THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF DAYTON POWER AND LIGHT COMPANY TO AMEND ITS POLE ATTACHMENT TARIFF.	CASE NO. 15-971-EL-ATA

FINDING AND ORDER

Entered in the Journal on September 7, 2016

I. SUMMARY

{¶ 1} The Commission finds that Dayton Power and Light Company should file its pole attachment tariff consistent with the determinations set forth in this Finding and Order.

II. APPLICABLE LAW

{¶ 2} R.C. 4905.51 and 4905.71 authorize the Commission to determine the reasonable terms, conditions, and charges that a public utility may impose upon any person or entity seeking to attach any wire, cable, facility, or apparatus to a public utility's poles, pedestals, conduit space or right-of-way.

III. PROCEDURAL BACKGROUND

{¶ 3} On July 30, 2014, as revised on October 15, 2014, the Commission in Case No. 13-579-TP-ORD (*Pole Attachment Rules Case*), *In re the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, adopted new administrative rules regarding access to poles, ducts, conduits, and rights-of-way of the public utilities (Pole Attachment Rules). The new rules became effective in January 8, 2015. On February 25, 2015, as revised on April 22, 2015, the Commission, in *Pole Attachment Rules Case* ordered all public utility pole owners in Ohio to file the appropriate company-specific tariff amendment application, including the applicable calculations based on 2014 data. The automatic approval date for the pole attachment amendments was extended until September 1, 2015. 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.

{¶ 4} On May 15, 2015, as amended on June 12, 2015, Dayton Power and Light Company (DP&L or Company) filed its tariff amendment application in this docket.

{¶ 5} On June 26, 2015, the Ohio Cable Telecommunications Association (OCTA) filed a motion to intervene in this proceeding.

{¶ 6} On August 3, 2015, OCTA filed objections relative to DP&L's tariff amendment application.

{¶ 7} Pursuant to the attorney examiner Entry of August 7, 2015, the tariff amendment application was suspended and removed from the automatic approval process. Additionally, the motion to intervene filed by the OCTA was granted.

{¶ 8} On August 24, 2015, DP&L filed a response to OCTA's objections.

{¶ 9} On September 18, 2015, OCTA filed a motion for leave to file a reply and a request for an expedited ruling. OCTA explains that its motion is appropriate in order to ensure that the Commission has further information upon which to consider certain disputed issues in this proceeding. OCTA also offers a proposal for the next procedural steps in this case. Specifically, OCTA proposes that an informal conference be scheduled so that DP&L, OCTA, and the Commission Staff (Staff) can discuss outstanding issues with the intent of avoiding a hearing.

{¶ 10} In regard to OCTA's September 18, 2015 motion for leave to file a reply, the Commission finds that the request is denied. The Commission notes that the procedural schedule set forth in the Entries of February 25, 2015, and April 22, 2015, did not contemplate the filing of replies to the responses to objections. Additionally, the Commission finds that OCTA's reply fails to raise additional arguments of significance for the Commission's consideration. Finally, the Commission does not believe that an informal conference will be productive at this time.

IV. Discussion

A. Calculation of Pole Attachment Rate Based Upon Internal Data

{¶ 11} Among its delineated objections, OCTA objects to DP&L's proposed pole attachment rate because it is based upon internal data, which has not been made available for independent verification. In noting that the Commission follows the assumptions and methodologies established by the Federal Communications Commission (FCC), OCTA avers that federal regulators frown upon the use of internal company-only data in the pole attachment rate context. Further, OCTA contends that, for decades, the FCC has made it clear that companies are required to use publicly available data because it usually leads to "expeditious resolution of disputes" without the resort to ratemaking proceedings or studies to confirm the proffered internal data. Pursuant to the FCC formula for calculating pole attachment rates, OCTA asserts that the maximum pole rate should be $7.59, instead of DP&L's proposed $8.08. Based on its contention that DP&L has largely relied upon internal accounting records, OCTA requests that the Commission hold a hearing and invite further discovery in order to verify DP&L's data and proposed rate calculation. (Objections at 4-5.)

{¶ 12} DP&L claims that while it used Federal Energy Regulatory Commission (FERC) Form 1 data extensively in its filing, it used its accounting records rather than FERC Form 1 data to determine net pole investment. DP&L contends that the company's accounting records allow an accurate Ohio-specific calculation of net pole investment to be made because these records include data specific to pole investment, depreciation on poles, and accumulated deferred taxes on poles for Ohio. DP&L argues that the alternative methodology that OCTA proposes relies more heavily on aggregated FERC Form 1 data. DP&L avers that FERC Form 1 includes gross pole data, but does not include separate figures for accumulated depreciation on poles or the accumulated deferred taxes on poles. DP&L contends that the accumulated depreciation and accumulated deferred taxes that are reported on FERC Form 1 are with respect to plant investment overall and not to specific plant types in Ohio.

{¶ 13} According to DP&L, in order to calculate a net pole investment using FERC Form 1 data, it is necessary to estimate accumulated depreciation on poles and accumulated deferred taxes on poles by multiplying the gross pole investment to gross total plant investment ratio by total accumulated depreciation and total company deferred taxes respectively. Therefore, DP&L believes that its methodology provides a more precise computation because the data is consistent and specific to the investment in poles and specific to the accumulated depreciation of poles and the accumulated deferred taxes associated with poles for Ohio.

{¶ 14} The use of FERC Form 1 data is less specific and relies on the ratios to approximate the amount of depreciation and deferred taxes associated with poles. DP&L notes that even OCTA's proposed methodology does not allow for a computation of the annual rental charge based solely on FERC Form 1 information because key factors in the computation such as the number of poles and the rate of return on investment do not appear anywhere within FERC Form 1. DP&L also notes that, if it did not rely on its accounting records in its calculation, its conduit rate would go up under the OCTA's methodology. Therefore, DP&L believes that its as-filed methodology uses the most accurate information, relying on specific accounting data to calculate pole attachment rates. (Response at 3-5.)

{¶ 15} The Commission finds that DP&L should use its actual, plant-specific, accumulated depreciation on poles and accumulated deferred taxes on poles for its pole attachment rate calculations. The Commission agrees with DP&L that this approach allows for a more accurate calculation of the net investment in poles than if the company relied upon estimates of accumulated depreciation and deferred taxes for poles.

B. Calculation of the Pole Attachment Rate Based on FERC Data

{¶ 16} OCTA further objects to DP&L's proposed pole attachment rate because DP&L failed to fully respond to OCTA's discovery requests. For instance, OCTA submits that according to FERC Form 1, Account 190 in 2014 was 20 percent of what it was in 2011. OCTA states that while DP&L was asked to explain the significant decline in this account, DP&L objected to the request and stated only that the change "is proportional to change in the underlying differences between tax and book income." (Objections at 3-4.)

{¶ 17} DP&L asserts that OCTA has stated inconsistent positions with respect to DP&L's computations - generally arguing that FERC Form 1 data should be used instead of DP&L's accounting records, but then arguing at times that the FERC Form 1 data should be viewed with suspicion. For example, with respect to Account 190, DP&L contends that OCTA seems to be suggesting that 2014 FERC Form 1 data should be disregarded or subject to some searching inquiry before it is used.

{¶ 18} Moreover, DP&L's contends its response to OCTA's data request was entirely accurate as OCTA was directed to FERC Form 1, page 234 for a list of the costs that are included in Account 190 and it was further stated accurately that the Account 190 balances as of 2014 reflect the underlying differences between tax and book income. DP&L submits that a casual review of the 2011 and 2014 pages 234 would have made clear that $42 million of the $51 million change from 2011 to 2014 was attributable to two tax matters. Additionally, according to DP&L, since the 2014 FERC Form 1, page 234 shows both beginning and end of year balances, it should have been clear to OCTA that the bulk of those changes actually occurred prior to 2014. DP&L contends that no reasonable inference could be drawn that the Account 190 balances are incorrect or manipulated for purposes of increasing the pole attachment rate. Therefore, DP&L asserts that FERC Form 1 accurately reflects the deferred taxes in the account as of end of year 2014 and that there is no basis for any change to be made in the rate computations relating to Account 190. (Response at 5-6.)

{¶ 19} The Commission finds that DP&L's 2014 Account 190 from FERC Form 1 was properly used in its calculation. The Commission agrees with DP&L that OCTA has provided no reasonable rationale to determine that DP&L's Account 190 balances are incorrect. Adjusting DP&L's 2014 Account 190 balances or using some other data would further defeat the purpose of having a formula rate and would not comport with the required filing of rates based on 2014 data.

C. *Calculation of Pole Attachment Rate Based on Net Investment in Pole Plant Presumption*

{¶ 20} Next, OCTA claims that while it requested DP&L to provide copies of all continuing property records for Account 364 with enough detail to show all subaccounts and other breakdowns, DP&L submitted only a summary report. According to OCTA, this response is incomplete inasmuch as it does not provide a full breakdown of the continuing property records with all items and all gross investment broken down into subaccounts. OCTA submits that absent this type of detail, neither the Commission nor any of the pole attachers are able to verify DP&L's proposed rate because it is impossible to ascertain if the net investment in the pole plant has been properly calculated, or if DP&L has mistakenly included extraneous expenses. (Objections at 3-4.)

{¶ 21} With respect to Account 364, DP&L claims that it has provided OCTA with a detailed listing of its plant records in Account 364. Due to the fact that Account 364 does not include subaccounts, DP&L states that the information provided in the original filing accurately reflects the costs to be used in the formula. According to DP&L, the costs within Account 364 for cross-arms and other expenses that are not attributable to the bare pole cost computation were taken into consideration by using an 85 percent factor, which is the traditional factor used by the Commission in such computations. (Response at 7.)

{¶ 22} The Commission finds that DP&L properly accounted for investments in cross-arms by using the default appurtenance factor of 15 percent to reduce the total 2014 Account 364 balance in order to address investment in cross-arms. OCTA has not presented any probative, direct evidence on the actual investment in non-pole-related appurtenances necessary to rebut the 15 percent appurtenance presumption.

D. Calculation of Administrative and Tax Carrying Charge Factors

{¶ 23} OCTA also objects to DP&L's calculation of the administrative and tax carrying charge factors. According to OCTA, the administrative carrying charge is intended to be a factor of administrative expenses that are properly attributed to the net plant-in-service and is calculated by dividing the total administrative and general expenses by net investment in total plant. OCTA further explains that net investment in total plant is determined by subtracting the accumulated depreciation and accumulated deferred taxes from the gross investment in total plant figure. OCTA claims that DP&L, in its calculations, has further adjusted the net plant in service denominator by subtracting from the gross investment in total plant a value for investment in "Intangible Plant" in addition to the depreciation reserve and accumulated deferred tax. Because DP&L includes a smaller value in the denominator, it results in a higher administrative carrying charge element. OCTA argues that DP&L should be required to adjust its calculations to include intangible plant in net plant when calculating the administrative carrying charge. For the same reasons, OCTA contends that DP&L should also be required to adjust its calculations to include intangible plant in net plant (the denominator) when calculating the tax carrying charge. (Objections at 5-6.)

{¶ 24} DP&L generally agrees that intangible plant should be included in the computations of administrative and tax components of the carrying charge. (Response at 5.)

{¶ 25} The Commission agrees with the parties and finds that intangible plant should not be subtracted when calculating net investment in total plant.

E. Number of Distribution Poles Utilized in the Pole Rate Calculation

{¶ 26} OCTA claims that DP&L's rate calculation is unverifiable because DP&L is unable to document its number of poles. OCTA contends that typically, the number of poles reported in the continuing property records should be the basis for calculating the net average bare pole figure since the continuing property records reflect the number of poles contained in the same investment account on which the pole rate is based. However, OCTA asserts that DP&L's number of poles reported in its proposed rate calculation are derived from DP&L's Geographic Information System (GIS).

{¶ 27} OCTA asserts that GIS for companies are often incomplete and that the process of placing poles into the GIS tends to miss some poles that are still in service. Therefore, OCTA contends that it is unclear if DP&L's GIS has captured all the poles on which the investment figures are based. Additionally, according to OCTA, although the FERC Form 1 data is purported to be determined as of December 31, 2014, DP&L is allegedly unable to retrieve information from its GIS based on December 31, 2014 numbers due to the fact that its GIS is constantly updated. Therefore, OCTA claims that it is unclear as to whether DP&L's pole number is accurate. Without an accurate and verifiable pole number, OCTA argues that DP&L's pole attachment rate calculation cannot be accepted as proposed. (Objection at 6-7.)

{¶ 28} DP&L's submits that its pole count is based on its GIS, which is a computerized system that comprehensively maps DP&L's property. DP&L explains the GIS is used, among other things, for dispatching trouble crews and for identifying every pole on a pole line to which an attacher may want to attach. DP&L argues that OCTA has failed to provide any support for the contention that it has found that other companies' GIS records are often incomplete and that DP&L should instead rely on its account records. GIS is, in DP&L's view, more reliable as an accurate measure of the actual number of poles that exist and has the most up-to-date information. (Response at 8.)

{¶ 29} The Commission finds that DP&L's pole count contained in its GIS system should be used in the pole attachment rate calculation. The basis for this decision is DP&L's representation that the pole count in its GIS system most accurately reflects the actual number of poles in service. However, the Commission notes it is imperative for sound accounting policy that DP&L's continuing property records accurately reflect the number of poles reflected in FERC Account 364 investments. DP&L is directed to ensure that the continuing property records be brought up to date with respect to pole count in future filings.

F. *Implementation of Rate Gradualism*

{¶ 30} OCTA proposes that if the Commission ultimately determines that the correct pole attachment rate for DP&L results in more than a 20 percent increase in its rate, the Commission should apply the concept of rate gradualism or rate continuity to avoid rate shock pursuant to the Commission's general supervisory authority under R.C. 4905.04.

{¶ 31} OCTA argues that the following three reasons require the Commission to apply the equitable concept of gradualism in regard to the proposed pole attachment rate. First, the amount of the increase in the pole attachment rate proposed by the company is extremely large. Second, the increase in the pole attachment rate is a business expense that is neither by-passable nor avoidable; thus, OCTA members will pay the rate increase and pass it along to the end users. Third, there is no evidence that the increase is commercially necessary or at least not necessary all at once. OCTA believes that the magnitude of the proposed rate increases under these circumstances and the potential disruptive impact on attaching entities and their customers warrant the application of the principle of gradualism and the establishment of a phase-in plan. OCTA further contends that a gradually implemented rate increase will not harm the utility. Accordingly, OCTA urges the Commission to establish a phase-in plan of approximately 20 percent each year until the authorized rate level is achieved. (Objections at 7-10.)

{¶ 32} DP&L contends that the Commission should reject OCTA's arguments for gradualism. According to DP&L, while OCTA has traditionally been and remains a major supporter and advocate for the implementation of the FCC formula, OCTA apparently now supports the FCC formula only if it reduces rates.

{¶ 33} DP&L argues that OCTA's assertions regarding the size of the rate increase fail to take into consideration the fact that DP&L's distribution rates, including its tariff pole attachment rates, have been frozen since 1991. Specifically, DP&L states that while it has continued to make investments in its poles across its system since that time, its pole attachment rate has continued to remain at 1991 levels. DP&L urges the Commission to disregard OCTA's request to phase-in the pole attachment rate and allow DP&L to begin immediately charging the pole attachers their fair share of the costs of DP&L's distribution system, which will then help offset costs that would otherwise be paid by electric distribution customers. (Response at 9-11.)

{¶ 34} The Commission finds that a phase-in of DP&L's pole attachment rate is not appropriate in this proceeding. The Supreme Court of Ohio has determined that the Commission lacks authority to phase-in rates, such as the pole attachment rates in this case, that deprive a utility of the annual revenues to which it is entitled. See *In re Columbus Southern Power Co. v. Pub. Uti. Comm. of Ohio*, 620 N.E.2d 835 (Ohio 1993). While the Commission notes it now does have the limited authority pursuant to R.C. 4928.144, to phase in standard service offering rates, this authority is distinguishable from the pole attachment rates being addressed in this case.

G. Access to Riser Poles

{¶ 35} Next, OCTA objects to a sentence in proposed Section 2 of DP&L's tariff, that states the Company's "riser poles" will only be available for attachment under "exceptional circumstances." OCTA submits that there is no explanation of what constitutes a "riser pole" and no explanation of what constitutes an "exceptional circumstance." OCTA objects if this verbiage is intended to limit access to risers because risers are essential for transitioning from the overhead facilities to the underground facilities.

{¶ 36} In support of its position, OCTA argues that Ohio Adm.Code 4901:1-03(A)(1) requires nondiscriminatory access to the utility's poles, ducts, conduits, and rights-of-way. Thus, OCTA believes that DP&L is statutorily required to permit attachments and cannot deny access except in limited situations. OCTA notes that while both R.C. 4905.71 and Ohio Adm.Code 4901:1-3-03(A)(l) allow a public utility to deny access based on very specific situations, neither limits access to "riser poles" or limits access for unspecified "exceptional circumstances." Rather, OCTA asserts that an attachment can be denied only if it (a) interferes, obstructs, or delays the service and operation of the telephone or electric light company, (b) creates a hazard to safety, (c) there is insufficient capacity, (d) there are reliability concerns, or (e) for reasons of generally applicable engineering. OCTA contends that DP&L has provided no justification for automatically limiting all access to "riser poles" as set forth in the tariff. Therefore, OCTA argues that DP&L's proposed sentence in Section 2 should be stricken in its entirety from the tariff. (Objections at 11.)

{¶ 37} DP&L contends that riser poles pose unique problems in that electric equipment on the riser pole is not just attached at the highest-most point overhead in the electric space, but rises from ground level through what is typically considered the "communications space" and up to the electric space. In many instances, according to DP&L, the electric equipment and the related protective covering occupy more than 50 percent of the circumference of the riser pole, which means that there is effectively no room for other parties to drive a bolt entirely through the pole to make attachments to hold communications equipment. DP&L maintains that its existing tariff has long contained language that restricts attachments to the poles with electric risers and that this language has not created any substantial problems in the past because DP&L has a history of working with its attachers to find the best engineering solution to make the attachments they need without the use of the riser pole. (Response at 12-13.)

{¶ 38} The Commission finds that DP&L should remove the disputed language from its tariff. The assumption is that all distribution poles are attachable except under limited circumstances. A requirement that a certain type of distribution pole is only available for attachment under exceptional circumstances is contrary to Ohio Adm.Code 4901:1-3-03. The Commission notes that its finding would not preclude DP&L from denying access to a riser pole after a request is made if the proposed attachment would interfere, obstruct, or delay the service and operation of the telephone or electric light company, or create a hazard to safety.

H. Scope of the Pole Attachment Application Process

{¶ 39} OCTA objects to a second sentence in proposed Section 2 of DP&L's tariff which provides that the pole attachment application process be used to "install or change attachments or equipment (e.g., power supply or amplifier) on or in any poles, ducts, and/or conduits of Owner, * * *." Specifically, OCTA objects to this language, as it unreasonably limits access to an attacher's own attachments by requiring consent before placing an amplifier on a strand. OCTA argues that this unreasonable limitation also highlights the importance of having a definition of "Attachment" in the tariff, which is absent from DP&L's proposed tariff. OCTA suggests that "or equipment (e.g., power supply or amplifier)" be removed from Section 2 and that DP&L's pole attachment tariff include the definition of "Attachment" currently incorporated in Ohio Power Company's tariff. (Objections at 12.)

{¶ 40} DP&L contends that OCTA's proposed definition of "Attachment" is inadequate because it fails to include equipment that is often attached, such as amplifiers, power supplies, and antennas. Moreover, DP&L contends that OCTA's intent is unclear in defining an "Attachment" as something that consumes no more than one foot of vertical space. According to DP&L, while some attachments do require more than one foot of space it should not result in its falling outside the definition of an attachment. While DP&L believes that the Commission should reject OCTA's proposed definition of "Attachment," it is, however, amenable to including in its tariff the definition of "Pole Attachment" which is identical to the Commission's definition in Ohio Adm.Code 4901:1-3-01. (Response at 13.)

{¶ 41} The Commission finds that DP&L should be allowed to require that the application process to install or change attachments or equipment include power supply and amplifier on its poles. The Commission agrees with DP&L that a re-evaluation is necessary as the additional equipment will increase the load on the pole and the fact that the characteristics of the pole may have changed since the initial attachment was placed on the pole. The Commission further finds that, as requested by OCTA and agreed to by DP&L, the tariff should include the definition of pole attachment consistent with Ohio Adm.Code 4901:1-3-01.

I. Application/Inspection Fee

{¶ 42} OCTA submits that in proposed Terms/Conditions Section 3, DP&L proposes an application fee or inspection fee to charge an attaching entity for each pole attachment request. According to OCTA, the fee is intended to cover the costs of field inspections, preparing records and maps, transportation, and other associated overhead costs involved in evaluating a requested attachment.

{¶ 43} OCTA notes that there is no specific amount or range set forth in the proposed tariff. Rather, DP&L proposes that the fee be set based on its "experienced costs in making the initial and follow-up field inspections" and preparing documents.

{¶ 44} OCTA also notes that in proposed Terms/Conditions Section 9, DP&L identifies what appears to be another inspection fee as part of a right to conduct periodic inspections of existing attachments. OCTA believes that this additional inspection fee is confusing as it is difficult to distinguish between the two separate fees sharing the same name. (Objections at 13-15.)

{¶ 45} Further, OCTA argues that nothing in Ohio Adm.Code Chapter 4901:1-3 allows a fee for evaluating attachment applications. Rather, according to OCTA, the rules simply envision an attachment application form, which is to be completed and reviewed for completeness by the public utility. If the attachment application is complete, then the public utility must perform a survey, and present an estimate of the make-ready work. In addition, OCTA submits that pursuant to *In re Texas Cable & Telecom. Ass'n v. GTE Southwest,* 14 FCC Rcd 2975, 2984 (1999), the FCC does not support a separate fee for evaluating attachment applications when the pole rate is based on full costs. If the application/inspection fee as identified in the Terms/Conditions Section 2 is intended to cover the costs with the make-ready work, OCTA believes that the tariff should be revised to clearly make that reference and correspond more directly with the Commission's rules. (Objections at 13-14.)

{¶ 46} DP&L submits that the tariff language within Terms/Conditions Sections 3 and 9 is word-for-word identical to the corresponding sections of the tariff that have been in place since at least 1992, with one minor exception that is not relevant to OCTA's comment. DP&L contends that based on the language within the two sections, it is clear that there are two different charges for entirely separate and distinct activities that are conducted by DP&L in the course of managing its pole attachments.

{¶ 47} Specifically, DP&L states that Section 3 charges are all associated with the initiation of a contractual relationship (i.e., a request to attach to a pole) with DP&L and the evaluation process used to determine whether any make-ready work is necessary. The Section 9 charges are for post attachment inspections, which allow DP&L to ensure that attaching entities have made their attachments in accordance with the instructions of DP&L as the pole owner. DP&L contends that OCTA appears to have confused the administrative costs associated with establishing contractual relationships with attaching entities and the evaluation process leading up to a make-ready determination with the make-ready work itself.

{¶ 48} DP&L submits that OCTA is incorrect in its suggestion that the annual pole rental charges cover the evaluation costs incurred specifically for the benefit of the attaching entity making a request. DP&L claims these costs are not reflected and recovered as make-ready work. (Response at 14-15.)

{¶ 49} The Commission finds that DP&L is allowed to charge a fee for evaluating attachment applications. DP&L is clearly incurring expenses prior to any make-ready work determination as it must survey its poles before presenting a make-ready estimate to the applicant. Absent the ability to charge such a fee, DP&L would be left with no way to recover these survey costs if it is determined that there is no make ready work required or if the applicant decides not to attach after it receives the make ready estimate.

{¶ 50} Further, the Commission finds that DP&L is allowed to charge for one post-installation inspection of an attachment regardless of when the attachment was placed. Placing a time limit on the inspection time frame could limit a utility's ability to recover the legitimate inspection expenses that are incurred as the result of the attaching entity placing the attachment on the pole.

J. Responsibility Related to the Transferring or Rearranging of Facilities

{¶ 51} OCTA objects to proposed Terms and Conditions Sections 6 and 8 of DP&L's tariff. OCTA contends that the proposed changes require the new attaching entity whose desired attachment can be accomplished by rearranging the facilities of DP&L and other existing attaching entities to seek and obtain the necessary financial arrangements with the other attaching entities.

{¶ 52} According to OCTA, other than providing required notifications to the other attaching entities, DP&L proposes that, in all such situations, it will have no obligation or responsibility. OCTA argues that this proposed "absolution" is not practical in light of the Commission's rules that requires DP&L to provide notice 60 days in advance of a modification of facilities, such as rearrangements. OCTA further claims that the potential attaching entity whose desired arrangement triggers the rearrangement will not have all of the information to accomplish the agreements with the other attaching entities. For example, when notice is provided by DP&L, the new attaching entity will not know what information was in the notice, who the existing attaching entities are, and any response from existing attaching entities. Thus, OCTA argues that the proposed language sets up an impractical situation, which can cause confusion

{¶ 53} Additionally, OCTA contends that the proposed language in the Terms and Conditions Section 6 is at odds with DP&L's proposed Terms and Conditions Section 8, wherein DP&L will determine and coordinate the cost allocation when there are multiple applicants applying for attachments and the facility must be replaced or rearranged. OCTA submits that there is no explanation for DP&L's willingness to handle the cost allocation when multiple applicants are triggering a rearrangement, but DP&L's unwillingness to handle the cost allocation when only one applicant is triggering a rearrangement. For these reasons, the OCTA proposes that the language in the last two sentences of proposed Terms and Conditions Section 6 should be stricken. (Objections at 15-17.)

{¶ 54} DP&L contends that OCTA's opposition appears to be based on a view that the utility should have the administrative, and perhaps even the financial burden, to negotiate with existing attaching entities to accommodate a new attaching entity. According to DP&L, this not legitimately a responsibility that should be imposed on the utility.

{¶ 55} DP&L points out that its electronic data base ("SPANS"), supplemented by physical inspections, allows the company to run a report upon the request of a prospective attacher to identify all attachers currently on a pole. Further, each existing attaching entity requested to move is notified through SPANS with a notation that the cost-causer is the requesting attaching entity.

{¶ 56} According to DP&L, while it has the capability to run a report upon the request of a prospective attaching entity to identify all attaching entities currently on the pole or poles, this does not impose a financial obligation for rearranging existing attachments on the existing attaching entities or DP&L. Rather, the responsibility to negotiate the costs for rearranging existing attaching entities' facilities to accommodate a new attacher always have been left up to the individual attaching parties. In support of its position, DP&L contends that Ohio Adm.Code 4901:1-3-03(A)(5) only requires it to notify attaching entities of changes or modifications. It does not contain any provision that assigns cost responsibility among attaching entities.

{¶ 57} DP&L claims that OCTA is incorrect in its suggestion that DP&L's tariff, Terms and Conditions Section 8, somehow involves a situation where DP&L would undertake the obligation to apportion the costs of rearranging attachments when there are two or more proposed new attaching entities. DP&L claims that Section 8 involves the apportionment of DP&L's make-ready costs between two or more new attachers. DP&L contends that there is nothing in that section that addresses the additional non-DP&L costs that might be incurred by pre-existing attachers to rearrange their equipment. According to DP&L, it could not apportion the non make-ready costs between new attachers since these costs are not known to the company. Rather, DP&L avers that such costs will need to be discussed between the pre-existing attachers and the new attacher(s). (Response at 16-17.)

{¶ 58} The Commission notes that according to DP&L, pursuant to Section 8 of its tariff, it will engage in the proration of its make-ready costs when there are two or more new attachers. The Commission agrees that this scenario is distinguishable from the scenario in which existing attachers may incur non-DP&L make-ready costs. With respect to these costs, the Commission finds that DP&L is not required to obtain the necessary financial arrangements with other attaching entities. Consistent with Ohio Adm.Code 4901:1-3-04(E), the new attacher, as the cost causer, is solely responsible for the cost of rearranging the existing attachments. The Commission further finds that

DP&L should incorporate into its tariff the specific information that will be provided to an attaching entity whose attachment triggers the rearrangement. While DP&L has agreed that it will provide the information on request, the Commission believes incorporating it in the tariff will alleviate any confusion as to the parties' responsibilities.

K. *Proration of Costs Associated With Replacements or Rearrangements*

{**¶ 59**} OCTA contends that proposed Terms and Conditions Section 8 requires that when more than one applicant seeks to attach to a particular space, DP&L will prorate the costs associated with replacements or rearrangements. However, OCTA objects to proposed language in Terms and Conditions Section 8 requiring that DP&L's proration "shall be determinative as to all parties," as it appears to mandate the costs and cost allocation to be as DP&L solely determines. In support of its position, OCTA argues that while Ohio Adm.Code 4901:1-3-03(B)(2)(c) and Ohio Adm.Code 4901:1-3-03(C) allow an applicant attacher to dispute a cost estimate and allow the applicant attacher to hire a contractor for the make-ready surveys and make-ready work as a means to resolve cost estimate disputes, DP&L's proposed language fails to take these rules into account. (Objections at 17.)

{**¶ 60**} Regarding OCTA's proposal to delete the last sentence of Section 8, DP&L agrees that there is a process under which a dispute can be resolved. DP&L suggests that the last sentence should be deleted and the phrase "subject to an attaching entities' rights to dispute a make-ready determination" should be added for clarity. (Response at 17-18.)

{**¶ 61**} The Commission finds that DP&L's proposed amendment to the last sentence of proposed Terms and Conditions Section 8 should be adopted. The proposed amended language addresses both of OCTA's concerns in that it removes the language opposed by OCTA and also makes reference to the attacher's right to dispute a make-ready determination.

L. Unauthorized Attachment Fees

{¶ 62} OCTA submits that DP&L's proposed Section 11 includes the opportunity to take several different actions if it discovers an unauthorized attachment on its facilities, including an unauthorized attachment fee. While OCTA acknowledges that the FCC found that certain penalties for unauthorized attachments are reasonable, OCTA objects to the proposed tariff language to the extent that it results in discriminatory, unjust, and unreasonable fees, in violation of R.C. 4905.71 and Ohio Adm.Code 4901:1-3-03(A)(l), in the event that the penalties exceed what the FCC permits.

{¶ 63} OCTA argues that DP&L's proposed penalties in Section 11 should be eliminated, or alternatively modified, so as to not exceed those authorized by the FCC. (Objections at 17-18.)

{¶ 64} DP&L contends that OCTA is under the misimpression that the FCC is the final arbiter as to what activities should be penalized and the scope of the applicable penalties. DP&L avers that this is not an FCC proceeding and that it is this Commission, and not the FCC, that is the decision-maker who establishes the policies governing pole attachments in Ohio. DP&L argues that by adopting the FCC's formula for pole attachment rates the Commission has neither delegated its pole attachment authority to the FCC for other purposes nor has it adopted all other FCC policies or rules pertaining to pole attachments.

{¶ 65} DP&L submits that it has had many years of experience with pole attachers. In light of this history, DP&L believes that it has proposed appropriate levels of contractual penalties necessary to address a number of problems that have arisen over the years. (Response at 18-19.)

{¶ 66} While the Commission agrees with DP&L that it is not bound by the FCC's rules regarding unauthorized attachment fees, the Commission finds that the unauthorized attachment fees for DP&L's tariff should not exceed the benchmark established by the FCC. DP&L should modify its tariff accordingly.

M. Establishment of a Payment Due Date

{¶ 67} OCTA submits that the proposed tariff will require all invoices from DP&L to be paid within 30 days. OCTA points out that Ohio Adm.Code 4901:1-3-03(B)(2)(b) provides that cost estimates must be paid within 21 days of receipt of the estimate, unless there is a dispute or request for additional information regarding the scope of work or allocation of costs. Additionally, OCTA contends that a dispute or request for additional information can extend the time for payment. Therefore, OCTA requests that DP&L's proposed tariff should be revised to comply fully with Ohio Adm.Code 4901:1-3-03(B)(2)(b). (Objections at 18-19.)

{¶ 68} DP&L agrees with the modification proposed by OCTA to recognize that invoices for make-ready work should be paid within 21 days unless subject to a dispute. (Response at 19.)

{¶ 69} The Commission finds that DP&L should modify its proposed tariff language as agreed to by the parties.

N. Liability for the Removal/Relocation of Attachments or Facilities

{¶ 70} OCTA contends that DP&L's tariff language in proposed Terms and Conditions Section 13 allows DP&L to have no liability if it (a) removes/relocates the attaching entities' attachments and/or facilities under any circumstances, or (b) discontinues/removes/relocates DP&L's poles regardless of occupancy so long as it notifies the attaching entity 60 days in advance.

{¶ 71} OCTA contends that DP&L does not have unfettered authority to change an attaching entities' facilities. OCTA claims that the proposed tariff language does not comply with the Commission's rules in several respects. First, it does not recognize that an attaching entity can contest the modification by seeking a temporary stay pursuant to Ohio Adm.Code 4901:1-3-03(A)(6). Second, the tariff language does not recognize the existing regulatory limitations that attachments must be provided on a nondiscriminatory basis under just and reasonable terms and conditions and that access can be denied only where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes pursuant to Ohio Adm.Code 4901:1-3-03(A)(1).

{¶ 72} Further, OCTA contends that the tariff language does not recognize that DP&L is required to provide advanced notice before any modification unless the modification is for routine maintenance or in response to emergencies. OCTA also objects to proposed tariff language in this section that requires an attaching entity to pay the "Non-Compliance Charge" if it fails to modify its attachment in compliance with the owner's request. OCTA submits that Ohio Adm.Code 4901:1-3-03(B)(8) provides that, if the utility finds an attachment to be noncompliant with the utility's applicable engineering and construction standards, the attacher shall be financially responsible for correcting the violation. According to OCTA, Ohio Adm.Code Chapter 4901:1-3 does not provide the utility with a right to impose a fine in addition to the correction costs. (Objections at 19-20.)

{¶ 73} DP&L claims that its language in Section 13 does not provide it with the unfettered authority to change an attaching entity's facilities under any circumstances as claimed by OCTA. Rather, DP&L states that the plain language of Section 13 demonstrates that there are specific limitations on DP&L's ability to require a rearrangement or removal of an attacher's facilities. Under Section 13(a), there must be interference with the maintenance and operation of equipment of DP&L or other attaching entities, or a safety violation, or a hazard to service rendered by DP&L or other attaching entities, or a failure by the attacher to comply with standards, codes, or regulations. In DP&L's view these are appropriate reasons for requiring an attacher to take some action to eliminate the identified hazard, interference, or violation and that these reasons should be retained.

{¶ 74} Similarly, DP&L opines that the costs incurred by an attacher to bring its attachment into compliance should be borne by the attacher and not DP&L. Therefore, DP&L contends that OCTA's proposed deletion of what is now the last sentence of Section 13(a) should be rejected. DP&L has no objection, however, to the additional two sentences that OCTA has proposed to be inserted at the end of Section 13(a) inasmuch as these sentences provide additional clarity regarding obligations associated with rearrangements and changes relating to routine maintenance. (Response at 19-20.)

{¶ 75} DP&L claims that Section 13(b) has been totally misinterpreted by OCTA because it only applies in the limited circumstance when DP&L discontinues its own use of a pole. DP&L avers that in such circumstances, attachers are required to remove their attachments from the pole within a certain period of time. DP&L avers that this is an obligation that arises under narrowly defined circumstances and is intended to eliminate problems which the Commission is well aware with "two-pole conditions" (an old and new pole set close together) and the fact that the attacher has not undertaken an obligation to maintain the pole that a utility is no longer using.

{¶ 76} DP&L opines that while OCTA may be legally correct in its assertions that tariff Section 13 does not reflect that an attacher may have the right to seek a stay against a notice for rearrangement, such a right exists independently of the tariff. In support of its position, DP&L asserts that there is no need to include a recitation of all such rights in the tariff any more than there would be a requirement to copy the Ohio Revised Code or the Administrative Code to describe what filings and pleadings can be made in an action seeking such a stay. (Response at 20.)

{¶ 77} The Commission finds that DP&L should remove its "Non-Compliance Charge" from the tariff. The Commission agrees with OCTA that the attaching entity is only financially responsible for bringing a noncompliant attachment into compliance. If a non-compliant attachment is not brought into compliance within the requisite time frame and is not contested by the attaching entity, DP&L can modify the attachment to bring it into compliance itself at the attacher's expense. The Commission further finds that the additional two sentences proposed by OCTA at the end of Section 13(a) should be included in the tariff as agreed to by the parties.

{¶ 78} The Commission finds that it is unnecessary for DP&L to include in its tariff the rights that an attacher has when DP&L notifies an attacher that it must remove and relocate its attachment in the situation where a pole is replaced or retired. The Commission agrees with DP&L that the attachers' rights under the rules exist independently of the tariff and do not need to be recited in the tariff.

O. Applicability of Overlashing

{¶ 79} OCTA submits that proposed Exhibit A, Section 3, allows for overlashing, but requires DP&L's advance permission. OCTA contends that the tariff should not require overlashing of an existing attachment to go through any approval process. OCTA contends that overlashing an existing pole attachment or riser cable is not an attachment to a pole controlled by the public utility and is not accessing a pole, duct, conduit or right-of-way. As such, OCTA argues that overlashing an existing pole attachment or rise cable is not required to follow the application process set forth in the tariff. OCTA avers that the FCC has found that overlashing does not require an attachment application and that prior notice is up to the parties to negotiate, in advance of the overlashing. In this case, OCTA proposes that the tariff be modified in order to provide DP&L with fifteen days advance notice of the overlashing. OCTA claims that its proposed modifications are necessary and appropriate in order to avoid future disputes. (Objections at 21-23.)

{¶ 80} DP&L submits that overlashing often results in increased weight as well as an increase in the diameter of the attached facilities strung from pole-to-pole, which in turn can increase the loading on the poles as the wind pushes against that increased diameter of the attached cable. Therefore, DP&L maintains that it is critically important that there be a re-evaluation of the pole and its loading before overlashing is permitted.

DP&L avers that the original make-ready analysis would have been based on the facilities that were then proposed to be attached and that there would have been no analysis done of what make-ready work would be necessary for an overlashed facility.

{¶ 81} DP&L maintains that evaluating the pole loading each and every time the characteristics of a pole attachment are changed is especially important to the company in light of the reliability standards that it has agreed to with the Commission. While the FCC may not require an application for overlashing, DP&L contends that the FCC and its rules do not necessarily take into account the electric system reliability requirements required by state utility commissions. DP&L would agree with OCTA that the overlashing may not give rise to a separate and duplicative annual pole attachment charge if the overlashed equipment occupies the same one foot of space that the original equipment occupied. However, DP&L argues, that does not mean that the procedures required to evaluate pole loading and to determine whether any make-ready work is necessary can be ignored. Rather, DP&L submits that overlashing does create additional strain on poles and DP&L's proposed agreement with attachers that requires permission prior to the attaching entity engaging in overlashing is entirely appropriate and justified. (Response at 21-22.)

{¶ 82} The Commission finds that DP&L's voluntary proposed tariff language requiring advanced permission by DP&L for an attaching entity to overlash existing facilities is reasonable. Attachers may also negotiate separate agreements pertaining to the issue of overlashing. The Commission agrees with DP&L that overlashing an existing facility increases the load on a pole and that it is necessary to determine whether a pole can safely accommodate the additional load before the facility is overlashed.

{¶ 83} Based on the foregoing, the following rates and their rate impacts are approved:

DP&L

Case No. 15-971-EL-ATA	Current Rate	New Rate	Increase/(Decrease)
Pole Attachment	$3.50	$ 8.08	$4.58
Conduit Attachment:	Not applicable	$.42	$.42

{¶ 84} Consistent with the determinations set forth in this Finding and Order, DP&L is directed to file a final pole attachment tariff within 30 days of this Order.

{¶ 85} It is, therefore,

{¶ 86} ORDERED, That within 30 days of this Finding and Order, DP&L file its final pole attachment tariff consistent with the determinations set forth in this Finding and Order. It is, further,

{¶ 87} ORDERED, That all other arguments not addressed in this Finding and Order are denied. It is, further,

{¶ 88} ORDERED, That OCTA's motion for leave to file a reply is denied consistent with Paragraph (10). It is, further,

{¶ 89} ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

JSA/dah/vrm/dah

Entered in the Journal
SEP 07 2016

Barcy F. McNeal
Secretary