

In the Matter of the Application of The)
Dayton Power and Light Company to Amend) Case No. 15-971-EL-ATA
Its Pole Attachment Tariffs.)

Now comes the Ohio Cable Telecommunications Association (“OCTA”), who seeks leave to file a reply *instantly* to the response filed by The Dayton Power and Light Company on August 24, 2015, in this proceeding. The OCTA makes this motion to (a) ensure that the Public Utilities Commission of Ohio has further information upon which to consider certain disputed issues in this matter and (b) reply to DP&L’s proposal for the next procedural steps. The OCTA requests an expedited ruling on the motion for leave so that this motion can be considered expeditiously and not unduly delay the proceedings. The reasons supporting the OCTA’s motion for leave and motion for an expedited ruling are set forth in the attached Memorandum.

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Attorneys for the Ohio Cable Telecommunications Association

**MEMORANDUM IN SUPPORT
OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION'S
MOTION FOR LEAVE TO FILE A REPLY *INSTANTER*
AND
MOTION FOR EXPEDITED RULING**

On February 25, 2015, as revised on April 22, 2015, the Public Utilities Commission of Ohio (“Commission”) ordered all public utility pole owners in Ohio to file amended tariffs that correspond with the Commission’s newly adopted administrative rules.¹ At the same time, the Commission established August 1, 2015, as the deadline for filing motions to intervene and objections in the tariff application dockets. The Dayton Power and Light Company (“DP&L”) filed its tariff application on May 15, 2015, and the Ohio Cable Telecommunications Association (“OCTA”) timely filed a motion to intervene and its objections in this docket. By Entry issued on August 7, 2015, the Commission granted the OCTA’s intervention request and allowed DP&L the opportunity to respond to the OCTA’s objections.² DP&L filed its response on August 24.

The August 7 Entry did not provide for an opportunity to reply to DP&L’s response, or provide any indication as to how this matter would proceed after the pole owner’s response was filed. Now that the OCTA has reviewed DP&L’s response (as well as those in the other pole attachment/conduit occupancy cases in which the OCTA is involved), the OCTA believes that a brief, targeted reply can complete the arguments in support of the remaining issues and assist the Commission in determining the next procedural steps in this proceeding.

The OCTA stands by the arguments it made in its objections. In its objections, the OCTA raised several concerns with DP&L’s proposed pole attachment tariff revisions. DP&L

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

² The Entry was issued in this case, as well as ten other dockets involving applications to establish new pole attachment and conduit occupancy tariff provisions.

responded to those objections, but DP&L did not accept all of the OCTA's objections. Thus, there are issues remaining for Commission resolution. The OCTA wishes to reply regarding:

- Important issues involving (a) DP&L's August 24 new rate calculations, (b) Account 364 data for determining the appurtenance factor and number of poles, (c) the application of gradualism to the approved new pole attachment rate (DP&L has proposed a 130% increase in its pole attachment rate), (d) riser poles, and (e) overlashing – responding to new information and arguments from DP&L.
- Next procedural steps – DP&L has suggested that the Commission order an informal conference be held between DP&L, the OCTA and the Commission Staff for possible informal resolution of the remaining tariff issues.³ The OCTA believes that it is an appropriate next step for this proceeding. In the event that a complete resolution is not reached, then a hearing may be held so that the parties have the opportunity to present the facts and arguments needed for determining the appropriate tariff provisions for the remaining issues.

The issues are technical and not straight-forward. DP&L's response raised, for the first time, arguments to which the OCTA would like to reply. Also, the issues involve the inaugural tariff for DP&L following the Commission's adoption of new industry-wide rules. As such, the OCTA believes that these disputed issues warrant careful deliberations so that DP&L's pole attachment tariff will be fully compliant with the Commission's new rules and the public interest. The OCTA seeks leave to reply in a targeted manner to some of the arguments made by DP&L in its response. This brief additional reply can provide a fuller picture for the Commission to understand the complexities of these few issues. For these reasons, the OCTA seeks leave to reply to the new arguments.

In addition, in reviewing the DP&L's response, the OCTA believes there is merit to DP&L's suggestion of an informal conference so that DP&L, the OCTA and Commission Staff can discuss the outstanding issues. This is another avenue for resolving the disputed issues – as a

³ DP&L Response at 2.

means for avoiding a hearing.⁴ In the event that a complete resolution is not reached, then a hearing may be necessary so that the parties have a full opportunity to present evidence for the Commission to appropriately resolve the remaining disputed tariff provisions. Accordingly, the OCTA also seeks leave to put on the record its reply to that procedural suggestion to the Commission.

Nothing in the Commission's rules precludes the OCTA's leave request. Moreover, as has been found by the Ohio Supreme Court, the Commission has the discretion to manage its dockets, including allowing leave to file the requested reply:

As the Ohio Supreme Court has recognized, the Commission is vested with broad discretion to manage its dockets, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business.⁵

The OCTA's request is akin to the reply memorandum under the motion cycle set forth in in Rule 4901-1-12, Ohio Administrative Code:

Motion Cycle	Procedure Set Forth in this Case
Motion	Objections
Memoranda Contra	Response
Rely Memorandum	Reply (requested by OCTA)

Finally, the OCTA notes that its motion for leave will not *unduly* delay this proceeding. Automatic approval of the proposed tariff has been suspended and there is no timetable under

⁴ The OCTA's requested informal conference is an alternative dispute resolution option that seems appropriate when considering the Commission Staff's knowledge on the technical considerations involved. The Commission has incorporated another more formal alternative dispute resolution option for parties who are unable to agree on rates, terms, or conditions for a pole attachment/conduit occupancy agreement. See, Rule 4901:1-3-06, Ohio Administrative Code.

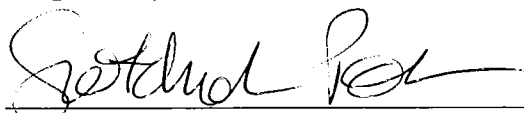
⁵ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO et al, Entry on Rehearing at 36 (May 28, 2015), citing *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 384 N.E. 2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St. 2d 559, 433 N.E. 2d 212 (1982).

which this matter will move forward. Moreover, the OCTA's Reply is being filed along with this motion for leave (as Attachment A) so that prompt consideration can be given.

In sum, the Commission has the flexibility and discretion to allow the filing of the reply. Also, the OCTA's motion for leave to file a reply *instantly* is reasonable and presented for good cause. No harm will come from granting OCTA's request for leave. Rather, granting the OCTA leave will allow the OCTA to provide the Commission with more information regarding the disputed issues and also agree to participate in informal discussions among DP&L, the OCTA and the Commission Staff, which could possibly resolve the remaining issues. Therefore, the Commission should grant the OCTA's motion.

Finally, the OCTA requests that the Commission issue an expedited ruling on this leave request. The OCTA has contacted DP&L (the only other party in this proceeding) to determine if it objects to the issuance of an ruling on this motion without the filing of memoranda, as allowed under Rule 4901-1-12(C), Ohio Administrative Code. DP&L does not object to the issuance of an immediate ruling on the motion for leave.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 18th day of September 2015 upon all persons/entities listed below:

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ATTACHMENT A
To the OCTA Motion for
Leave to file a Reply *Instante*

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The)	
Dayton Power and Light Company to Amend)	Case No. 15-971-EL-ATA
Its Pole Attachment Tariffs.)	

THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION'S
REPLY TO THE RESPONSE OF THE DAYTON POWER AND LIGHT COMPANY

I. Introduction

The Dayton Power and Light Company ("DP&L") filed a pole attachment tariff application in this docket on May 15, 2015. The Ohio Cable Telecommunications Association ("OCTA") timely filed a motion to intervene and objections. By Entry issued August 7, 2015, the Public Utilities Commission of Ohio ("Commission") granted the OCTA's intervention request and allowed DP&L the opportunity to respond to the OCTA's objections,¹ which it did on August 24.

The OCTA has reviewed DP&L's response (as well as those in the other pole attachment/conduit occupancy cases in which the OCTA is an intervenor), and files this pleading to briefly reply to the DP&L response. The OCTA believes that this targeted reply will assist the Commission in determining the next procedural steps in this proceeding and ensure that the Commission has further information upon which to consider a few of the remaining issues.

¹ The Entry was issued in this case, as well as ten other dockets involving applications to establish new pole attachment and conduit occupancy tariff provisions.

II. Important Issues in Dispute

The OCTA raised a number of objections about the following in DP&L's May 2015 tariff application:

- Incomplete discovery responses
- Reliance on internal data for the rate calculation
- Administrative and tax carrying charges
- Number of poles used in the rate calculation
- Gradualism
- Attachment limitations
- Application fee/inspection fee
- Rearrangement of attachments
- Multiple attachment applicants
- Unauthorized attachment charges
- Payments
- Removal/rearrangement/change of attachments
- Overlapping

This will be the inaugural pole attachment/conduit occupancy tariff for DP&L following the Commission's adoption of new industry-wide rules. Thus, these disputed issues warrant careful deliberations so that DP&L's pole attachment/conduit occupancy tariff will be fully compliant with the Commission's new rules. These issues are technical and not straight-forward. DP&L's proposed tariff raises many issues regarding access and operations that need to be addressed. In reply to the arguments made by DP&L, the OCTA wishes to provide the Commission with further information for purposes of evaluating the issues raised in this matter regarding only a few of those issues: (a) new rate calculations, (b) data regarding appurtenances and number of poles, (c) gradualism, (d) riser poles, and (e) overlapping.

New Rate Calculations: In its August 24 response, DP&L presented new rate calculations that are based more on its FERC Form 1 data than what it had presented in either of its the earlier calculations.² While DP&L states that these new calculations are "per the OCTA's

² DP&L originally proposed rates on May 15, 2015 and then amended its proposed rates on June 12, 2015.

recommendations,”³ the fact is that the Commission’s new rules require all public utility pole owners to use the FERC Form 1 data.⁴ It is clear that DP&L wishes to rely on its own accounting records for the net pole investment and not follow the Commission’s adopted formula. Even though DP&L agrees with the OCTA that the “use of FERC Form 1 data for these rate calculations provides a transparent and easily replicable methodology,” DP&L continues to advocate for its own company-specific approach. DP&L’s approach and the rate revisions warrant further investigation and review.

Data Regarding Appurtenances and Number of Poles: The OCTA sought information in discovery regarding the utility’s Account 364 data to determine whether the data relied upon in the rate calculation related to only pole-related expenses. DP&L provided details about Account 364 to the OCTA after the OCTA objections were filed. Then, in its August 24 response, DP&L explained that its Account 364 has no subaccounts and “the information provided in the original filing accurately reflects the costs to be used in the formula.”⁵ Then, DP&L stated that it used an 85% factor to eliminate costs for cross-arms and other expenses that are not attributable to the bare pole costs computation.⁶

DP&L’s discovery response and August 24 response do not explain whether DP&L has data in Account 364 that would allow a more-accurate determination of appurtenances or the number of poles. Thus, there is a question regarding the appurtenance information used that remains unsubstantiated and needs to be further explored. Specific to the number of poles, the OCTA explained earlier that DP&L used the number of poles from its Geographic Information

³ See, the cover sheets for Attachments 1 and 2 of DP&L’s August 24 response.

⁴ See, Rule 4901:1-3-04(D), Ohio Administrative Code.

⁵ DP&L Response at 7.

⁶ *Id.*

System (“GIS”), but that data has been found to be incomplete in the past.⁷ The OCTA has been unable to evaluate the number of poles used in DP&L’s rate calculation because DP&L refused to provide the number of poles identified in Account 364, which the OCTA has found to be more accurate than the GIS. There is a difference of fact and opinion between the OCTA and DP&L on the appurtenances and the number of poles to be included in the calculation, and an opportunity to present facts and arguments to the Commission is warranted for further review and analysis.

Gradualism: The OCTA noted that DP&L’s proposed pole attachment rate, if adopted as proposed, is a 130% rate increase.⁸ Consistent with the regulatory equitable concept of gradualism, the OCTA requested that DP&L’s new pole attachment rate resulting from the Commission’s new rate formula be gradually implemented, approximately 20% each year until the authorized level is achieved.⁹ DP&L argues that a gradually implemented rate will not be consistent with the formula and is not warranted because DP&L has not changed its pole attachment rates since 1991.¹⁰ In DP&L’s view, it has continued to invest in its poles while the OCTA members have benefitted from a frozen rate and known that this rate proceeding was underway.¹¹ DP&L also disagreed with the OCTA that attaching entities or retail customers will be disrupted by the rate change, even though it acknowledged that the impact of DP&L’s proposed rate increase amount is close to an additional \$1 million each year.¹²

⁷ OCTA Objections at 7. *See, e.g., In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval*, Case No. 08-710-EL-ATA, OCTA Objections at 1-12 (February 26, 2009).

⁸ OCTA Objections at 8.

⁹ *Id.* at 7-10.

¹⁰ DP&L Response at 9

¹¹ *Id.* at 9, 11.

¹² *Id.* at 11.

DP&L admits that gradualism is within the Commission's discretion.¹³ Moreover, the Commission's general supervisory authority under O.R.C. 4905.04 includes the duty to review the effects of implementing rate increases and consideration of the equitable balance. That is how the Commission would be using its supervisory authority if it elects to gradually implement the significant increase in pole attachment rate requested.

The facts in this proceeding support the principles behind the equitable concept of gradualism to address the rate increase. Those facts include: (a) the size and dollar amount of the possible increase represented by the proposed pole attachment rate, which is unquestionably significant; (b) the increases will not be avoidable and if the approved rate is sizeable, it cannot be easily absorbed by OCTA members, leading to the likelihood of an impact on retail customers; and (c) DP&L has failed to support that a need for immediate, full implementation.

DP&L does not dispute that the increase is not avoidable; rather, it contends that it was unable to change its pole attachment rate for numerous years and the magnitudes of the requested price increase is not going to impact retail customers significantly, because it can be spread over many customers.¹⁴ However, DP&L overlooks the fact that DP&L either agreed or did not challenge the decisions to keep pole attachment rates at a fixed level for many years. And, an additional increase of nearly \$1 million every year, if the approved rates are approved, is not readily absorbed by all OCTA members or their customers. DP&L has made assumptions about the attaching entities and their customers, and side-stepped the indisputable fact that an extremely large rate increase has been proposed and its implementation will affect the attaching entities and their customers.

¹³ DP&L Response at 10.

¹⁴ *Id.* at 10-11.

The Commission should consider that as recently as 2009 it noted that gradualism is a useful tool in managing overall customer impacts.¹⁵ It has applied the regulatory concept of gradualism to avoid a price spike and let the market adjust to significantly higher rates. In light of the fact that this matter is not being conducted under the dictates of O.R.C. 4909.15,¹⁶ and the increase could be 130%, the Commission should follow the gradualism concept it has used in other proceedings to allow approximately 20% each year until the authorized level is achieved. The Commission has the authority and should apply gradualism when implementing the new pole attachment rate structures for DP&L.

Riser Poles: DP&L's proposed tariff (T/C Section 2) contains a provision limiting attachments to DP&L's riser poles under only exceptional circumstances. The Commission's rules stated that a public utility must provide "access to **any** pole * * * owned or controlled by it under rates, terms and conditions that are just and reasonable" unless there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.¹⁷ (Emphasis added.) In DP&L's response, it claims that there are unique problems with riser poles and that the cited language has been in its tariff for a very long time.¹⁸ As the Commission's rules state, there should not be any sweeping limitations in DP&L's tariff. DP&L's most recent statements have raised factual issues for resolution for this issue.

¹⁵ OCTA Objections at 4, footnote 9.

¹⁶ The Ohio Supreme Court in *Columbus S Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 537, ruled that gradualism cannot be applied in the context of the "detailed, comprehensive and, as construed by this court, mandatory ratemaking formula under O.R.C. 4909.15." However, DP&L has argued that O.R.C. 4904.15 should not apply to these pole attachment applications. When the OCTA requested earlier that the Commission apply O.R.C. 4909.18 (which incorporates the requirements of O.R.C. 4909.15) in the event of a rate increase, the electric utilities objected. The electric utilities, including DP&L, argued that "[i]t would be inappropriate to consider all of the statutes and rules generally and specifically applicable to public utility services as applying to pole attachments because they are distinguishable from one another and serve different purposes" See, *In re Adoption of Chapter 4901:1-3, Ohio Administrative Code Concerning Access to Poles, Ducts, Conduits and Rights-of-Way by Public Utilities*, Case No. 13-579-AU-ORD, Memorandum Contra Ohio Cable Telecommunications Association Motion for Clarification or, In the Alternative Application for Rehearing at 5 (April 6, 2015). As a result, the regulatory concept of gradualism can be applied in implementing DP&L's new pole attachment and conduit occupancy rates.

¹⁷ Rule 4901:1-3-03(A)(1), Ohio Administrative Code.

¹⁸ DP&L Response at 11-12.

Overlashing: The OCTA urges the Commission to further distinguish between an attachment and overlashing in DP&L's tariff so as to treat these different matters differently. Overlashing is a simple and safe way for an attaching party with an existing attachment to add a wire or cable to its strand to allow the provision of new services or service to new customers. The cable operator adds a light fiber or coaxial cable to its existing facilities, without making a new attachment or creating any issues regarding use of pole space. While pole loading can be impacted, the typical increase in ice or windloading is minimal and can safely be reviewed by the pole owner after the fact. That is why the Federal Communication Commission ("FCC") has held that overlashing does not require permitting and does not even require prior notice.¹⁹

DP&L seeks to ignore the FCC rulings by arguing that the Commission should allow DP&L to evaluate an overlashing proposal first.²⁰ However, DP&L overlooks the facts associated with overlashing. Also, the OCTA's proposals do not create safety or reliability problems.

Overlashing is simple and safe, and DP&L should address it directly in the tariff by adding new language. Additionally, even though the FCC has held that overlashing does not require prior notice, OCTA believes providing 15 days' notice prior to overlashing would best

¹⁹ See, *Implementation of Section 703(E) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6807, ¶¶ 59-69 (rel. Feb. 6, 1998); *Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd. 12103, 12141-12145 (rel. May 25, 2001) (overlasher is not required to obtain prior consent of the pole owner, but should provide notice); see also *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 578 (D.C. Cir. 2002) ("The Commission * * * clarified that an overlashing party does not need to obtain advance consent from a utility if that party has a primary wire attachment already in place * * * however * * * a utility is entitled to notice of the overlashing * * *." (internal citation and quotation omitted)); *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, 16340-41 (rel. Aug. 8, 2003) (affirming policy that no prior consent may be required for overlashing).

²⁰ DP&L Response at 21.

benefit all interests involved. Accordingly, the OCTA recommended the following new language:

- (1) *Add at the end of Rental Charge Schedule Section 1(a) addressing availability: “An Attachment does not include the overlashing of a wire onto an existing Attachment or riser cable to the extent that it runs vertically on the pole owned by Owner and begins or ends at the base of the pole, in duct or direct buried and extends vertically to the point of horizontal attachment of the cable and/or strand owned by the Attachor on the pole. In addition, a modification to an Attachment does not include overlashing an existing permitted Attachment.”*
- (2) *Add at the end of T/C Section 1(a) addressing availability: “An Attachment does not include the overlashing of a wire onto an existing Attachment or riser cable to the extent that it runs vertically on the pole owned by Owner and begins or ends at the base of the pole, in duct or direct buried and extends vertically to the point of horizontal attachment of the cable and/or strand owned by the Attachor on the pole. In addition, a modification does not include overlashing an existing permitted Attachment.”*
- (3) *Add at the beginning of T/C Section 2(a): “Except for overlashing an existing, permitted Attachment (before which Attachor will provide at least fifteen (15) days advance written notice to Owner)” * * *.*

III. Next Procedural Steps

In reviewing DP&L’s response, the OCTA believes there is merit to DP&L’s suggestion of an informal conference so that DP&L, the OCTA and Commission Staff can discuss the outstanding issues. The issues in this matter are important on a going-forward basis. The OCTA believes that this approach can be effective to work through the issues efficiently. This is another avenue for resolving the disputed issues – as a means for avoiding a hearing.²¹

²¹ The informal conference is an alternative dispute resolution option that seems appropriate when considering the Commission Staff’s knowledge on the technical considerations involved. The Commission has incorporated another more formal alternative dispute resolution option for parties who are unable to agree on rates, terms, or conditions for a pole attachment/conduit occupancy agreement. *See*, Rule 4901:1-3-06, Ohio Administrative Code.

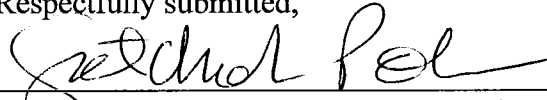
In the event that a complete resolution of issues does not result from the informal conference, then a hearing may be necessary so that the parties have a full opportunity to present the facts and arguments needed and the Commission can appropriately resolve the remaining disputed tariff provisions. The issues herein are technical and important. The tariff provisions that will be established in this proceeding will have a significant impact on pole attachments for years to come. The OCTA strongly urges the Commission to order that informal discussions be held between DP&L, the OCTA and the Commission Staff. To the extent that a difference of opinion remains after the informal discussions, the OCTA suggests that a hearing be held.

The OCTA further believes that this approach will help establish just and reasonable pole attachment tariff provisions on a going-forward basis that are compliant with the Commission's new rules.

IV. Conclusion

The OCTA appreciates the opportunity to reply to DP&L's response in this docket. The OCTA urges the Commission to order its Staff to schedule an informal conference between DP&L, the OCTA and the Commission Staff for further discussions and possible resolution of the remaining tariff issues. In the event that a complete resolution is not reached, then a hearing may be necessary so that the parties can present the facts and arguments needed to determine the appropriate tariff provisions for remaining issues.

Respectfully submitted,



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Case No(s). 15-0971-EL-ATA

Summary: Motion For Leave to File a Reply Instanter and Motion for an Expedited Ruling electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable Telecommunications Association