the charges that are imposed under such joint use agreements is one-sided. DP&L states that ILECs are not small entities who need special protection because ILECs, in general, are large organizations with economic power and legal resources. Similarly, AEP and Duke also take issue with this burden stating that the rule would place the burden of proof on the party seeking to uphold the voluntary, joint use agreement between the parties.

{¶ 62} Further, DP&L, AEP, Duke, and FirstEnergy aver that the "clear and convincing" standard to rebut the presumption is improper, as this standard is typically applied in cases involving fraud, wills, and inheritances. FirstEnergy states that the evidentiary standard in every other complaint case is a "preponderance of the evidence" and complaint proceedings filed pursuant to Ohio Adm.Code 4901:1-3-05 should be treated no differently. FirstEnergy argues that, if the Commission adopts proposed Ohio Adm.Code 4901:1-3-03(B), the Commission also adopt, at the end of Ohio Adm.Code 4901:1-3-05(B), the following amendment: "[i]n such proceedings, an ILEC must present clear and convincing evidence to rebut any other presumptions under this Chapter."

{¶ 63} Lastly, DP&L, AEP, and Duke point to several benefits that ILECs receive, such as additional space, larger stronger poles installed for the ILECs with no make ready costs, no charge for application fees, engineering, or pole inspections, and preferential location, which are unavailable to non-ILEC attachers. DP&L argues that it is inappropriate for an ILEC operating under a joint use agreement to be charged the same low attachment rate that a non-ILEC attacher is charged. AEP and Duke believe that the FCC adopted a presumption, which is similar to that proposed in Ohio Adm.Code 4901:1-3-05(B), based upon the alleged repeated disputes between ILECs and electric utilities. AEP and Duke believe the FCC's presumption is unlawful and have challenged that particular portion of the FCC's 2018 order. Ultimately, whether the FCC's presumption is unlawful or not, AEP and Duke aver that the Commission should not follow suit.

{¶ 64} AEP and Duke agree with DP&L and aver that the Commission should not adopt Ohio Adm.Code 4901:1-3-05(B). Specifically, AEP and Duke argue that the proposed rule would undermine long-standing joint use agreements, create a regulatory presumption at odds with the facts, and conflict with Commission precedent. AEP and Duke posit that the joint use relationship between electric utilities and ILECs is fundamentally different from the relationship between electric utilities and attaching entities who make attachments under an electric utility's pole attachment tariff, and the differences between joint use agreements and pole attachment tariffs reflect inseverable bargained-for exchanges and the fact that each party to the joint use agreement is a public utility with rights, powers, obligations, and regulatory oversite that is not attendant to other attaching entities.

{¶ 65} Additionally, AEP and Duke state that proposed Ohio Adm.Code 4901:1-3-05(B) conflicts with existing Ohio Adm.Code 4901:1-3-04(A). Specifically, AEP and Duke cite to the Commission order adopting Ohio Adm.Code 4901:1-3-04(A) providing that joint use rates are to be determined through negotiated agreements and argue that the proposed presumption, if adopted, would immediately cast doubt upon the negotiated agreements the Commission expressly condoned in 2014. *In re Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-5779-AU-ORD, Finding and Order (Jul. 30, 2014) at 42. AEP and Duke ultimately believe that the presumption embedded within Ohio Adm.Code 4901:1-3-05(B) – that telephone utilities are similarly situated to other attaching entities – is incorrect.

{¶ 66} AEP and Duke believe that ILECs place a greater burden on poles than their competitors stating that ILECs take up more space on a pole and ILECs have heavier, bundled lines which create mid-span sag. AEP and Duke propose that draft Ohio Adm.Code 4901:1-3-05(B) be deleted and recommend that the Commission adopt the following:

> "(B) In complaint proceedings challenging the rates, terms, and conditions of existing joint use agreements between public utilities,

> there is a presumption that such rates, terms, and conditions are just and reasonable. A public utility can rebut this presumption with clear and convincing evidence demonstrating that a rate, term, or condition is not just and reasonable."

{¶ 67} In response to OCTA and Crown Castle's recommendation to shorten the complaint timeframe from 360 days to 180 days, we note that 47 C.F.R. 1.1405(f) provides states up to 360 days to resolve a complaint before jurisdictions reverts back to the FCC. Therefore, we reject OCTA and Crown Castle's modification with respect to the complaint timeframe of 360 days as reflected in the draft rules attached to the Finding and Order.

{¶ 68} We decline to adopt Sprint's modifications to explicitly outline a forum for third-party overlashers to bring complaints against pole owners or existing attachers before the Commission. We note that the only complaint a third-party could file is if the third-party is denied access by a public utility that has an advance notice requirement pursuant to 47 C.F.R. 1.1415(c). If an existing attacher or third-party attaching with an existing attachers permission is denied access, the existing attacher or third-party attaching with an existing attachers permission has to address the issue with the public utility. 47 C.F.R. 1.1415(c) states, in pertinent part, ". . . the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. . ." To adopt Sprint's recommendation when there is already a federal process in place for third-party overlashers seeking recourse when advance notice is required would conflict with the intent of R.C. 121.95 by adopting redundant regulatory restrictions.

{¶ 69} We generally agree with the arguments made by DP&L, AEP, Duke, and FirstEnergy in relation to Staff's recommendations to Ohio Adm.Code 4901:1-3-05. The presumption that telephone utilities are similarly situated to other attaching entities is incorrect. As currently proposed by Staff, Ohio Adm.Code 4901:1-3-05(B) would permit ILECs to receive the same rates as non-utilities under tariff agreements. By allowing ILECs

to negotiate joint use agreements, which are presumed just and reasonable, while, at the same time, being treated equal to non-public utility attachers who are attaching pursuant to a tariff would provide ILECs with a competitive advantage over other attachers. Furthermore, the Commission previously reasoned that default rate formulas may be negotiated among the parties to a joint use agreement but may not be unilaterally insisted upon due to the unique nature of joint use agreements. *In re the Commission's Review of Ohio Adm.Code Chapter 4901:1-3, Concerning Access to Poles, Ducts, Conduits, and Right-of-Way*, Case No. 13-5779-AU-ORD, Finding and Order (July 30, 2014) at 42. Staff's proposal, if adopted, would immediately conflict with the policy concerning the allowance for negotiated agreements between utilities we expressly condoned five years ago. Finally, permitting ILECs to retain all of the benefits of their existing joint use agreements with public utilities while simultaneously seeking a reduction in the charges that are imposed under such joint use agreements is one-sided.

{¶ 70} We also reject Staff's recommendations to adopt a "clear and convincing" standard to rebut the presumption. As DP&L, AEP, Duke, and FirstEnergy point out, this standard is typically applied in cases involving fraud, wills, and inheritances. Additionally, we note that the evidentiary standard in every other complaint case is a "preponderance of the evidence," and complaint proceedings filed pursuant to Ohio Adm.Code 4901:1-3-05 should be treated no differently.

{¶ 71} By adopting AEP and Duke's proposed language, there is a rebuttable presumption that the rates, terms, and conditions of the joint use agreements are just and reasonable unless the public utilities demonstrate, by a preponderance of the evidence, otherwise. In response to the arguments mentioned supra, we reject Staff's proposed draft of Ohio Adm.Code 4901:1-3-05(B) and adopt AEP and Duke's recommended language as reflected in the draft rules attached to the Finding and Order.

IV. CONCLUSION

{¶ 72} In making its rules, an agency is required to consider the continued need for the rules, the nature of any complaints or comments received concerning the rules, and any factors that have changed in the subject matter area affected by the rules. The Commission has evaluated Ohio Adm.Code Chapter 4901:1-3 and recommends amending the rules as demonstrated in the attachment to this Finding and Order.

{¶ 73} An agency must also demonstrate that it has included stakeholders in the development of the rule, that it has evaluated the impact of the rule on businesses, and that the purpose of the rule is important enough to justify the impact. The agency must seek to eliminate excessive or duplicative rules that stand in the way of job creation. Moreover, the agency must remove two or more existing regulatory restrictions for every new regulatory restriction added. The Commission has included stakeholders in the development of these rules, has sought to eliminate excessive or duplicative rules that stand in the way of job creation, and has adhered to the requirement regarding the removal of regulatory restrictions.

{¶ 74} Accordingly, at this time, the Commission finds that amendments to Ohio Adm.Code 4901:1-3-01, -02, -03, -04, and -05, should be adopted and filed with Joint Committee on Agency Rule Review (JCARR), the Secretary of State, and the Legislative Service Commission (LSC). The Commission also finds that no changes should be made to Ohio Adm.Code 4901:1-3-06.

{¶ 75} The rules are posted on the Commission's Docketing Information System website at http://dis.puc.state.oh.us. To minimize the expense of this proceeding, the Commission will serve a paper copy of this Finding and Order only. All interested persons are directed to input case number 19-834 into the Case Lookup box to view this Finding and Order, as well as the rules, or to contact the Commission's Docketing Division to request a paper copy.

V. CONCLUSION

{¶ 76} It is, therefore,

{¶ 77} ORDERED, That amended Ohio Adm.Code 4901:1-3-01, -02, -03, -04, and -05 be adopted. It is, further,

{¶ 78} ORDERED, That Ohio Adm.Code 4901:1-3-06 be adopted with no changes. It is, further,

{¶ 79} ORDERED, That the adopted rules be filed with JCARR, the Secretary of State, and LSC, in accordance with divisions (D) and (E) of R.C. 111.15. It is, further,

{¶ 80} ORDERED, That the final rules be effective on the earliest date permitted. Unless otherwise ordered by the Commission, the five-year review date for Ohio Adm. Code Chapter 4901:1-3 shall be in compliance with R.C. 106.03. It is, further,

{¶ 81} ORDERED, That a copy of this Finding and Order, with the rules and BIA, be served upon the Common Sense Initiative at CSIPublicComments@governor.ohio.gov. It is, further,

{¶ 82} ORDERED, That a copy of this Finding and Order be sent to the Telephone and Electric industry list-serves. It is, further,

{¶ 83} ORDERED, That a copy of this Finding and Order be served upon all certified telephone companies, including all certified commercial mobile radio service providers; all

regulated electric distribution companies; the Ohio Cable Telecommunications Association; the Ohio Telecom Association; and all other interested persons of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
M. Beth Trombold
Lawrence K. Friedeman
Dennis P. Deters

LLA/hac

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AMENDED

4901:1-3-01 Definitions.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

As used within this chapter, these terms denote the following:

(A) "Attaching entity" means cable operators, telecommunications carriers, incumbent and other local exchange carriers, public utilities, governmental entities and other entities with either a physical attachment or a request for attachment to the pole, duct, conduit, or right-of-way and that is authorized to attach pursuant to section 4905.51 or 4905.71 of the Revised Code. It does not include governmental entities with only seasonal attachments to the pole.

(B) "Cable operator" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(5), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(C) "Cable service" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(6), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(D) "Cable system" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(7), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(E) "Commission" means the public utilities commission of Ohio.

(F) "Communications space" means that portions of the pole typically used for the placement of communications conductors beginning below the bottom point of the communications workers safety zone and ending at the lowest point on the pole to which horizontal conductors may be safely attached.

(G) "Complex make-ready" means the transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communications attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, point-to-point wireless communications and wireless internet service providers, are to be considered complex.

(H) "Conduit" means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

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(~~H~~I) "Conduit system" means a collection of one or more conduits together with their supporting infrastructure.

(~~I~~J) "Days" means calendar days for the purposes of these rules.

(~~J~~K) "Duct" means a single enclosed raceway for conductors, cable, and/or wire.

(~~K~~L) "Electric company" for purposes of this chapter, shall have the same meaning as defined in division (A)(3) of section 4905.03 of the Revised Code.

(~~L~~M) "Inner-duct" means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

(~~M~~N) "Local exchange carrier" (LEC) for purposes of this chapter, shall have the same meaning as defined in division (A)(7) of section 4927.01 of the Revised Code.

(O) "Overlashing" means the tying or lashing of an additional fiber optic cables to an existing communications wires, cables, or supporting strand already attached to poles.

(P) "Pole attachment" means any attachment by an attaching entity to a pole, duct, conduit, or right-of-way owned or controlled by a public utility.

(Q) "Public utility" for purposes of this chapter, shall have the same meaning as defined in section 4905.02 of the Revised Code.

(R) "Simple make-ready" means make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communications attachment or relocation of an existing wireless attachment.

(S) "Telecommunications" for purposes of this chapter, shall have the same meaning as defined in division (A)(10) of section 4927.01 of the Revised Code.

(T) "Telecommunications carrier" for purposes of this chapter, shall have the same meaning as defined in division (A)(11) of section 4927.01 of the Revised Code.

(U) "Telecommunications services" for purposes of this chapter, shall have the same meaning as defined in division (A)(12) of section 4927.01 of the Revised Code.

(V) "Telephone company" for purposes of this chapter, shall have the same meaning as defined in division (A)(13) of section 4927.01 of the Revised Code and includes the definition of

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"telecommunications carrier" incorporated in 47 U.S.C. 153(44), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(W) "Unusable space" with respect to poles, means the space on a public utility pole below the usable space, including the amount required to set the depth of the pole.

(X) "Usable space" with respect to poles, means the space on a public utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the public utility. With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable, and associated equipment for telecommunications or cable services, and which includes capacity occupied by the public utility.

AMENDED

4901:1-3-02 Purpose and scope.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

(A) Each citation contained within this chapter that is made to either a section of the United States code or a regulation in the code of federal regulations is intended, and shall serve, to incorporate by reference the particular version of the cited matter as effective on ~~July~~ March 1, 2021~~4~~.

(B) This chapter establishes rules for the provision of attachments to a pole, duct, conduit, or right-of-way owned or controlled by a utility under rates, terms, and conditions that are just and reasonable. Ohio has elected to regulate this area pursuant to 47 U.S.C. 224(c)(2).

(C) The obligations found in this chapter, shall apply to:

(1) All public utilities pursuant to 47 U.S.C. 224(c) through (i), 47 U.S.C. 253(c), as effective in paragraph (A) of this rule, and section 4905.51 of the Revised Code; and

(2) A telephone company and electric light company that is a public utility pursuant to section 4905.71 of the Revised Code.

(D) The commission may, upon an application or motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

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(E) Any party seeking a waiver(s) of rules contained in this chapter shall specify the period of time for which it seeks such a waiver(s), and a detailed justification in the form of a motion filed in accordance with rule 4901-1-12 of the Administrative Code.

(F) All of the automatic time frames set forth in this chapter may be suspended pursuant to directives of the commission or an attorney examiner.

AMENDED

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

(A) Duty to provide access and required notifications

(1) A public utility will comply with the duty to provide access and required notification pursuant to 47 C.F.R 1.1403, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(2) An attaching entity may file with the commission a petition for temporary stay of action contained in a notice received pursuant to 47 C.F.R. 1.1403(c), as effective in paragraph (A) of rule 4901:2-3-02 of the Administrative Code, within fifteen days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of service and a copy of the notice. The public utility may file an answer within seven days of the date the petition for temporary stay was filed. No further filings under this rule will be considered unless requested or authorized by the commission. If the commission does not rule on a petition filed pursuant to this paragraph within thirty days after the filing of the answer, the petition shall be deemed denied unless suspended.

(3) If the public utility establishes or adopts an electronic notification system, the attaching entity must participate in the electronic notification to qualify under this chapter.

(B) Timeline for access to public utility poles

(1) Application review and survey:

A public utility or a new attaching entity will comply with the application review and survey requirements, pursuant to 47 C.F.R 1.1411(c), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

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(2) Estimate

A public utility or a new attaching entity will comply with the make-ready estimate requirements pursuant to 47 C.F.R 1.1411(d), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(3) Make-ready

A public utility will comply with the notification requirements and make-ready time periods for new and existing attaching entities; for attachments in the communications space and above the communications space, pursuant to 47 C.F.R 1.1411(e) – (f), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(4) Compliance with the time periods in this rule:

A public utility will comply with the time periods pursuant to 47 C.F.R 1.1411(g), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(5) Deviation from the time limits specified in this rule unless:

A public utility will comply with the deviation from time limits pursuant to 47 C.F.R 1.1411(h), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(6) Self-help remedy:

A public utility or new attaching entity will comply with the self-help remedy process for incomplete survey and make-ready pursuant to 47 C.F.R 1.1411(i), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(7) One-touch make-ready option.

For attachments involving simple make-ready, a public utility or a new attaching entity will comply with one-touch make-ready option requirements pursuant to 47 C.F.R. 1.1411(g), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(C) Contractors for survey and make-ready.

(1) Contractors for self-help complex make-ready and above the communications space make-ready:

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A public utility will comply with the contractor requirements for self-help complex make-ready and above the communications space make-ready pursuant to 47 C.F.R 1.1412(a), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(2) Contractors for simple make-ready work:

A public utility will comply with the contractor requirements for simple make-ready work pursuant to 47 C.F.R 1.1412(b), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(D) Overlashing

(1) An existing attaching entity or third party overlashing with permission from an existing attaching entity (overlashing party) and a public utility will comply with overlashing rules established pursuant to 47 C.F.R 1.1415, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code, with the following exceptions:

(a) A public utility may not prevent an overlashing party from overlashing because another overlashing party has not fixed a preexisting violation; unless the overlashing will exacerbate the violation or create a capacity, safety, reliability, or engineering issue.

(b) If a public utility requires advance notice of a planned overlashing, the public utility may charge the overlashing party the just and reasonable costs the public utility actually incurs to inspect the proposed overlash.

(E) Rights-of-way

(1) Public utilities are subject to all constitutional, statutory, and administrative rights and responsibilities for use of public rights-of-way.

(2) Private rights-of-way for all public utilities are subject to negotiated agreements with the private property owner, exclusive of eminent domain considerations.

(3) Public utilities are prohibited from entering into exclusive use agreements of private building riser space, conduit, and/or closet space.

(4) Public utilities shall coordinate their right-of-way construction activity with the affected municipalities and landowners. Nothing in this rule is intended to abridge the legal rights and obligations of municipalities and landowners.

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(F) The commission reserves the right to require any or all arrangements between public utilities and between public utilities and private landowners to be submitted to the commission for its review and approval, pursuant to sections 4905.16 and 4905.31 of the Revised Code.

(G) All time limits in this chapter are to be calculated according to 4901-1-07 of the Administrative Code.

AMENDED

4901:1-3-04 Rates, terms, and conditions for poles, ducts, and conduits.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code Code.]

(A) Rates, terms, and conditions for nondiscriminatory access to poles, ducts, conduits, and right-of-way of a telephone company or electric light company by an entity that is not a public utility are established through tariffs pursuant to section 4905.71 of the Revised Code. Initial implementation of such tariff or any subsequent change in the tariffed rates, terms, and conditions for access to poles, ducts, conduits, or rights-of-way shall be filed as an application for tariff amendment (ATA) and will be approved in accordance with a sixty-day automatic approval process. Increases to tariffed rates pursuant to this paragraph require customer notice to be sent to all affected attachers concurrent with the filing of the ATA. Any objections to the ATA application should be filed within twenty-one days of its filing. The applicant shall have ten days to file its reply to the stated objections. The tariffed rates, terms and conditions must be consistent with parameters established in rule 4901:1-3-03 of the Administrative Code. Nothing 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.

(1) An automatic time frame will begin on the day after a filing is made with the commission's docketing division. Under the automatic approval process, if the commission does not take action before the expiration of the filing's applicable time frame, the filing shall be deemed approved and become effective on the following day, or a later date if requested by the company. For, example, a filing subject to a sixty-day process will, absent suspension or other commission action, become effective on the sixty-first day after the initial filing is made with the commission. Unless otherwise ordered, any motions not ruled upon by the commission during the filing's applicable time frame are deemed to be denied.

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(2) Unless the law specifically precludes suspension of an automatic approval process, a pending application filed with the Commission under full or partial suspension will be automatically approved thirty days from the date of suspension if all issues are resolved. If all issues are not resolved by the thirtieth day, the application will be either dismissed by entry or suspended a second time. Any such second suspension shall be accompanied by notice to the applicant explaining the rationale for the additional suspension. Applications under a second suspension cannot be approved without a commission entry or order.

(3) Under this paragraph, an application under full suspension is entirely precluded from taking effect.

(4) Under this paragraph, an application under partial suspension is permitted to take effect, in part or in its entirety, under the proposed terms and conditions, subject to further review by the commission. The applicant is put on notice that the commission, subsequent to further review, may modify the rates and/or terms and conditions of tariffed pole, duct, conduit, and rights-of-way access affected by the applications.

~~(1)~~(5) A full or partial suspension of tariffed pole, duct, conduit, and rights-of-way access may also be imposed, after an application is approved under the automatic approval process, if an ex post facto determination is made that the tariff is in violation of law or commission rules. Applications proposing to change the rate shall include a calculation sheet, identification of the specific sources of the formula inputs, workpapers, and any company-specific records/data underlying the formula inputs including the appurtenance factor, pole height and pole count. The application shall identify the manner in which the unamortized excess accumulated deferred income tax has been deducted and the amortization schedule(s) relied upon.

(B) 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.

(C) Access to poles, ducts, conduits, and rights-of-way as outlined in paragraphs (A) and (B) of this rule shall be established pursuant to 47 U.S.C. 224, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(D) Pole attachment and conduit occupancy rate formulas

(1) The commission shall determine whether a rate, term, or condition is just and reasonable in complaint proceedings or in tariff filings. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied

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by the pole attachment by the sum of the operating expenses and actual capital costs of the public utility attributable to the entire pole, duct, conduit, or right-of-way. When calculating the pole attachment and conduit occupancy rates, any unamortized excess accumulated deferred income tax resulting from the Tax Cut and Jobs Act of 2017 shall be deducted from the gross plant and gross pole investment total.

(2) The commission will apply the formula set forth in 47 C.F.R. 1.1406(d)(1) and (e), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code for determining a maximum just and reasonable rate for pole attachments.

(3) The commission will apply the formula set forth in 47 C.F.R. 1.1406(d)(3) – (4) and (e), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code for determining a maximum just and reasonable rate for conduit occupancy.

(4) With respect to the formula referenced in paragraph (D)(2) of this rule, the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be thirteen and one-half feet. The amount of unusable space is presumed to be twenty-four feet. The pole height is presumed to be thirty-seven and one-half feet. These presumptions may be rebutted by either party.

(5) Relative to joint use agreements, the default rates may be negotiated or determined by the commission in the context of a complaint case.

(E) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in paragraph (B)(3) of rule 4901:1-3-03 of the Administrative Code, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

(F) A public utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole

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attachment rate for which such company would be liable under this rule, pursuant to 47 U.S.C. 224(g), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

AMENDED

4901:1-3-05 Complaints.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

(A) Any attaching entity may file a complaint against a public utility pursuant to section 4905.26 or 4927.21 of the Revised Code, as applicable, to address claims that it has been denied access to a public utility pole, duct, conduit, or right-of-way in violation of section 4905.51 of the Revised Code or 47 U.S.C. 224, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code; and/or that a rate, term, or condition for a pole attachment are not just and reasonable. The provisions and procedures set forth in sections 4905.26 and 4927.21 of the Revised Code, and Chapters 4901-1 and 4901-9 of the Administrative Code, shall apply. The commission shall issue a decision resolving issue(s) presented in a complaint filed pursuant to this rule within a reasonable time not to exceed three hundred sixty days after the filing of the complaint.

(B) In complaint proceedings challenging the rates, terms, and conditions of existing joint use agreements between public utilities, there is a presumption that such rates, terms, and conditions are just and reasonable. A public utility can rebut this presumption by a preponderance of the evidence demonstrating that a rate, term, or condition is not just and reasonable.

NO CHANGE

4901:1-3-06 Mediation and arbitration of agreements.

All public utilities have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way consistent with paragraph (A)(1) of rule 4901:1-3-03 of the Administrative Code. If parties are unable to reach an agreement on rates, terms, or conditions regarding access to poles, ducts, conduits, and rights-of-way, either party may petition the commission to mediate

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or arbitrate such agreement according to procedures established in rules 4901:1-7-08 to 4901:1-7-10 of the Administrative Code.

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Case No(s). 19-0834-AU-ORD

Summary: Finding & Order adopting the proposed amendments to Ohio Adm.Code Chapter 4901:1-3 regarding the Commission's rules for access to poles, ducts, conduits, and right-of-way, as determined in and attached to this Finding and Order electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio