

## 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

### ENTRY

Entered in the Journal on November 30, 2016

#### I. SUMMARY

{¶ 1} In this Entry, the Commission grants the Ohio Cable Telecommunications Association's motion objecting to Dayton Power and Light Company's amendment of its tariff specific to access to poles, ducts, conduits, and right-of-way.

#### II. DISCUSSION

##### A. *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 utilities' poles, pedestals, conduit space, or right-of-way.

{¶ 3} Dayton Power and Light Company (DP&L) is an electric light company under R.C. 4905.03 and a public utility under R.C. 4905.02 and is, therefore, subject to the Commission's jurisdiction.

##### B. *Procedural History*

{¶ 4} 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. The new rules became effective January 8, 2015. On February 25, 2015, as revised on April 22, 2015, the Commission, in the *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.

{¶ 5} On May 15, 2015, as amended on June 12, 2015, DP&L filed its tariff amendment application in this docket.

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

{¶ 7} On August 3, 2015, OCTA filed its objections in this proceeding.

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

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

{¶ 10} On September 7, 2016, the Commission issued its Finding and Order establishing the rates, terms, and conditions to be incorporated into DP&L's pole attachment tariff.

{¶ 11} On September 30, 2016, DP&L filed its final pole attachment tariff.

{¶ 12} On October 5, 2016, OCTA filed a motion objecting to language incorporated into DP&L's September 30, 2016 tariff. Specifically, OCTA contends that DP&L's unauthorized attachment fee language exceeds the benchmark adopted by the Commission by attempting to impose an additional \$100 for any unauthorized attachment discovered by the pole owner. In support of its motion, OCTA submits that the Commission's established benchmark for reasonableness for contract-based penalties

for unauthorized attachments requires that the unauthorized attachment fee not exceed those implemented by the Oregon Public Utility Commission. This benchmark specifically limits the imposition of such a penalty to situations where the pole owner identifies the violation in an inspection in which the pole occupant has declined to participate. Based on DP&L's proposed language, OCTA expresses concern that the company may demand a \$100 fine whenever it discovers an unauthorized attachment, possibly outside of a formal attachment audit, and whether or not it has provided notice and an opportunity to the attacher to participate. Therefore, OCTA asserts that DP&L's proposed \$100 per pole additional charge if an unauthorized attachment is discovered by the pole owner under any circumstance exceeds the established benchmark.

{¶ 13} OCTA notes that adding the requested language would not eliminate the penalty for unauthorized attachments discovered in the field by DP&L outside the confines of a formal attachment inventory. Rather, for any unauthorized attachments discovered by DP&L in the course of normal inspections or work on the poles, the applicable penalty would be five times the current annual rental fee per pole. OCTA submits that the additional \$100 penalty is intended to encourage cooperation between the parties in conducting regular attachment inventories and could only be charged if the pole occupant has declined to participate in an inspection. OCTA represents that no other pole owner in Ohio levies a penalty of this type outside of the context of an audit in which the attacher refuses to participate. Therefore, OCTA conjectures that allowing DP&L's proposed language will result in additional tariff revisions by other pole owners.

{¶ 14} OCTA opines that DP&L's concern that it could not recover for unauthorized attachments discovered during its normal course of business or when examining a pole at the request of a prospective attacher is a red herring. In support of its position, OCTA states that it is unaware of any regular practice of DP&L notifying its members of the existence of an unauthorized attachment outside the course of a formal audit.

{¶ 15} In its memorandum contra, DP&L states that OCTA is incorrect in its belief that the Federal Communications Commission (FCC) has established unauthorized attachment penalties that the Commission has incorporated by reference and that DP&L's tariff must mirror the FCC language. Rather, DP&L contends that the Commission intended to ensure that the size of the penalties must conform to the levels reflected in the FCC Order. Specifically, DP&L believes that in *In the Matter of Implementation of Section 224 of the Act a National Broadband Plan for Our Future*, 26 FCC Rcd 5240, (rel. Apr. 7, 2011) (FCC Order), the FCC was merely providing guidance to entities subject to its jurisdiction as to a basic structure of penalties that could be established between utilities and attachers.

{¶ 16} Further, DP&L contends that the Commission Order did not require a tariff provision that limited penalties for unauthorized attachments only when scheduled inspections are performed. In support of its position, DP&L submits that OCTA is incorrect in its position that DP&L's tariff must conform word-for-word to a bullet summary description in the FCC Order that describes a \$100 per pole fee if a violation is found in an inspection in which the pole occupant has declined to participate. According to DP&L, the bullet summary was included in the FCC Order which summarized select provisions within a much larger set of regulations issued by the Oregon Public Utility Commission.

{¶ 17} DP&L explains that in the vast majority of circumstances, a violation is identified either by DP&L personnel in following their day-to-day job responsibilities or when DP&L personnel or a contractor is examining a pole because a new prospective attacher has requested to attach. DP&L argues that under OCTA's proposal there could be no penalty assessed under either scenario.

{¶ 18} The Commission finds that OCTA's motion objecting to language incorporated in DP&L's September 30, 2016 tariff filing should be granted. In reaching this determination, the Commission finds that, consistent with our September 7, 2016

Finding and Order and our Second Entry on Rehearing of November 30, 2016, DP&L is required to amend its pole attachment tariff as requested in OCTA's motion in order to be consistent with the FCC Order and the requisite incorporation of the Oregon Public Utility Commission's provisions. The Commission notes that there has been no demonstration that either the FCC Order or Oregon Public Utility Commission's provisions reference DP&L's proposed penalty provision.

{¶ 19} In regard to when a violation is identified by either DP&L personnel as a result of their daily job responsibilities or when DP&L personnel or a contractor is examining a pole because a new prospective attacher requested to attach, DP&L should amend its pole attachment tariff to reflect that in such scenarios the permitted penalty is limited to five times the current rental fee per pole.

### III. ORDER

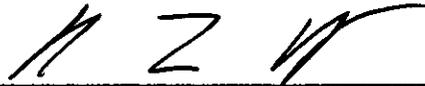
{¶ 20} It is, therefore,

{¶ 21} ORDERED, That the OCTA's motion is granted. It is, further,

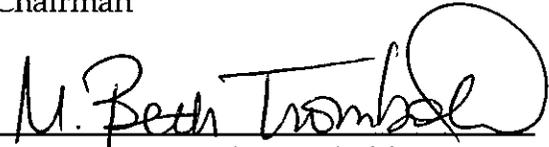
{¶ 22} ORDERED, That, within 30 days of this Entry, DP&L file its final pole attachment tariff consistent with the determination set forth in this Entry. It is, further,

{¶ 23} ORDERED, That a copy of this Entry be served upon DP&L, OCTA, and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

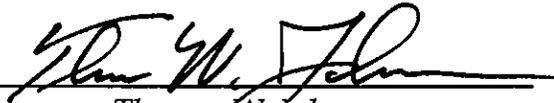


Asim Z. Haque, Chairman



M. Beth Trombold

Lynn Slaby



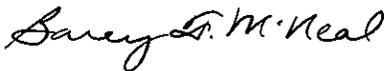
Thomas W. Johnson

M. Howard Petricoff

JSA/dah

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**NOV 3 0 2016**



Barcy F. McNeal  
Secretary