

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Chapter )  
4901:1-3, Ohio Administrative Code, )  
Concerning Access to Poles, Ducts, ) Case No. 13-579-AU-ORD  
Conduits, and Rights-of-Way by Public )  
Utilities. )

ENTRY

The Commission finds:

- (1) Utility pole attachments and conduit occupancy are subject to the provisions of Sections 4905.51 and 4905.71, Revised Code. The Commission's current rule on pole attachments and conduit occupancy is found in Rule 4901:1-7-23, Ohio Administrative Code (O.A.C.).
- (2) The Commission is considering adopting a new chapter of rules, in Chapter 4901:1-3, O.A.C., specifically dedicated to access to poles, ducts, conduits, and rights-of-way provided by public utilities.
- (3) In accordance with Section 121.82, Revised Code, in the course of developing draft rules, the Commission must evaluate the rules that adversely affect businesses. If there will be an adverse impact on businesses, as defined in Section 107.52, Revised Code, 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 Section 121.82, Revised Code, to provide the Common Sense Initiative (CSI) office the draft rules and the business impact analysis. The Commission is to consider any recommendations made by CSI with regard to the draft rules and provide CSI with a memorandum explaining either how CSI's recommendations were incorporated into the rules or why the recommendations were not incorporated into the rules. The Commission has considered the current rule review procedures and revised them to incorporate the new CSI process.

- (4) By entry issued April 3, 2013, the Commission scheduled a workshop at the offices of the Commission on April 17, 2013, to elicit feedback on the new chapter of rules specifically dedicated to access to poles, ducts, conduits, and rights-of-way provided by public utilities.
- (5) The workshop was held as scheduled. Comments were offered on behalf of TW Telecom, Fibertech Networks (Fibertech), AEP Ohio, and the Ohio Cable Telecommunications Association (OCTA). Rather than develop standards from scratch, Fibertech encouraged the Commission to look to other regulatory bodies as rules are developed in Ohio. For example, Fibertech advocated that the Commission adopt some of the Connecticut time frames to ensure that access and make-ready work is accomplished in a timely fashion. Moreover, Fibertech and OCTA noted that New York allows the use of utility-approved contractors to complete make-ready work in an expeditious and economic fashion. Additionally, like Connecticut, New York permits the use of temporary attachments. Finally, Fibertech encouraged the Commission to consider adopting time frames for conduit access which, to date, has not been dealt with by the Federal Communications Commission (FCC). OCTA was appreciative of the Staff's proposal to formally provide for mediation of disputes among utilities and attachees. OCTA also encouraged the Commission to adopt standards regarding the attachment of wireless antennas to utility street light poles for broadband access.

AEP Ohio opined that the current regulatory scheme is working fine. AEP Ohio noted that within the past two years, the company negotiated new pole attachment tariffs with OCTA and that the company was currently working with Fibertech on a broadband build-out situation. However, should the Commission deem it necessary to adopt rules covering pole attachments and conduit occupancy, AEP Ohio encouraged the Commission to forgo adopting wholesale the FCC's methodologies on access or rates. AEP Ohio submitted that, while the FCC is focused on the expeditious build-out of broadband, the Commission must remain mindful of pole reliability and safety. AEP Ohio also expressed the view that joint use agreements

between two public utilities (e.g., the electric utilities and the incumbent telephone companies) should be excluded from any O.A.C. rules and the complaint procedure should remain as the appropriate mechanism for a public utility to seek redress if there is a denial of access or improper rates between those two parties. AEP Ohio also suggested that the Commission make clear that current and future tariffs supplant any O.A.C. rules to the extent that there are differences between the rules and approved tariffs. Finally, AEP Ohio noted that the Commission should carefully consider pricing as the FCC formulas establish rates closer to marginal costs which may lead to electric customers having to make up the difference.

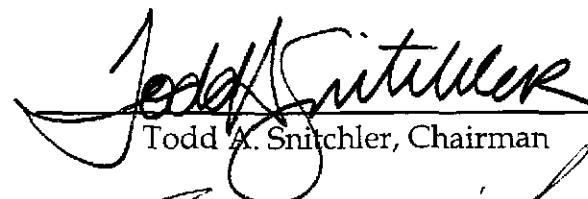
- (6) Staff has evaluated the draft rules contained in proposed Chapter 4901:1-3, O.A.C., and has taken into consideration the stakeholder comments referred to in Finding (5). Among other issues, the Staff has added to the definitions section; further enhanced the mediation provisions; inserted time frames for surveys, the payment of estimates, and make-ready work; proposed safe harbor rate formulas for cable attachments and for telecommunication attachments; and added language encouraging negotiations and clarifying the status of existing tariffs and joint use agreements.
- (7) The Commission now invites interested persons to comment on the attached proposed rules and to assist in the review required by Executive Order 2011-01K. Comments on the draft rules and/or on the business impact analysis contained in the attachments should be filed, either via electronic filing or in hard copy, by June 14, 2013. Reply comments should be filed by July 1, 2013.
- (8) In order to avoid needless production of paper copies, the Commission will serve a paper copy of this entry only and will make Staff's proposed rules in Chapter 4901:1-3, O.A.C., as well as the business impact analysis for this package of rules, available on line at: [www.puco.ohio.gov/puco/rules](http://www.puco.ohio.gov/puco/rules). All interested persons may download the proposed rules and the business impact analysis from the above website, or contact the Commission's Docketing Division to be sent a paper copy.

It is, therefore,

ORDERED, That all interested persons file comments and reply comments on the proposed rules and business impact analysis contained in the attachments by June 14, 2013, and by July 1, 2013, respectively. It is, further,

ORDERED, That a notice or copy of this entry without the attached rules or business impact analysis be served upon all investor-owned electric utilities in the state of Ohio, all certified local exchange carriers in the state of Ohio, the Electric-Energy and Telephone industry list-serve, and any other interested person of record.

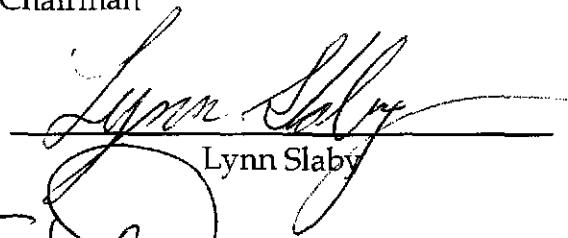
THE PUBLIC UTILITIES COMMISSION OF OHIO



Todd A. Snitchler, Chairman



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MAY 15 2013



Barcy F. McNeal

Barcy F. McNeal  
Secretary

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**4901:1-3-01 Definitions.**

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. 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) "Conduit" means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.
- (G) "Conduit system" means a collection of one or more conduits together with their supporting infrastructure.
- (H) "Duct" means a single enclosed raceway for conductors, cable, and/or wire.
- (I) "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.
- (J) "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.
- (K) "Pole attachment" means any attachment by a cable system, a provider of telecommunications service, or an entity other than a public utility to a pole, duct, conduit, or right-of-way owned or controlled by a public utility.

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- (L) "Public utility" for purposes of this chapter, shall have the same meaning as defined in section 4905.02 of the Revised Code.
- (M) "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.
- (N) "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.
- (O) "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.
- (P) "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 "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.
- (Q) "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.
- (R) "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.

**4901:1-3-02 General applicability.**

- (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 June 1, 2013.
- (B) The obligations found in this chapter, shall apply to: (i) all public utilities pursuant to 47 U.S.C. 224(c) through (i), 47 U.S.C. 253(c), as effective in

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paragraph (A) of this rule, and section 4905.51 of the Revised Code; and (ii) a telephone company and electrical light company that is a public utility pursuant to section 4905.71 of the Revised Code.

- (C) The commission may for good cause shown and consistent with state and federal law, waive any requirement, standard, or rule set forth in this chapter, other than a requirement mandated by statute unless such waiver is permitted by the terms of the statute.
- (D) Any public utility 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.
- (E) All waiver requests must be approved by the commission. Such a request may, at the commission's discretion, toll any time frames.

**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 shall provide an attaching entity with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a public utility providing electric service may deny an attaching entity access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes.
  - (2) Requests for access to a public utility's poles, ducts, conduits, or rights-of-way must be in writing. If access is not granted within forty-five days of the request for access, the public utility must confirm the denial in writing by the forty-fifth day. The public utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.
  - (3) A public utility shall provide an attaching entity no less than sixty days written notice prior to:
    - (a) Removal of facilities or termination of any service to those facilities, such

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removal or termination arising out of a rate, term, or condition of the attaching entity's pole attachment agreement;

- (b) Any increase in pole attachment rates; or
- (c) Any modification of facilities other than routine maintenance or modification in response to emergencies.

(4) An attaching entity may file with the commission a petition for temporary stay of the action contained in a notice received pursuant to paragraph (3) of this section 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 section 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.

(5) Cable operators must notify pole owners upon offering telecommunications services or any comparable services regardless of the technology used.

(B) Timeline for access to public utility poles

(1) Survey

A public utility shall respond as described in paragraph (A)(2) of this section to an attaching entity within forty-five days of receipt of a complete application to attach facilities to its poles (or within sixty days, in the case of larger orders as described in paragraph (B)(5) of this section). This response may be a notification that the public utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the public utility with the information necessary under its procedures to begin to survey the poles.

(2) Estimate

Where a request for access is not denied, a public utility shall present to the attaching entity an estimate of charges to perform all necessary make-ready work within fourteen days of providing the response required by paragraph

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(B)(1) of this section, or in the case where a prospective attaching entity's contractor has performed a survey as described in paragraph (C) of this section, within fourteen days of receipt by the public utility of such survey.

- (a) A public utility may withdraw an outstanding estimate of charges to perform make-ready work beginning fourteen days after the estimate is presented.
- (b) An attaching entity may accept a valid estimate and make payment within fourteen days from receipt of the estimate but before the estimate is withdrawn.

(3) Make-ready

Upon receipt of payment specified in paragraph (B)(2)(b) of this section, the public utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

- (a) For attachments in the communications space, the notice shall:
  - (i) Specify where and what make-ready will be performed.
  - (ii) Set a date for completion of make-ready that is no later than sixty days after notification is sent (or one-hundred and five days in the case of larger orders, as described in paragraph (B)(5) of this section).
  - (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.
  - (iv) State that the public utility may assert its right to fifteen additional days to complete make-ready.
  - (v) State that if make-ready is not completed by the completion date set by the public utility (or, if the public utility has asserted its fifteen-day right of control, fifteen days later), the attaching entity requesting access may complete the specified make-ready.
  - (vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

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(b) For wireless attachments above the communications space, the notice shall:

- (i) Specify where and what make-ready will be performed.
- (ii) Set a date for completion of make-ready that is no later than ninety days after notification is sent (or one-hundred and thirty-five days in the case of larger orders, as described in paragraph (B)(5) of this section).
- (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.
- (iv) State that the public utility may assert its right to fifteen additional days to complete make-ready.
- (v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(4) For wireless attachments above the communications space, a public utility shall ensure that make-ready is completed by the date set by the public utility in paragraph (3)(b)(ii) of this section (or, if the public utility has asserted its fifteen-day right of control, fifteen days later).

(5) For the purposes of compliance with the time periods in this section:

- (a) A public utility shall apply the timeline described in paragraphs (B)(1) through (B)(3) of this section to all requests for pole attachments up to the lesser of three-hundred poles or one-half percent of the public utility's poles in the state.
- (b) A public utility may add fifteen days to the survey period described in paragraph (B)(1) of this section to larger orders up to the lesser of three-thousand poles or five percent of the public utility's poles in the state.
- (c) A public utility may add forty-five days to the make-ready periods described in paragraph (B)(3) of this section to larger orders up to the lesser of three-thousand poles or five percent of the public utility's poles in the state.

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- (d) A public utility shall negotiate in good faith the timing of all requests for pole attachments larger than the lesser of three thousand poles or five percent of the public utility's poles in the state.
- (e) A public utility may treat multiple requests from a single attaching entity as one request when the requests are filed within thirty days of one another.
- (6) A public utility may deviate from the time limits specified in this section:
  - (a) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.
  - (b) During performance of make-ready for good and sufficient cause that renders it infeasible for the public utility to complete the make-ready work within the prescribed time frame. A public utility that so deviates shall immediately notify, in writing, the attaching entity requesting attachment and other affected entities with existing attachments, and shall include the reason for, and date and duration of the deviation. The public utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.
- (7) If a public utility fails to respond as specified in paragraph (B)(1) of this section, an attaching entity requesting attachment in the communications space may, as specified in section (C) of this rule, hire a contractor to complete a survey. If make-ready is not completed by the date specified in paragraph (B)(3)(a)(ii) of this section, the attaching entity requesting attachment in the communications space may hire a contractor to complete the make-ready:
  - (a) Immediately, if the public utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attaching entity that it will do so; or
  - (b) After fifteen days if the public utility has asserted its right to perform make-ready by the date specified in paragraph (B)(3)(a)(ii) of this section and has failed to complete make-ready.

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(C) Contractors for survey and make-ready

- (1) A public utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its poles in cases where the public utility has failed to meet deadlines specified in section (B) of this rule.
- (2) If an attaching entity hires a contractor for purposes specified in section (B) of this rule, it shall choose from among the public utility's list of authorized contractors.
- (3) An attaching entity that hires a contractor for survey or make-ready work shall provide the public utility with a reasonable opportunity for a public utility representative to accompany and consult with the authorized contractor and the attaching entity.
- (4) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

(D) Notwithstanding all time frames identified above, parties are free to negotiate different time frames on a case-by-case basis.

(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 section 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) The public utility is required to allow attaching entities to use the same attaching techniques used by the public utility itself or another similarly situated attaching entity on the pole.
- (H) The time frame for access to a public utility's conduits shall be identical to the time frame established in this rule for access to a public utility's poles.

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

- (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 in the appropriate proceeding 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.
- (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 section 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 the rate, term, or condition is just and reasonable in complaint proceedings. 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

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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 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.

(2) When parties fail to resolve a dispute regarding charges for pole attachments and the commission's complaint procedure under sections 4905.26 or 4927.21 of the Revised Code are invoked, the commission will apply the formulas set forth in the appendix to this rule for determining a maximum just and reasonable rate.

(E) Allocation of Unusable Space Costs

(1) With respect to the formula referenced in the appendix of this rule, a public utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(2) All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

(3) Public utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formulas referenced in the appendix of this rule. For non-urbanized service areas (under fifty-thousand population), a presumptive average number of attaching entities of three. For urbanized service areas (fifty-thousand or higher population), a presumptive average number of attaching entities of five. If any part of the public utility's service area within the state has a designation of urbanized (fifty-thousand or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

(4) A public utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

(a) Each public utility shall, upon request, provide all attaching entities and

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all entities seeking access the methodology and information upon which the utilities presumptive average number of attaching entities is based.

- (b) Each public utility is required to exercise good faith in establishing and updating its presumptive average number of attaching entities.
- (c) The presumptive average number of attaching entities may be challenged by an attaching entity by submitting information demonstrating why the public utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.
- (d) Upon successful challenge of the existing presumptive average number of attaching entities, the resulting data determined shall be used by the public utility as the presumptive number of attaching entities within the rate formula.

(F) With respect to the formulas referenced in the appendix 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.

(G) 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 rule 4901:1-3-03(B)(3) 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

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modification rendered possible the added attachment.

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

**4901:1-3-05 Complaints.**

Any attaching entity or a public utility may file a complaint against a public utility pursuant to sections 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 section within a reasonable time not to exceed three-hundred and sixty days after the filing of the complaint.

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

(A) All local exchange carriers (LECs) have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way to competing providers of telecommunications services on rates, terms, and conditions that are consistent with 47 U.S.C. 224 pursuant to 47 U.S.C. 251(B)(4), as effective in paragraph (A) of rule 4901:1-3-02 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 or arbitrate such agreement pursuant to 47 U.S.C. 252, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code according to procedures established in rules 4901:1-7-8 through 4901:1-7-10 of the Administrative Code.

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(B) All public utilities have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way. If an attaching entity is unable to reach an agreement on rates, terms, or conditions regarding access to poles, ducts, conduits, or rights-of-way, in a situation other than those identified in paragraph (A), either party may petition the commission to mediate such an agreement pursuant to the process outlined in paragraphs (C)(1) through (C)(8) of this section.

(C) Mediation process

- (1) Mediation is a voluntary alternative dispute resolution process in which a neutral third party assists the parties in reaching their own settlement. At any point during the negotiation, any party or both parties to the negotiation may ask the commission to mediate any differences arising during the course of the negotiation.
- (2) To request mediation, a party to the negotiation shall notify in writing the chief of the telecommunications section of the commission's legal department and the chief of the telecommunications division of the utilities department of the commission. A copy of the mediation request should be simultaneously served on the other party in the dispute. The request shall include the following information:
  - (a) The name, address, telephone number, e-mail, and fax number of the party to the negotiation making the request.
  - (b) The name, address, telephone number, e-mail, and fax number of the other party to the negotiation.
  - (c) The name, address, telephone number, e-mail, and fax number of the parties' representatives participating in the negotiations and to whom inquiries should be made.
  - (d) The negotiation history, including meeting times and locations.
  - (e) A statement concerning the differences existing between the parties, including relevant documentation and arguments concerning matters to be mediated.
  - (f) The other party to the negotiation shall provide a written response within seven calendar days of the request for mediation to the chief of

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the telecommunications section of the commission's legal department and to the chief of the telecommunications section of the utilities department. The response to a request for mediation shall be simultaneously served upon the party requesting the mediation.

- (3) The commission will appoint a mediator to conduct the mediation. The mediator will promptly contact the parties to the negotiation and establish a time to commence mediation. The mediator will work with the parties to establish an appropriate schedule and procedure for the mediation.
- (4) The mediator's function is to be impartial and to encourage voluntary settlement by the parties. The mediator may not compel a settlement. The mediator may schedule meetings of the parties, direct the parties to prepare for those meetings, hold private caucuses with each party, request that the parties share information, attempt to achieve a mediated resolution, and, if successful, assist the parties in preparing a written agreement.
- (5) Participants in the mediation must have the authority to enter into a settlement of the matters at issue.
- (6) Confidentiality
  - (a) Discussions during the mediation process shall be private and confidential between the parties. By electing mediation under this rule, the parties agree that no communication made in the course of and relating to the subject matter of the mediation shall be disclosed, except as permitted in this chapter.
  - (b) No party shall use any information obtained through the mediation process for any purpose other than the mediation process itself. This restriction includes, but is not limited to, using any information obtained through the mediation process to gain a competitive advantage.
  - (c) As provided in the Ohio Rules of Evidence 408, offers to compromise disputed claims and responses to them are inadmissible to prove the validity of that claim in a subsequent proceeding. Evidence of conduct or statements made in compromise negotiations are also not admissible in a future proceeding. This rule does not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

**\*\*\*DRAFT - NOT FOR FILING\*\*\***

- (7) Parties to the mediation shall reduce to writing the mediated resolution of all or any portion of the mediated issues and submit the resolution to the mediator.
- (8) A member of the commission staff or an attorney examiner who serves as a mediator shall, by virtue of having served in such capacity, be precluded from serving in a decision-making role or as a witness on matters subject to mediation in a formal commission case involving the same parties and the same issues.

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

**Agency Name:** Public Utilities Commission of Ohio (PUCO)  
Attention: Jeff Jones, Chief, Telecommunications Section  
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jeff.jones@puc.state.oh.us.

**Regulation/Package Title:** Chapter 4901:1-3, Access to Poles, Ducts, Conduits, and Rights- of-Way – Case No. 13-579-AU-ORD

**Rule Number(s):**

- 4901:1-3-01 Definitions
- 4901:1-3-02 General Applicability
- 4901:1-3-03 Access to Poles, Ducts, Conduits, and Rights-of-way
- 4901:1-3-04 Rates, Terms, and Conditions for Poles, Ducts, and Conduits
- 4901:1-3-05 Complaints
- 4901:1-3-06 Mediation and Arbitration of Agreements

**Date:** May 15, 2013

**Rule Type:**

<input checked="" type="checkbox"/> New	<input type="checkbox"/> 5-Year Review
<input type="checkbox"/> Amended	<input type="checkbox"/> Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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**Regulatory Intent**

**1. Please briefly describe the draft regulation in plain language.**

Chapter 4901:1-3, Ohio Administrative Code (O.A.C.), establishes the rates, terms, and conditions by which public utilities and non-public utilities (attachees) attach facilities to a pole or in the conduit of an electric company or telephone company.

**2. Please list the Ohio statute authorizing the Agency to adopt this regulation.**

Sections 4927.03 and 4927.15, Revised Code.

**3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

The rules in this chapter exercise state regulatory authority over rates, terms, and conditions, of pole attachments, ducts, conduits, and rights-of-way as authorized under federal law in 47 USC 224(c). The PUCO has certified to the Federal Communications Commission (FCC), in accordance with 47 USC 224, that Ohio, through the PUCO, regulates such attachments.

**4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

This chapter generally follows the pole attachment and conduit occupancy rules adopted by the FCC in 47 Code of Federal Regulations (CFR) Subpart J, 1.1401 through 1.1424. There are two noteworthy areas where the PUCO has added provisions not found in the federal rules. First, the PUCO has added language encouraging parties to mediate pole attachment agreements in the first instance and clarifies that the rules being adopted in Chapter 4901:1-3, O.A.C., provide a safe harbor in those instances where mediation and negotiations fail. The second noteworthy area is that the PUCO makes clear that these provisions apply equally to attachments to poles and to conduit occupancy.

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**5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The PUCO has had statutory authority over utility-to-utility pole attachments through Section 4905.51, Revised Code, since 1953 and over non-utility-to-utility pole attachments through Section 4905.71, Revised Code, since 1981. Additionally, the Commission has had a guideline or O.A.C. rule in place covering pole attachments since 1995. Thus, this is not a new area of regulation by the PUCO. However, in recent years and with the advent of more competition, the PUCO is seeing more disputes between attachees and pole and conduit owners. These rules balance the need for just, reasonable, and timely attachment by attachees against safety, reliability, and insufficient capacity concerns of owners of poles and conduits.

**6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

The PUCO will be able to monitor complaints and mediate resolutions of pole and conduit occupancy disputes.

**Development of the Regulation**

**7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

On April 3, 2013, in Case No. 13-579-AU-ORD, the PUCO issued an entry by U.S. Mail and e-mail indicating that a workshop would be conducted on April 17, 2013, to listen to any proposed modifications to the proposed rules. The entry was served upon all electric companies, all incumbent local exchange telephone companies, the Ohio Telecom Association, and the Ohio Cable Telecommunications Association (the OCTA) as well as on the PUCO's Electric-Energy, Gas-Pipeline, Telephone, and Water industry list-serves. The workshop was held as scheduled.

**8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

Comments at the workshop, which was transcribed, were offered by TW Telecom, Fibertech Networks, AEP Ohio, and the OCTA. A summary of the comments offered at the workshop and how the PUCO addressed those comments in putting the rules out for formal written comment can be found in findings (5) and (6) of the May 15, 2013, Commission entry in Case No. 13-579-AU-ORD.

The PUCO also grants other opportunities for stakeholders to provide input on proposed rules, including through the PUCO call center and through the formal comment period of the rule review process. All stakeholder comments provided during the formal comment period are reviewed and addressed by the PUCO.

**9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

No scientific data was used to develop the rules; however, the rate formulas in the appendix of Rule 4901:1-3-04, O.A.C., mirror the rate formulas adopted by the FCC in 47 CFR 1.1409. The FCC's stated purpose for adoption of these formulas is to assure a public utility the recovery of no 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 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.

**10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

In developing the proposed rules in this chapter, the PUCO Staff considered alternative regulations but ultimately decided to pattern the rules after the rules adopted by the FCC.

**11. Did the Agency specifically consider a performance-based regulation? Please explain.**

*Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

The proposed rules are performance-based in the sense that the rules encourage pole owners and attachees to negotiate rates, terms, and conditions before seeking PUCO intervention. Once negotiations break-down, however, the proposed rules are intended to provide a mechanism to balance the parties' interests in determining just and reasonable terms of attachment.

**12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

The PUCO has reviewed other Ohio regulations and found no duplicate.

**13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

The adoption of Chapter 4901:1-3, O.A.C., will provide the PUCO with a framework to ensure consistent and predictable application for affected entities as well as to provide guidance to stakeholders when necessary.

**Adverse Impact to Business**

**14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

**a. Identify the scope of the impacted business community;**

The scope of the business community impacted by the adoption of Chapter 4901:1-3, O.A.C., includes public utilities owning poles and conduit as well as any business engaged in providing electric service or cable, telecommunications, or broadband

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internet services in Ohio. Affected businesses will benefit by having predictable, measurable standards by which to approach negotiations.

**b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**

The proposed rules were drafted in an effort to minimize any adverse impact on business, while fulfilling the statutory obligation of encouraging pole and conduit occupancy through rates, terms, and conditions that are just and reasonable as set forth in Sections 4905.51 and 4905.71, Revised Code.

**c. Quantify the expected adverse impact from the regulation.**

*The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a "representative business." Please include the source for your information/estimated impact.*

No new impacts are expected from adoption of these regulations.

**15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

There is no additional recognized adverse impact to the regulated business community as public utilities have entered into agreements with attachees for years pursuant to the obligations of Sections 4905.51 and 4905.71, Revised Code.

**Regulatory Flexibility**

**16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

The rules provide any impacted entity with the opportunity to seek a waiver of a provision of these rules. As part of the consideration of any waiver request, the PUCO could explore alternative means of compliance to satisfy the intent of the statutory obligations.

**17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

The rules in Chapter 4901:1-3, O.A.C., do not impose fines or penalties for failure to comply.

**18. What resources are available to assist small businesses with compliance of the regulation?**

Commission Staff works with all affected entities, including small businesses, to assist such companies with compliance.

APPENDIX

4901:1-3-04 (Rates, Terms, and Conditions for Poles, Ducts and Conduits)  
Pole Attachment and Conduit Occupancy Rate Formulas

(A) The following formula shall apply to attachments to poles by cable operators that solely provide cable services and do not offer any services comparable to telecommunications services regardless of the technology used:

Maximum Rate = space factor x net cost of a bare pole x carrying charge rate

Where:

Space factor = space occupied by attachment ÷ total usable space

(B) With respect to attachments to poles by any telecommunications carrier or cable operator providing either telecommunications services or any comparable services regardless of the technology used, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (B)(1) or (B)(2) of this section.

(1) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (B)(2) of this section:

Rate = space factor x cost

Where

Cost in Urbanized Service Areas =  $0.66 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$

Cost in Non-Urbanized Service Areas =  $0.44 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$ .

Where

Space factor =

$$\frac{\left( (\text{space occupied}) + \left( \frac{2}{3} \times (\text{usable space} \div \text{No. of attaching entities}) \right) \right)}{\text{pole height}}$$

(2) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (B)(1) of this section:

Rate = space factor x net cost of a bare pole x (maintenance and administrative carrying charge rate)

Where

Space factor =

$$\frac{\left( \text{space occupied} \right) + \left( \frac{2}{3} \times (\text{usable space} \div \text{No. of attaching entities}) \right)}{\text{pole height}}$$

(C) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\text{Maximum Rate per Linear ft./m.} = \left[ \frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[ \frac{\text{No. of Ducts}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Net Conduit Investment}}{\text{Carrying Charge Rate}} \right] \times \text{Percentage of Conduit Capacity} \times \text{Net Linear Cost of a Conduit}$$

Simplified as:

$$\frac{\text{Maximum Rate}}{\text{Per Linear ft./m.}} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Carrying Charge Rate}}{\text{Rate}}$$

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be  $\frac{1}{2}$ .