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

MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO APPLICATION FOR REHEARING BY OHIO TELECOM ASSOCIATION, THE OHIO BELL TELEPHONE CO., AND THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

I. INTRODUCTION

On April 7, 2021, the Public Utilities Commission of Ohio ("Commission") issued a Finding and Order on proposed revisions to Ohio Adm.Code Chapter 4901:1-3, which adopted certain proposed amendments regarding the Commission's rules for access to poles, ducts, conduits, and rights-of-way.[1] Applications for rehearing were then separately filed by Ohio Telecom Association ("OTA"), the Ohio Bell Telephone Co. ("AT&T"), and the Ohio Cable Telecommunications Association ("OCTA"), asserting various assignments of error.[2] For the reasons set forth below, OTA's, AT&T's, and OCTA's applications for rehearing should be denied.

II. LAW AND ARGUMENT

[1] Finding and Order (April 7, 2021).
[2] Dayton Power and Light Company ("DP&L") also submitted an application for rehearing, but it is not discussed in this Memorandum Contra.

Revised Code Section 4903.10 requires a party seeking rehearing to identify, with specificity, how the Commission's order was erroneous.[3] An application for rehearing fails to satisfy this requirement where it "fail[s] to provide any facts or arguments that would give the Commission just cause to reconsider its decision" and where the application "simply reiterates arguments that were considered and rejected by the Commission in its order in [the] case."[4] Here, each of AT&T's, OTA's, and OCTA's assignments of error are nothing more than reiterations of arguments raised in previous Comments and/or Reply Comments to the proposed changes to O.A.C. 4901:1-3. Each was considered and rejected by the Commission in its Finding and Order.[5] AT&T, OTA, and OCTA have failed to provide any facts or arguments that would merit rehearing, and their applications for rehearing should be denied.

A. It Was Reasonable and Lawful for the Commission to Define Overlashing as the Tying or Lashing of Fiber Optic Cables (O.A.C. 4901:1-3-01).

OCTA argues that the Commission unreasonably and unlawfully limited the definition of "overlashing" to the tying or lashing of only fiber optic cables to wires, cables or strands already attached to a pole. Contrary to OCTA's position, the Commission's decision to remove the phrase "similar to incidental equipment such as fiber slice closers" and limit the definition of "overlashing" to "the tying or lashing of an additional fiber optic cables to an existing communications wires, cables, or supporting strand already attached to poles," was not only reasonable and lawful, but it was also based upon careful consideration of the comments of all parties. The Commission correctly found that the phrase "similar to incidental equipment such as

[3] R.C. § 4903.10; *see also*, *In the Matter of the Complaint of Sherry A. Wiley v. Duke Energy Ohio, Inc*., Case No. 10-2463-GE-CSS, Entry on Rehearing (11/29/2011) at 9.

[4] *In the Matter of the Complaint of Sherry A. Wiley v. Duke Energy Ohio, Inc*., Case No. 10-2463-GE-CSS, Entry on Rehearing (11/29/2011) at 9.

[5] Finding and Order at ¶¶ 16, 48,

fiber slice closers" within the "overlashing" definition is vague and open-ended and, therefore, removed the phrase from the definition.[6]

As Duke Energy Ohio, Inc. ("Duke"), the Ohio Power Company ("AEP"), and Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") pointed out, in addition to being vague and open-ended, allowing for the above-referenced phrase and/or potentially expanding and broadening the definition of "overlashing" even more could lead to disputes[7]. Without specific limitations, disputes encompassing the various conflicting interpretations of the "overlashing" definition would inevitably arise. Additionally, limiting "overlashing" to fiber optic cable, which is lighter than other communication cables such as copper, will less likely result in overloaded support structures.

In sum, expanding and/or broadening the definition of "overlashing" is unnecessary and would likely lead to disputes between parties with conflicting interpretations of the scope of the definition. The Commission's decision to limit the definition of "overlashing" by removing the vague and open-ended phrase "similar to incidental equipment such as fiber slice closers," was both reasonable and lawful, and OCTA's application for rehearing should be denied.

B. It Was Reasonable and Lawful for the Commission to Decline to Adopt the Rebuttable Presumption that an Incumbent Local Exchange Carrier Should be Treated as a Non-Utility Attaching Entity in Complaints Concerning New or Renewed Joint Use Agreements (O.A.C. 4901:1-3-05).

In both OTA and AT&T's applications for rehearing, the argument presented is that the Commission was unreasonable in failing to adopt a rebuttable presumption that an incumbent local

[6] Finding and Order ¶ 16.
[7] The Companies described the disputes and dangers that could arise from expanding and/or refraining from limiting the definition of "overlashing" on pages 3-5 of their Reply Comments filed in this proceeding on September 9, 2019.

exchange carrier should be treated as a non-utility attaching entity, as applied to complaints concerning new or renewed joint use agreements. These assignments of error are nothing more than reiterations of arguments raised in previously submitted comments and reply comments for this matter. OTA and AT&T have failed to provide any facts or arguments that would merit rehearing, and their assignment of error should be denied.

The two main arguments presented in OTA's application for rehearing are that the Commission's decision "undermines the expansion of broadband facilities in Ohio," and that it "unduly discriminates in favor of non-utility entities."[8] Not only have both of these arguments been raised in previously submitted Comments and Reply Comments here, these arguments were both raised and rejected in past rule reviews.[9]

In addition to the argument previously being presented to the Commission, the Commission specifically considered the request and fully explained its reason for not adopting it[10]. The Commission correctly concluded the following

> 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….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.[11]

[8] Application for Rehearing of Ohio Telecom Association at p. 7, ¶ 1.
[9] *See In re the Commission's Review of Ohio Adm.Code Chapter 4901:1-3, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way*, Case No. 13-5779-AU-ORD, Finding and Order (July 30, 2014) at pp. 37-44.
[10] Finding and Order ¶¶ 56, 60-66, 69-71.
[11] *Id.* at ¶ 69.

C. It Was Reasonable and Lawful for the Commission to Adopt a Rebuttable Presumption that the Rates, Terms, and Conditions of New or Renewed Joint Use Agreements are Just and Reasonable (O.A.C. 4901:1-3-05).

Both OTA and AT&T also present the assignment of error that the Commission was unreasonable in adopting a rebuttable presumption that the rates, terms, and conditions of new or renewed joint use agreements are just and reasonable. OTA and AT&T generally combine this argument with their previous assignment of error regarding rebuttable presumptions involved with treating ILECs as a non-utility attaching entity in new or renewed joint use agreements. However, much like the above assignment of error, this issue was also raised in previously submitted comments and reply comments, in which the Commission thoroughly examined and considered all requests and arguments in making a decision[12].

OTA's main argument is that the "Commission fails to address arguments concerning the issues regarding the reasonableness of the Staff's proposed amendment."[13] This argument is not denying that the issue has been raised before. However, OTA fails to recognize the important provision stated by the Commission within the Finding and Order at ¶ 10.

> 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.

The Commission's decision to adopt a rebuttable presumption that the rates, terms, and conditions of new or renewed joint use agreements are just and reasonable was both lawful and reasonable, and therefore, both OTA and AT&T's assignments of error should be denied.

[12] Finding and Order at ¶¶ 56, 60-61, 63, 65-66, 69, 71.
[13] Application for Rehearing of Ohio Telecom Association at p. 14, ¶ 4.

D. **It Was Reasonable and Lawful for the Commission to Adopt and Incorporate Select FCC Regulations, While Refraining to Adopt and Incorporate Certain Other FCC Regulations Throughout O.A.C. 4901:1-3 Provisions.**

All three of the applications for rehearing submitted by OCTA, OTA, and AT&T opine in various ways that it was unreasonable and/or unlawful for the Commission to adopt only certain Federal Communications Commission ("FCC") provisions and incorporate them into 4901:1-3, while not adopting certain other FCC regulations concerning access to poles, ducts, conduits, and rights-of-way. Contradictory to OCTA, OTA, and AT&T's opinion, the Commission's decision to be selective on which FCC provisions to adopt, and which ones to omit, was both lawful and reasonable, as well as consistent with Commission precedent.[14]

As articulated in 47 U.S.C. § 224(c)(2)(B), when a state reverse preempts the FCC's jurisdiction, they are required to take a balanced approach in their review and consider the interests of *all* utilities, as well as the interests of their customers. Such was the case here. The Commission thoroughly explained its reasoning and considered the interests of all:

> 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

[14] For example, in 2014 the Commission modified then-current FCC regulations for Ohio regarding pole attachments in PUCO case no. 13-579-AU-ORD (Finding and Order; Entry on Rehearing).

> administrative burden public utilities and attaching entities face to reach compliance.[15]

It should be noted that the Commission never claimed or intended to adopt *all* of the FCC provisions in this area, as the applications for rehearing appear to suggest. In fact, the Commission specifically said that adopting *certain* provisions from the FCC regulations would help in alleviating *some* of the burdens that go along with reaching compliance. There is no requirement that the Commission follow and/or adopt all of the FCC regulations when the Commission is the regulatory authority and may adopt appropriate procedures, rates, terms, and conditions, so long as just and reasonable[16].

There is nothing unreasonable or unlawful about the Commission's decision. All interests were thoroughly considered in selecting which FCC regulations to adopt and incorporate. For this reason, OTA, OCTA, and AT&T's assignments of error concerning the failure to adopt FCC provisions should be denied.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission deny the Applications for Rehearing of the Ohio Telecom Association, the Ohio Bell Telephone Co., and the Ohio Cable Telecommunications Association.

Respectfully submitted,

[15] Finding and Order (4/7/2021) at ¶ 48.
[16] *See* 47 U.S.C. § 224(b).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Application for Rehearing by Ohio Telecom Association, the Ohio Bell Telephone Co., and the Ohio Cable Telecommunications Association was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 24th day of May 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/Kristen M. Fling
Kristen M. Fling
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Summary: Memorandum MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO APPLICATION FOR REHEARING BY OHIO TELECOM ASSOCIATION, THE OHIO BELL TELEPHONE CO., AND THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION electronically filed by Ms. Kristen M Fling on behalf of Ohio Edison Company and The Toledo Edison Company and The Cleveland Electric Illuminating Company