

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Dayton Power and Light Company d/b/a)	Case No. 22-80-EL-ATA
AES Ohio for Approval to Establish a)	
New Pole Attachment Tariff)	

**OBJECTIONS
OF
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

I. Introduction

The Ohio Cable Telecommunications Association (“OCTA”), representing the interests of Ohio’s broadband and cable industry and whose members attach to the poles owned by The Dayton Power and Light Company d/b/a AES Ohio (“AES Ohio”), files this response to the utility’s application to modify its Poles, Ducts, and Conduits Attachment Tariff P.U.C.O. No. 2 (“Tariff”). As reflected in Exhibit C-2 to the application in this proceeding, AES Ohio has filed the application “to bring its existing Tariff Sheets into conformity with the revised rules.” AES Ohio proposes only a few revisions, and the OCTA does not oppose most of those changes. AES Ohio, however, does not include other changes that should be made in order to bring the Tariff into compliance with the new pole attachment and conduit occupancy rules that took effect on January 31, 2022. Ohio Adm.Code Chapter 4901:1-3.

Careful review of pole attachment rates, terms, and conditions is vitally important because unreasonable terms for pole access impede essential broadband investment and deployment, thus harming not only potential attachers, but also the consumers who seek connectivity to high-speed internet. Broadband facilities need poles, and when the terms for pole attachments are too unreasonable, broadband deployment unnecessarily suffers. AES Ohio’s Tariff should be

carefully scrutinized to protect the public interest in a fair marketplace for pole attachments, and to avoid artificially stunting the ability of broadband providers to invest and deploy broadband facilities for Ohio consumers and businesses. To that end, revisions for the Tariff are needed to:

- Appropriately limit the attachment application/permission/fee process to attachments and not other matters such as overloading;
- Require the utility to comply with and allow additional options set forth in the new rules, such as self-help and overloading;
- Clarify that the Tariff does not supersede the requirements of the new rules;
- Include several exceptions to certain costs, as recognized in the rules;
- Ensure that the Tariff reflects the payment period recognized in the rules for make-ready estimates;
- Ensure the utility provides the required written notice to an attachor in advance of the utility removing facilities; and
- Remove extraneous language.

Finally, AES Ohio is not proposing to change its pole attachment or occupancy rental fees, which have been in place nearly five years. The Commission should require AES Ohio to substantiate why it is not proposing to adjust the rates in order to allow the Commission to ensure that retaining the rates would be just and reasonable.

II. Argument

AES Ohio's Tariff is composed of three distinct parts: (1) Rental Charge Schedule; (2) General Terms and Conditions; and (3) Poles, Ducts, and Conduits Attachment Agreement. AES Ohio proposes a few revisions in its application for all three parts. The OCTA does not oppose most of those changes as explained below, but other changes and information as detailed below should be adopted in order for the Tariff to conform with Ohio Adm.Code Chapter 4901:1-3.

- A. **The Rental Charge Schedule (Revised Sheet No. 2) should be revised to appropriately limit applicability of the application/permission/fee process, remove irrelevant language, and ensure additional options set forth in the new rules are available as required; and AES Ohio should substantiate why it is not proposing to adjust the rental charges.**

Rental Charge Schedule - Paragraph 1

The Rental Charge Schedule states that, except as provided in a non-Tariff agreement, the Tariff applies to any attaching entity “who installs **any facilities** on, in or along, poles, ducts, and conduits, and rights-of-way owned by The Dayton Power and Light Company.” Revised Sheet No. 2, paragraph 1 (Emphasis added). This language is overly broad because it could include installations such as overlashing, but as the Commission has twice confirmed, a wire or cable overlashed to an existing facility is not an attachment subject to an attachment fee.¹ In addition, the Commission rejected AES Ohio’s proposal for an application and approval process specifically for overlashing.² It is therefore not reasonable for AES Ohio’s Rental Charge Schedule to state that the Tariff applies to the installation of “any facilities.” Instead, the Rental Charge Schedule should be revised to apply only to attachments as permitted under Ohio Adm.Code Chapter 4901:1-3.

Rental Charge Schedule - Paragraph 3

AES Ohio proposes to retain the following language in paragraph 3 even though its applicability has long passed:

For calendar year 2017, the Annual Rental Fee per attachment per foot occupied shall be computed as the sum of (\$3.50 multiplied by the ratio of days in which the prior Tariff’s Base Rental was effective divided by 365)

¹ *In the Matter of the Application of Ohio Power Company to Amend Its Pole Attachment Tariff*, Case No. 15-974-EL-ATA, Finding and Order at ¶ 25 (September 7, 2016); and *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 (“2019 Pole Attachment Rule Review”), Entry on Rehearing at ¶ 39 (September 23, 2021).

² *2019 Pole Attachment Rule Review*, Finding and Order at ¶¶ 27 and 48 (April 7, 2021).

plus (\$8.05 multiplied by the ratio of days in which this Annual Rental Fee is in effect divided by 365).

The purpose of that language was to reflect how, in 2017, the then-new annual rental fee would be charged on a pro rata basis because the Commission's last approved pole attachment rate adjustment took effect part way through the 2017 calendar year. The above language is unnecessary and no longer relevant. The OCTA would not object, however, if AES Ohio's Tariff affirmatively stated that, unless otherwise ordered by the Commission, any adjustments to the attachment charges that become effective during a calendar year will be applied to the bills on a pro rata basis using the following formula: (old rate multiplied by the ratio of days in which the prior Tariff's Annual Rental Fee was effective divided by 365) plus (new rate multiplied by the ratio of days in which the newly effective Annual Rental Fee is in effect divided by 365).

AES Ohio also proposes to retain its existing pole attachment rental fee and conduit occupancy fee in paragraph 3 as they were put into effect in 2017. AES Ohio does not explain in its application why it is not proposing to change the rates. Nearly five years have passed since those rates took effect and those rates were based on 2014 data.³ The Commission should require AES Ohio to substantiate why it is not proposing to adjust the rates in order to allow the Commission to ensure that retaining the rates would be just and reasonable.

Rental Charge Schedule - Paragraph 6

Paragraph 6 of the Rental Charge Schedule states that both the Rental Charge Schedule and the General Terms and Conditions are "subject to Section 4901:1-3 of the Ohio Administrative Code and the jurisdiction of the Public Utilities Commission of Ohio." That language, however, does not clearly or appropriately reflect the self-help and overlapping obligations adopted in the

³ *In the Matter of the Application of The Dayton Power and Light Company to Amend its Pole Attachment Tariff*, Case No. 15-971-EL-ATA, Finding and Order (September 7, 2016), Second Entry on Rehearing (November 30, 2016), Entry (April 12, 2017) and Entry on Rehearing (July 26, 2017).

Rule 4901:1-3-03. Those new obligations are not appropriately set forth elsewhere in the Rental Charge Schedule and the General Terms and Conditions either.⁴ Both are significant changes in the Commission’s rules for attachers, and they must be properly addressed so that it is clear that they are available in the AES Ohio’s service territory. AES Ohio’s language also does not plainly state that neither the Rental Charge Schedule nor the General Terms and Conditions supersedes Ohio Adm.Code Chapter 4901:1-3. Additional language in paragraph 6 would clarify these points and the OCTA recommends adding the following: “The Company will comply with the obligations in Ohio Administrative Code Chapter 4901:1-3, including the opportunities for self-help and overloading, pursuant to the federal regulations incorporated therein by reference. Nothing in this Rental Charge Schedule or in the General Terms and Conditions supersedes the obligations in Ohio Administrative Code Chapter 4901:1-3.”

- B. The General Terms and Conditions (Revised Sheet No. 3) should be revised to appropriately limit applicability of the application/permission/fee process, remove language not authorized by the new rules, remove duplicative language, include several exceptions to certain costs, ensure written notice is provided when required, and ensure additional options set forth in the new rules are available as required.**

General Terms and Conditions - Paragraphs 1 and 2(a)

The General Terms and Conditions state in paragraph 1 that, except as provided in a non-Tariff agreement, the Tariff applies to any attaching entity “who installs **any facilities** on poles, in ducts or conduits, and along rights-of-way owned by The Dayton Power and Light Company.” Revised Sheet No. 3, paragraph 1 (Emphasis added). In paragraph 2(a), it states that the application process must be used “for permission to **install or change attachments or equipment** (e.g. power

⁴ There is an inappropriate reference to overloading in paragraph 2(b) of the General Terms and Conditions, which is discussed further below, with a recommended removal of the language because it wrongly subjects overloading to an attachment application/permission/fee process.

supply or amplifier) on or in any poles, ducts, and/or conduits of Owner....” Revised Sheet No. 3, paragraph 2(a) (Emphasis added). In both paragraphs, the language is overly broad because it could include installations such as overlashing. As explained above regarding similar language in the Rental Charge Schedule, the Commission specifically rejected that overlashing is an attachment⁵ and rejected that the application/permission/fee process applies to overlashing.⁶ It is therefore not reasonable for AES Ohio’s General Terms and Conditions in the Tariff to state that it applies to the installation of “any facilities” or installing or changing “attachments or equipment.” Instead, the General Terms and Conditions should be revised to state that the application/permission/fee process applies only to attachments as permitted under Ohio Adm.Code Chapter 4901:1-3.

General Terms and Conditions - Paragraph 2(b)

In paragraph 2(b), AES Ohio proposes to add new language that would reference several important obligations that are part of the Commission’s new rules as follows:

Company shall evaluate requests for attachments, accept or deny applications, provide notices, including notices with respect to “overlashing”, prepare both “complex make-ready” and “simple make-ready” estimates and perform make-ready work consistent with the requirements, including exceptions, limitations and conditions, set forth in the Ohio Administrative Code, Section 4901:1-3-03. The terms “complex make-ready,” “overlashing” and “simple make-ready” have the same meaning as in Ohio Administrative Code, Section 4901:1-3- 01.

The reference to overlashing is placed in the “Application” paragraph such that overlashing would be part of AES Ohio’s application process for attachments, again suggesting that AES Ohio can require an application/permission/fee for overlashing. As explained, the Commission rejected

⁵ *Ohio Power Company, supra*, Finding and Order at ¶ 25 (September 7, 2016).

⁶ *Id.*; and *2019 Pole Attachment Rule Review*, Finding and Order at ¶¶ 27 and 48 (April 7, 2021).

that argument when it addressed its pole attachment rules.⁷ As a result, AES Ohio’s revision for paragraph 2(b) should be modified to remove “including notices with respect to ‘overlapping’.” As explained further at the end of this section, the OCTA recommends an entirely separate paragraph be added to the General Terms and Conditions to reflect that the utility shall allow overlapping consistent with Ohio Adm.Code Chapter 4901:1-3. Lastly with regard to the proposed changes to paragraph 2(b), the OCTA notes that the last sentence of paragraph 2(b) regarding the meaning of several terms could have better placement, such as before paragraph 1 of the General Terms and Conditions.

General Terms and Conditions - Paragraph 5

Paragraph 5 (entitled “Conditions of Attachment”) states that all attachments may be placed so long as the placement does not interfere with “the present or any future use which Owner may desire to make of said poles, duct, conduits, and rights-of-way or the wires attached thereto or therein.” The Commission’s rules, however, do not allow access to be limited in that manner. Rather, Rule 4901:1-3-03(A) incorporates 47 C.F.R. § 1.1403 and that federal regulation contains no limitation on access due to the utility’s possible desired future use. 47 C.F.R. § 1.1403 states, instead, that access may be denied where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes. A future use restriction should be removed from the tariff language as follows:

All attachments are to be placed on, in, or along Owner’s poles, ducts, conduits, and rights-of-way as instructed by and in a manner satisfactory to Owner so as not to interfere with the present ~~or any future~~ use ~~which Owner may desire to make~~ of said poles, duct, conduits, and rights-of-way or the wires attached thereto or therein.

⁷ 2019 Pole Attachment Rule Review, Finding and Order at ¶¶ 27 and 48 (April 7, 2021).

In addition, the end of paragraph 5 includes duplicative language that should be removed as follows to avoid confusion:

Any guying required by reason of the attachments of Attachor either in Attachor's or Owner's judgment shall be installed, maintained and provided at the expense of Attachor and to the satisfaction of Owner and shall be in place prior to the installation of Attachor's messenger wire and/or cable. In no event shall Attachor use any of Owner's anchors without first securing Owner's approval.~~in place prior to the installation of Attachor's messenger wire and/or cable. In no event shall Attachor use any of Owner's anchors without first securing Owner's approval.~~

General Terms and Conditions - Paragraph 6

In paragraph 6, an attacher is required to bear the cost of rearranging facilities when made to accommodate that attacher's request. The paragraph does not, however, reflect the exceptions in Rule 4901:1-3-04(E) that costs are to be shared when (1) a preexisting party who after receiving notice of the modification adds to or modifies its own attachment and (2) subsequent parties attach to the facility after the modification. The paragraph also does not reflect the exception in 47 C.F.R. § 1.1411(c)(4), which is incorporated by reference in Rule 4901:1-3-04(A), to prohibit the utility from charging to bring poles, attachments or third-party equipment into compliance with standards and guidelines if they were out of compliance due to another's work prior to the new attachment. The language in the middle of paragraph 6 should be revised as follows:

The requesting Attachor shall be obligated to pay Owner for any costs incurred by Owner for such rearrangements and shall be financially obligated with respect to any charges imposed by the other Attaching Entity's for their costs to rearrange, except (i) when the Owner or another existing Attaching Entity adds to or modifies its attachment after receiving notice of the rearrangement and (ii) for charges to bring the pole, attachment or third-party equipment into compliance with standards and guidelines if they were out of compliance due to another's work prior to the Attachor's new attachment. Subsequent Attaching Entities who attach after the rearranging shall share proportionately in the rearranging costs.

General Terms and Conditions – Paragraphs 7(b) and 7(c)

In paragraphs 7(b) and 7(c), the language states that an attacher shall pay the cost of replacing a pole when the replacement is necessary in order to provide adequate space or strength to accommodate the attacher's attachments. The language further states that the cost shall be the costs of the new pole, labor, materials, overhead, cost of transferring existing electric facilities, cost of removal of the old pole, and any other incremental costs, less any salvage value of the facilities removed. The Commission's rules and referenced federal regulations, however, do not include such a requirement. Moreover, this Tariff language conflicts with the Commission's requirements in Rule 4901:1-3-04(E) applicable when a facility is modified. The pole replacement paragraph in the Tariff fails to recognize that costs are to be shared when (1) a preexisting party who after receiving notice of the modification adds to or modifies its own attachment; and (2) subsequent parties attach to the facility after the modification. The language also does not reflect the exception in 47 C.F.R. § 1.1411(c)(4), incorporated by reference in Rule 4901:1-3-04(A), to prohibit the utility from charging to bring poles, attachments or third-party equipment into compliance with standards and guidelines if they were out of compliance due to another's work prior to the new attachment. In addition, there is duplicative language in the paragraphs. The language in paragraphs 7(b) and (c) should be revised as follows:

(b) In any case where Owner installs a new pole as a replacement of an existing pole because of the necessity of providing adequate space or strength to accommodate the attachments of Attachor, either at the request of Attachor or to comply with the above standards, codes and regulations, the Attachor shall pay ~~Owner's~~ the make-ready cost of this replacement, except (i) when the Owner or other Attaching Entity adds to or modifies its attachment after receiving notice of the pole replacement and (ii) for charges to bring the pole, attachments or third-party equipment into compliance with standards and guidelines if they were out of compliance due to another's work prior to the Attachor's new attachment. Such cost shall be the total estimated cost of the new pole, including material, labor, and applicable overheads, plus the cost of transferring existing electric facilities

to the new pole, plus the cost of removal of the existing pole and any other incremental costs required to provide for the attachments including any applicable taxes and fees the Owner may be required to pay because of this change in plant, minus salvage value of any facilities removed. Subsequent Attaching Entities who attach to the new pole after the pole replacement shall share proportionately in the costs.

(c) ~~Attachor shall also pay to the Owner and shall be financially responsible to any existing Attaching Entities for the cost of removing all existing attachments from the existing pole and re-establishing the same or like attachments on the newly installed pole.~~ Owner's notice to the Attachor shall include the name and contact information of other existing Attaching Entities whose facilities need to be transferred.

General Terms and Conditions - Paragraph 12

Paragraph 12 involves payments by an attacher. It states in relevant part the following regarding payment for a make-ready work estimate:

Payment for make ready work shall be made within twenty-one (21) days of receipt of the cost estimate, unless the Owner receives a written dispute or request for additional information regarding the scope of work or allocation of costs of the work from Attachor, in which case the 21-day period will be held in abeyance until the dispute or inquiry is resolved.

The above language does not follow Rule 4901:1-3-04(B)(2), which incorporates by reference the language in 47 C.F.R. § 1.1411(d)(2) allowing a new attacher to accept a valid estimate and make payment any time after receipt of an estimate, except the attacher may not accept the estimate after the estimate is withdrawn. Paragraph 12, therefore, should be revised as follows:

Payment for a make ready work estimate shall be made ~~within twenty-one (21) days of receipt of the cost estimate~~ at any time, unless the Owner withdraws the estimate. ~~or receives~~ The Attachor may submit a written dispute or request for additional information regarding the scope of make-ready work or allocation of costs of the make-ready work from Attachor, in which case the 21-day period will be held in abeyance until the dispute or inquiry is resolved.

General Terms and Conditions – Paragraph 23

The language in paragraph 23 allows AES Ohio to remove an attacher's facilities if it is noncompliant with or in default of obligations under the Tariff. Paragraph 23 is incorporated into AES Ohio's Attachment Agreement as well.⁸ The language, however, fails to include the advance 60-day written notification that is required by 47 C.F.R. § 1.1403(C)(1),⁹ which is incorporated by reference in Rule 4901:1-3-03(A)(1). Accordingly, paragraph 23 should be revised as follows:

If Attachor fails to comply with any of the provisions of this Tariff or defaults in the performance of any of its obligations under this Tariff and fails to correct such default or non-compliance within 60 days of Owner's written notification, Owner may, at its option, forthwith remove Attachor's facility from Owner's pole, duct and conduit and no liability shall be incurred by Owner because of such action and Attachor shall indemnify and hold Owner harmless for such action pursuant to Section 18. In addition, Attachor shall be liable to Owner for Owner's total costs in removing Attachor's attachments and/or facilities.

General Terms and Conditions - Paragraph 27

Paragraph 27 states that AES Ohio may modify the Generation Terms and Conditions or promulgate "further rules and regulations." It is unclear how AES Ohio can promulgate rules and regulations. More importantly, however, AES Ohio's General Terms and Conditions do not reflect that they do not supersede Ohio Adm.Code Chapter 4901:1-3. Changes to the language in paragraph 27 would clarify these points as follows:

The Company reserves to itself the right with the approval of The Public Utilities Commission of Ohio, to modify, alter or amend these General Terms and Conditions ~~or to promulgate such other and further rules and regulations~~—as experience and conditions may suggest, or as it deems necessary in the conduct of its business. Nothing in the General Terms and

⁸ See AES Ohio Tariff Sheet 4 at ¶ 1.

⁹ 47 C.F.R. § 1.1403(C)(1) states: A utility shall provide a cable television system or telecommunications carrier no less than 60 days written notice prior to:

- (1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's or telecommunications carrier's pole attachment agreement[.]

Conditions supersedes the obligations in Ohio Administrative Code Chapter 4901:1-3.

General Terms and Conditions – New Paragraph 28

The OCTA notes important omissions from this part of the Tariff. The General Terms and Conditions do not clearly reflect the new obligations adopted in the Rule 4901:1-3-03 regarding the opportunities for self-help and overlashing. Ohio Adm.Code Chapter 4901:1-3 includes new and significant changes regarding both. Omitted or inappropriate references to self-help and overlashing in the General Terms and Conditions improperly creates confusion regarding their availability to attachers in the AES Ohio’s service territory. The OCTA recommends an entirely separate paragraph 28 be added, stating: “The Company will comply with the obligations in Ohio Administrative Code Chapter 4901:1-3, including the opportunities for self-help and overlashing, pursuant to the federal regulations incorporated therein by reference.”

- C. The Attachment Agreement (Revised Sheet No. 4) should be revised to comport with the obligation to offer access and to appropriately limit applicability of the application/permission/fee process.**

Attachment Agreement – Second Whereas Clause

The Attachment Agreement contains language that does not comply with the Ohio Adm.Code Chapter 4901:1-3. In the second “WHEREAS” paragraph, the agreement states that AES Ohio is willing to permit use of its poles, ducts and conduits “where, in Owner’s judgement, such use will not interfere with its own service requirements, including considerations of economy and safety.” Access to AES Ohio’s poles, ducts and conduits is not discretionary – it is required by law but subject to certain specified limitations. *See* R.C. 4905.71 and Rule 4901:1-3-03(A). In addition, access to AES Ohio’s poles, ducts and conduits is not dependent on economy. This paragraph should be revised to remove the inappropriate and misleading language. The OCTA recommends revisions as follows: “WHEREAS, Owner ~~is willing to permit, to the extent it may~~

~~lawfully do so, the use of its~~ owns poles, ducts and conduits available for rent by Attachor, ~~where, in Owner's judgment, such use will not interfere with its own service requirements, including considerations of economy and safety;”.~~

Attachment Agreement – Paragraph 3

The Attachment Agreement includes language in paragraph 3 requiring a written application for permission to install attachments, or make “modifications or additions to an existing attachment or use.” In addition, the Attachment Agreement states “[o]verlashing must be specifically approved prior to commencing any construction activities.” This language in paragraph 3 does not comport with the Commission’s rules because the Commission rejected the argument that overlashing is an attachment and rejected AES Ohio’s proposal that overlashing undergo an application or approval process.¹⁰ Paragraph 3 should be revised as follows:

3. **PERMIT FROM OWNER:** Before making any attachment to any of Owner’s poles or making use of any duct or conduit used by Owner, or making modifications or additions to an existing attachment or use, Attachor shall make written application for permission to install attachments on any pole of Owner or make use of any duct or conduit of Owner, subject to the terms and conditions of the Owner’s Pole Attachment Tariff, General Terms and Conditions, PUCO No. 2, Original Sheet No. 3. ~~Overlashing must be specifically approved prior to commencing any construction activities.~~

In light of AES Ohio’s repeated attempts in multiple Commission cases to subject overlashing to a written application and approval process (despite multiple adverse rulings from the Commission), the OCTA further recommends that AES Ohio be required to include an additional paragraph in its Attachment Agreement stating that AES Ohio will not require prior

¹⁰ *Ohio Power Company, supra*, Finding and Order at ¶ 25 (September 7, 2016); and *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 (“2019 Pole Attachment Rule Review”), Entry on Rehearing at ¶ 39 (September 23, 2021).

approval for overlashing as set forth in Ohio Adm.Code 4901:1-03-03 and the federal regulation incorporated by reference therein.

III. Conclusion

Broadband facilities need poles, and the terms for pole attachments need to be reasonable, or broadband deployment will unnecessarily suffer. AES Ohio's Tariff should be carefully scrutinized to protect the public interest in a fair marketplace for pole attachments. The OCTA recommends revisions for the Tariff so that it (a) appropriately limits the attachment application/permission/fee process to attachments and not other matters such as overlashing; (b) requires the utility to comply with and allow additional options set forth in the new rules, such as self-help and overlashing; (c) clarifies that the Tariff does not supersede the requirements of the new rules; (d) includes several exceptions to certain costs, as recognized in the rules; (e) ensures that the Tariff reflects the payment period recognized in the rules for make-ready estimates; (f) ensures the utility provides the required written notice to an attacher in advance of the utility removing facilities; and (g) does not include extraneous language. Finally, the Commission should require AES Ohio to substantiate why it is not proposing to adjust the rates in order to allow the Commission to ensure that retaining the rates would be just and reasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ Gretchen L. Petrucci

Gretchen L. Petrucci

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