BEFORE 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 Rights-of-Way	**))))**	**Case No. 19-834-AU-ORD**

OHIO POWER COMPANY'S MEMORANDUM CONTRA IN RESPONSE TO THE APPLICATIONS FOR REHEARING FILED BY AT&T OHIO AND OHIO TELECOM ASSOCIATION

Ohio Power Company ("AEP Ohio") respectfully submits the following memorandum contra in response to the applications for rehearing filed by the Ohio Bell Telephone Co. d/b/a AT&T ("AT&T Ohio") and the Ohio Telecom Association ("OTA") on May 7, 2021.

Respectfully submitted,

/s/ *Steven T. Nourse*

Steven T. Nourse (0046705), Counsel of Record
Christen M. Blend (0086881)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608/ 1915
Facsimile: (614) 716-2950
stnourse@aep.com
cmblend@aep.com

(willing to accept e-mail service)

Counsel for Ohio Power Company

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I. INTRODUCTION

Though AEP Ohio does not agree with all amendments to the pole attachment rules adopted by the Public Utilities Commission of Ohio ("Commission") in its April 7, 2021 Finding and Order ("Order") in this docket, AEP Ohio generally supports the amended rules and believes they strike the proper balance between the interests of pole owners on the one hand, and the interests of attaching entities on the other. AEP Ohio's memorandum contra is limited in scope and seeks ***only*** to address the arguments raised in the applications for rehearing filed by AT&T Ohio and OTA.

The essence of AT&T Ohio's and OTA's arguments is that the Commission acted unreasonably by not adopting Section 1.1413(b) of the FCC's pole attachment rules (the "FCC ILEC Complaint Rule").[1] The fulcrum of the FCC's ILEC Complaint Rule is the presumption that ILECs are "similarly situated" to other attaching entities and, therefore, presumptively entitled to pay the same pole attachment rates.[2] The Commission, after reciting substantial record evidence showing that ILECs make their attachments under more favorable terms and conditions than other attaching entities, made the following finding of fact: "The presumption that telephone utilities are similarly situated to other attaching entities is incorrect."[3]

At a minimum, this finding justifies the Commission's decision to not adopt the FCC's ILEC Complaint Rule. However, when viewed in tandem with the Commission's longstanding authority recognizing the "unique nature of joint use agreements," it likely would have been *unreasonable* for the Commission to adopt the FCC's ILEC Complaint Rule, especially given that

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[1] 47 C.F.R. § 1.1413; *see also Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7767-71, ¶¶ 123-129 (Aug. 3. 2018) (the "2018 Order").

[2] *See* 47 C.F.R. § 1.1413(b).

[3] Finding and Order at ¶ 69.

neither AT&T Ohio nor OTA presented any evidence to the contrary.[4] Accordingly, the Commission should deny AT&T Ohio's and OTA's applications for rehearing.

II. THE COMMISSION'S FINDING AND ORDER IS NOT "UNREASONABLE."

A. In Ohio, Joint Use Agreements Have *Always* Been Subject to Commission Oversight.

As noted above, AT&T Ohio and OTA contend that the Commission acted unreasonably by refusing to adopt the FCC's ILEC Complaint Rule. At the heart of the ILEC Complaint Rule lies the presumption that ILECs are "similarly situated" to other attaching entities and, therefore, presumptively entitled to pay the same pole attachment rates.[5] After reviewing the record submitted in the underlying proceedings, though, the Commission broke with the FCC and found that, at least in Ohio, "the presumption that telephone utilities are similarly situated to other attaching entities is incorrect."[6] Based on this finding, the Commission acted reasonably when it rejected the FCC's ILEC Complaint Rule.

By rehashing the arguments from their initial comments, which essentially regurgitate the FCC's findings in the 2018 Order (which was based on a national, as opposed to Ohio-specific, record), AT&T Ohio and OTA miss the forest for the trees. Neither their comments in the underlying proceeding nor their applications for rehearing address the key differences between the Commission's and the FCC's regulatory history over joint use agreements: the FCC exerted jurisdiction over joint use agreements *for the first time* in 2011; joint use agreements in Ohio *have always* been subject to Commission regulation. In other words, all joint use agreements in Ohio were formed under the Commission's regulatory scrutiny and are, therefore, *presumptively just and reasonable*.

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[4] *See infra* note 11.

[5] *See* 47 C.F.R. § 1.1413(b).

[6] Finding and Order at ¶ 69.

Because joint use agreements have always been subject to the Commission's jurisdiction, ILECs have always had the right to file complaints challenging the rates, terms and conditions of such agreements. Yet, as explained in the initial comments submitted by AEP Ohio and Duke Energy Ohio, disputes involving joint use agreements are exceedingly rare in Ohio, which is a testament to the Commission's regulatory framework.[7] The dearth of ILEC complaint proceedings in Ohio stands in stark contrast to the stated justification for the FCC's ILEC Complaint Rule—*i.e.*, that the FCC's previous precedent "led to disputes between [ILECs] and utilities over appropriate pole attachment rates."[8] Thus, while AEP Ohio takes exception to the need for the FCC's ILEC Complaint Rule anywhere, it makes even less sense for the Commission to adopt it in Ohio. Logic, regulatory history, and the facts on the ground in Ohio all indicate that rejecting the FCC's ILEC Complaint Rule was a reasonable course of action for the Commission to take.

B. ILECs Are *Not* "Similarly Situated" to Other Attaching Entities.

AT&T Ohio and OTA contend that the Commission acted unreasonably by refusing to incorporate the FCC's "similarly situated" presumption—*i.e.*, the presumption that ILECs are "similarly situated" to other attaching entities and, therefore, presumptively entitled to pay the same pole attachment rates—into Ohio's pole attachment rules. As noted above, the Commission rejected the "similarly situated" presumption because it found, as a matter of fact: "the presumption that telephone utilities are similarly situated to other attaching entities is incorrect."[9] The Commission's finding is supported by the underlying record.[10] The Commission's finding is also

[7] AEP Ohio and Duke Energy Ohio's Initial Comments at 1; *see also id.* at 10 (noting that the Commission has never found a rate within either AEP or Duke's joint use agreements to be unjust or unreasonable).

[8] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, 32 FCC Rcd 3266, 3281 ¶ 44 (Apr. 21, 2017).

[9] Finding and Order at ¶ 69.

[10] The Commission found credible the explanations by DP&L, AEP Ohio, and Duke Energy Ohio that ILECs receive benefits not enjoyed by other attaching entities, such as "additional space, larger stronger poles installed for the ILECs

supported by longstanding and recently affirmed Commission authority—authority that AT&T Ohio and OTA did not even address, let alone attempt to distinguish.[11]

While the Commission's finding is supported by evidence and authority, the applications for rehearing filed by AT&T Ohio and OTA are propped up by mere invocations of the FCC's findings in the 2018 Order—findings that are clearly at odds with the Commission's own findings on an Ohio-specific record (*i.e.*, that ILECs make their attachments under more favorable terms and conditions than their non-ILEC competitors).[12] Neither AT&T Ohio nor OTA produced any evidence showing that ILECs make their attachments in Ohio under terms and conditions that are comparable to other attaching entities. Moreover, neither AT&T Ohio nor OTA produced any evidence to rebut the electric utilities' explanations of the "unique benefits" ILECs enjoy under joint use agreements.[13]

The shortcomings of their applications for rehearing are not limited to what AT&T Ohio and OTA failed to do. Their applications for rehearing are also rife with mischaracterizations of FCC authority. For instance, AT&T Ohio argues that two recent FCC decisions demonstrate that

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with no make ready costs, no charge for application fees, engineering, or pole inspections, and preferential location, which are unavailable to non-ILEC attachers." Finding and Order at ¶ 63. The Commission also credited AEP Ohio and Duke Energy Ohio's assertion that "the differences between joint use agreements and pole attachment tariffs reflect inseverable bargained-for exchanges and the fact that each party to a joint use agreement is a public utility with rights, powers, obligations, and regulatory oversite that is not attendant to other attaching entities." *Id.* at ¶ 64.

[11] *See, e.g., In the Matter of Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-579-AU-ORD, Finding and Order at 42 (Jul. 30, 2014) ("[T]he 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***. Instead, in the event of a dispute, the applicable rate shall be determined by the Commission in the context of a complaint case.") (emphasis added); *In the Matter of the Complaint of the Ohio Telecommunications Association, et al. v. Columbus So. Power Co d/b/a American Electric Power and Ohio Power Company d/b/a American Electric Power*, Case No. 96-1309-EL-CSS, Opinion and Order at 17-18, (Aug. 27, 1997) (finding that an electric utility provided preferential treatment to an attaching entity when it allowed the attaching entity to attach under the terms of an affiliate's joint use agreement, which provided several benefits that the attaching entity's competitors did not enjoy under their pole license agreements).

[12] *See supra* note 11.

[13] *See, e.g.*, AEP Ohio and Duke Energy Ohio's Initial Comments at 5-9; Dayton Power and Light Company's Initial Comments at 18-19.

"even large ILECs are entitled to a presumption."[14] In the first decision cited by AT&T Ohio, the *AT&T Florida Order*, the FCC did not actually apply the *2018 Order* or its "similarly situated" presumption.[15] Furthermore, in both the *AT&T Florida Order* and the *Verizon Maryland Order* (*i.e.*, the second decision cited by AT&T Ohio), the FCC determined that the ILECs enjoyed benefits under their joint use agreements that provided them with a competitive advantage over their competitors.[16] In other words, the FCC determined in both of those cases that the ILECs *were not* similarly situated to other attaching entities.

OTA engages in similar mischaracterization in its application for rehearing by arguing that both the FCC and the Ninth Circuit Court of Appeals have rejected arguments that the unique benefits afforded under joint use agreements justify higher attachment rates for ILECs.[17] To the contrary, in nearly every decision it has rendered since first exerting jurisdiction over joint use agreements in 2011, the FCC has determined that the ILEC *should pay a higher rate* than other attaching entities because the unique benefits within its joint use agreement provided the ILEC with a competitive advantage over other attaching entities.[18] Furthermore, in the only proceeding

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[14] AT&T Ohio's Application for Rehearing at 5 (citing *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Co.*, Memorandum Opinion and Order, Proceeding No. 19-187, 35 FCC Rcd 5321, 5327 at ¶12 (May 20, 2020) (the "*AT&T Florida Order*"); *Verizon Maryland LLC v. The Potomac Edison Co.*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607, 13616-18 at ¶¶ 23-38 (Nov. 23, 2020) (the "*Verizon Maryland Order*")).

[15] *See AT&T Florida Order*, 35 FCC Rcd at 5321, ¶ 1 (noting that the claim period preceded the effective date of the FCC's 2018 Order).

[16] *See AT&T Florida Order*, 35 FCC Rcd at 5328, ¶ 14 ("[W]e find that AT&T receives significant benefits under the [joint use agreement] not afforded competitive [local exchange carriers] and cable attachers…"); *Verizon Maryland Order*, 35 FCC Rcd at 13614, ¶ 20 ("The record demonstrates that the [joint use agreement] provides Verizon with material advantages over competitive [local exchange carriers] and cable attachers on the same poles.").

[17] *See* OTA Application for Rehearing at 8.

[18] *See, e.g., Verizon Florida, LLC v. Florida Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1148 at ¶ 21 (Feb. 11, 2015) ("[B]ecause Verizon has received, and continues to receive, unique benefits under the Agreement, we find that Verizon is not similarly situated to competitive [local exchange carriers] and therefore is not entitled to pay the New Telecom Rate."); *Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric and Power Co. d/b/a Dominion Virginia Power*, Order, Proceeding No. 15-190, 32 FCC Rcd 3750, 3757-58 at ¶¶ 15-17 (May 1, 2017) (acknowledging that ILEC enjoyed advantages under the joint use agreement, but finding the advantages did not justify the rate it was paying under its joint use agreement); *AT&T Florida Order*, 35 FCC Rcd at 5328, ¶ 14 (applying higher Old Telecom Rate because joint use agreement provided ILEC with material

in which the FCC has actually applied its "similarly situated" presumption to date, the FCC found that the electric utility established—by "clear and convincing" evidence—that the joint use agreement provided the ILEC "with material advantages over competitive LEC and cable attachers on the same poles."[19] And OTA's reference to the Ninth Circuit decision misses its mark because the Ninth Circuit did not pass judgment on the underlying facts—only whether the FCC had acted within its authority in adopting the "similarly situated" presumption.[20]

The Ohio Supreme Court has explained that "[f]or a presumption to be sustained, there must be a natural and logical connection, in light of common experience, between the fact proved and the ultimate fact presumed."[21] Because ILECs in Ohio are not "similarly situated" to other attaching entities, and because joint use agreements have always been subject to the Commission's regulatory oversight (and are therefore presumptively reasonable), it would have been unreasonable for the Commission to adopt the "similarly situated" presumption. This conclusion is bolstered by the fact that the FCC has not yet found—in any decision involving an ILEC complaint—an ILEC to be "similarly situated" to other attaching entities. There is therefore no "logical connection" between the facts and the presumption urged by OTA and AT&T Ohio.

C. Relative Pole Ownership Has No Bearing on Bargaining Power.

OTA also argues that the Commission's Order is unreasonable because it fails to account for its argument that declining ILEC pole ownership reduces ILEC bargaining power and, in turn, results in ILECs paying increasingly higher pole attachment rates.[22] However, the Commission

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advantage over other attaching entities); *Verizon Maryland Order*, 35 FCC Rcd at 13614, ¶ 20 (finding electric utility rebutted "similarly situated" presumption because record demonstrated that joint use agreement provided ILEC with "material advantages" over other attaching entities).

[19] *Verizon Maryland Order*, 35 FCC Rcd at 13614-16, ¶ 20.

[20] *See City of Portland v. United States*, 969 F.3d 1020, 1052-53 (9th Cir. 2020).

[21] *Wilson v. Cincinnati*, 346 N.E.2d 666, 671 (Ohio 1976).

[22] *See* OTA's Application for Rehearing at 9, 13.

acknowledged (and discarded) OTA's argument when it "generally agree[d]" with the arguments raised by the electric utilities, including the following:

> 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.[23]

Moreover, the Commission expressed concern about the disparity of bargaining power that would accrue to ILECs under the FCC's ILEC Complaint Rule when it stated:

> [P]ermitting 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."[24]

These portions of the Commission's Order appear to *directly* address OTA's "bargaining power" argument; at a minimum, these portions of the Commission's Order indicate that the Commission did not find OTA's argument persuasive. In other words, the Commission's Order provides sufficient detail for a reviewing court to discern how the Commission reached its decision to reject the FCC's ILEC Complaint Rule.

Furthermore, it was reasonable for the Commission to reject OTA's "bargaining power" argument. OTA failed to produce any evidence suggesting that ILEC pole ownership is on the decline in Ohio. OTA failed to produce any evidence suggesting that ILEC pole attachment rates are increasing in Ohio.[25] And OTA failed to produce any evidence demonstrating that there is even a correlation between ILEC pole ownership and ILEC pole attachment rates. The only "evidence" OTA produced was a table showing static (and in some cases, stagnant) figures of total pole ownership for various utilities in Ohio.[26] Besides the fact that this data was produced for the

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[23] Finding and Order at ¶¶ 61, 69.

[24] *Id.* at ¶ 69.

[25] In fact, OTA does not even seem to allege—in either its underlying comments or its application for rehearing—that ILEC pole attachment rates are on the rise in Ohio.

[26] OTA's Application for Rehearing at 11. OTA claims to have (belatedly) attached a copy of the USTelecom study that the FCC relied upon in finding a correlation between bargaining power and pole ownership to its application for

first time in OTA's application for rehearing (and is, therefore, untimely), OTA's pole ownership "evidence" is completely irrelevant.[27] Though AEP Ohio disputes that pole ownership has any bearing on bargaining power at all (especially when the Commission's jurisdiction serves as a throttle on any alleged disparity of bargaining power), the issue of consequence in the FCC's 2018 Order was *relative* pole ownership. OTA's pole ownership data do not address this issue at all. It was therefore reasonable for the Commission to reject OTA's "bargaining power" argument.

D. ILEC Attachments Are Qualitatively Different than Those of Other Attachers.

By not adopting the ILEC Complaint Rule, OTA argues that the Commission's Order is unreasonable because it discriminates against attachments made by ILECs.[28] In making this argument, OTA draws a false equivalency between ILEC attachments and those made by non-ILEC attachers and argues that ILEC attachments are no more burdensome than the types of attachments made by non-ILEC attachers. Notably, OTA did not raise this argument in the underlying proceedings—OTA raises it for the first time in its application for rehearing. Moreover, as with virtually all its other arguments, OTA has produced no evidence demonstrating that ILEC attachments in Ohio are in any way comparable to those made by non-ILEC attachers—besides, of course, allegorical evidence from a nineteenth century Gertrude Stein poem.[29] But perhaps the more apropos Gertrude Stein quote is one that succinctly describes OTA's argument: "there is no there there."[30]

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rehearing. *See* OTA's Application for Rehearing at 10 n.3. However, OTA did not actually attach the USTelecom study to its application for rehearing.

[27] *See, e.g.*, *In the Matter of the Complaint of Edward L. Williams, President of 3W American Enterprises v. Ameritech Ohio*, Entry on Rehearing, Case No. 98-1362-TP-CSS, 2000 Ohio PUC LEXIS 432, at *5-6, ¶ 7 (Apr. 13, 2000) ("An application for rehearing is a means to alert the Commission to any significant factual or legal errors in its decision; ***it is not a mechanism for retrying a case or presenting evidence that was obtainable at the time of the hearing***.") (emphasis added).

[28] *See* OTA's Application for Rehearing at 13-14.

[29] OTA's Reply Comments at 5 & n.1 (paraphrasing Gertrude Stein, Sacred Emily, in Geography and Plays (1922)).

[30] Gertrude Stein, Everybody's Autobiography 289 (Random House 1937).

In contrast to OTA's paltry offering, the electric utilities developed the record on this issue by providing multiple explanations regarding how ILEC attachments are qualitatively different than those of other attaching entities. For example, the Commission's Order includes a summary of AEP Ohio's and Duke Energy Ohio's explanation as follows:

> 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 midspan sag.[31]

And shortly after summarizing AEP Ohio's and Duke Energy Ohio's argument on this issue, the Commission noted that it "generally agree[d] with the arguments" made by AEP Ohio and Duke Energy Ohio and found that "the presumption that telephone utilities are similarly situated to other attaching entities is incorrect."[32] Because there is nothing in the record to support a finding that ILEC attachments are functionally equivalent to those of other attaching entities, the Commission's rejection of the FCC's ILEC Complaint Rule was a reasonable course of action.

E. The Commission's Complaint Rule Will Not Hinder Broadband Deployment.

AT&T Ohio and OTA argue that it was "unreasonable" for the Commission to adopt Rule 4901:1-3-05(B), which establishes a rebuttable presumption that rates, terms and conditions within existing joint use agreements are just and reasonable, because it "undermines broadband expansion."[33] In their eyes, the only reasonable course of action was for the Commission to adopt the FCC's ILEC Complaint Rule (and the presumptions embedded therein). However, neither AT&T Ohio nor OTA actually produced any *evidence* showing that the FCC's ILEC Complaint Rule would promote broadband deployment in Ohio. Moreover, neither AT&T Ohio nor OTA

[31] Finding and Order at ¶ 66; *see also* AEP Ohio and Duke Energy Ohio's Initial Comments at 8-9.

[32] Finding and Order at ¶ 69.

[33] *See* OTA's Application for Rehearing at 13; AT&T Ohio's Application for Rehearing 5.

produced any evidence showing that Rule 4901:1-3-05(B) would inhibit broadband deployment in Ohio.[34]

Instead of building an Ohio-centric record to support adoption of the FCC's ILEC Complaint Rule, AT&T Ohio and OTA instead rely exclusively on the findings made in the FCC's 2018 Order (*e.g.*, "[a]doption of the FCC policy will, *as the FCC noted*, promote broadband deployment").[35] To avoid their obligation to build a case for adoption of the FCC's ILEC Complaint Rule on an Ohio-specific record, AT&T Ohio and OTA baselessly argue that the Commission should have afforded great deference to the FCC's findings in the 2018 Order. AT&T Ohio goes one step further and claims that it was unreasonable for the Commission to not blindly adopt the FCC's findings. AT&T Ohio argues:

> Great weight should be accorded the FCC's conclusions in this regard; the Commission failed to do so—and acted unreasonably—here.[36]

In taking this extreme stance, however, AT&T Ohio fails to mention that it argued against incorporating other aspects of the FCC's pole attachment rules.[37] In other words, according to AT&T Ohio, it is only reasonable to break with the FCC when it is in AT&T Ohio's best interest.

The foregoing demonstrates that AT&T Ohio's and OTA's "promotion of broadband deployment" arguments are backed by nothing but the seductiveness of the proposition. The record is devoid of any evidence suggesting that Rule 4901:1-3-05(B) will hinder broadband deployment in Ohio. But the record is not devoid of evidence supporting the Commission's rejection of the FCC's ILEC Complaint Rule. As noted in Section II.A. *supra*, the Commission's

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[34] Rule 4901:1-3-05(B) closely tracks the rule revisions proposed by AEP Ohio and Duke Energy Ohio's initial comments. *See* AEP Ohio and Duke Energy Ohio's Initial Comments at 10-11. Therefore, AT&T Ohio and OTA had ample opportunity to produce evidence on this issue.

[35] AT&T Ohio's Application for Rehearing at 5 (emphasis added); *see also* OTA's Application for Rehearing at 9.

[36] AT&T Ohio's Application for Rehearing at 4.

[37] *See* AT&T Ohio's Reply Comments at 9-10 (opposing Ohio Cable Telecommunications Association's proposal to incorporate the FCC's shorter timelines for taking final action on pole attachment complaints).

regulatory history over joint use agreements is very different than the regulatory history giving rise to the FCC's ILEC Complaint Rule. And the stated justification for the FCC's ILEC Complaint Rule (*i.e.*, FCC's previous authority on joint use agreements spawning multiple disputes) simply does not apply in Ohio. Accordingly, the Commission acted reasonably when it adopted Rule 4901:1-3-05(B).

III. THE COMMISSION'S FINDING AND ORDER IS NOT "UNLAWFUL."

OTA separately argues that the Commission's Order is "unlawful" because it: (1) "summarily concludes that incumbent local exchange carriers' attachments receive special benefits that justify different rates," and (2) "does not mention the bargaining concerns raised by AT&T Ohio and OTA."[38] As a preliminary matter, OTA claims these purported deficiencies violate Section 4903.09 of the Ohio Code.[39] which provides as follows:

> In all *contested cases* heard by the public utilities commission, a complete record of all the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.[40]

OTA's reliance on Section 4903.09 is misplaced. As a quasi-legislative rulemaking, this proceeding does not qualify as a "contested case," and therefore, the requirements of Section 4903.09 are not applicable.[41] But even if Section 4903.09 were applicable to this proceeding, OTA's arguments would still fail.

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[38] OTA's Application for Rehearing at 15.

[39] *See id*. at 14.

[40] Ohio Rev. Code Ann. § 4903.09 (emphasis added).

[41] *See In the Matter of the Commission's Review of Its Rules for Electrical Safety and Service Standards Contained in Chapter 4901:1-10 of the Ohio Administrative Code*, Entry on Rehearing, Case No. 17-1842-EL-ORD, 2021 Ohio PUC LEXIS 20, at * 47-48, ¶ 57 (Jan 27, 2021) ("As a quasi-legislative proceeding, a rulemaking such as this one is not subject to the requirements of R.C. 4903.09.") (citing *Craun Transp., Inc. v. Pub. Util. Comm.*, 120 N.E.2d 436, 436 (Ohio 1954) (finding that a proceeding involving the "promulgation and adoption of rules" was not "an adversary (sic) one as contemplated by the term, 'contested cases'")).

First, the Commission's Order does not "summarily conclude" that ILECs receive unique benefits that justify different rates. Instead, the Commission's Order: (1) acknowledges the fact that the electric utility commenters agree that ILECs enjoy unique benefits under joint use agreements; (2) recites the unique benefits identified by the electric utility commenters; (3) notes that it "generally agree[s]" with the arguments made by the electric utility commenters; (4) makes a factual finding that the "presumption that telephone utilities are similarly situated to other attaching entities is incorrect"; and (4) determines that "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."[42] This hardly qualifies as a "summary conclusion" and meets the applicable standard—*i.e.*, it provides sufficient detail for a reviewing court to determine how the Commission reached its decision.[43] Moreover, the Commission's finding is validated by longstanding and recently affirmed authority on this issue.[44]

Second, while the Commission did not recite the "bargaining power" arguments raised by AT&T Ohio and OTA, the Commission's Order nevertheless addresses these arguments. As discussed in Section II.C. *supra*, the Commission rejected the "bargaining power" arguments by reciting (and later "agreeing" with) the following counterargument:

> 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.[45]

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[42] Finding and Order at ¶¶ 63, 69.

[43] *See Payphone Ass'n v. Pub. Util. Comm. of Ohio*, 849 N.E.2d 4, (Oct. 25, 2005) ("The purpose of R.C. 4903.09 is to enable this court to review the action of the commission without reading the voluminous records in Public Utilities Commission cases. This Court has stated that strict compliance with the terms of the statute is not required. The detail need be sufficient only for this court to determine the basis of the PUCO's reasoning. The PUCO is required only to set forth some factual basis and reasoning based thereon in reaching its conclusion.") (internal quotation marks and citations omitted).

[44] *See supra* note 11.

[45] Finding and Order at ¶ 61.

The Commission also found that it would be "one-sided" to permit "ILECs to retain all of the benefits of their existing joint use agreements" while also allowing ILECs to "simultaneously seek[] a reduction in the charges imposed under such joint use agreements…"[46] In other words, the Commission clearly explained its concern regarding the disparity in bargaining power that would accrue to ILECs if the FCC's ILEC Complaint Rule was adopted in Ohio. Therefore, there are sufficient details in the Commission's Order for a reviewing court to determine why the Commission rejected AT&T Ohio's and OTA's "bargaining power" arguments.[47]

IV. CONCLUSION

For the reasons set forth above, the Commission's decision to not adopt the FCC's ILEC Complaint Rule is reasonable, lawful and supported by the record. Therefore, AEP Ohio respectfully requests that the Commission deny the applications for rehearing filed by AT&T Ohio and OTA.

Respectfully submitted,

/s/ *Steven T. Nourse*
Steven T. Nourse (0046705), Counsel of Record
Christen M. Blend (0086881)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608/ 1915
Facsimile: (614) 716-2950
stnourse@aep.com
cmblend@eap.com

(willing to accept e-mail service)

Counsel for Ohio Power Company

[46] *Id.* at ¶ 69.

[47] *See supra* note 43.

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Memorandum Contra* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 24th day of May, 2021, via electronic transmission.

/s/ *Steven T. Nourse*
Steven T. Nourse

EMAIL SERVICE LIST

Crown Castle Fiber, LLC	Rebecca Hussey Rebecca.hussey@crowncastle.com
Dayton Power & Light	Randall Griffin Randall.Griffin@aes.com
Duke Energy Business Services, LLC	Jeanne Kingery Rocco D'Ascenzo Jeanne.Kingery@duke-energy.com Rocco.DAscenzo@duke-energy.com
Ohio Bell	Mark Ortlieb Mo2753@att.com
Ohio Cable Telecommunications Assoc.	Gretchen Petrucci John Davidson glpetrucci@vorys.com dthomas@sheppardmullin.com
Ohio Edison Co., The Cleveland Electric Illuminating Co., & The Toledo Edison Co.	Kristen Fling kfling@firstenergycorp.com
Ohio Telecom Association	Frank Darr Fdarr2019@gmail.com
Sprint	Diane Browning diane.browning@sprint.com

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Summary: Memorandum -Ohio Power Company's Memorandum Contra
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