

## 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

### SECOND ENTRY ON REHEARING

Entered in the Journal on November 30, 2016

#### I. SUMMARY

{¶ 1} In this Second Entry on Rehearing, the Commission denies the application for rehearing filed by Dayton Power and Light Company, regarding the 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.

{¶ 4} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

**B. Procedural History**

{¶ 5} 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.

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

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

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

{¶ 9} 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.

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

{¶ 11} 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.

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

{¶ 13} On October 7, 2016, DP&L filed an application for rehearing regarding the Commission's Finding and Order of September 7, 2016.

{¶ 14} On October 17, 2016, OCTA filed its memorandum contra the application for rehearing.

{¶ 15} On November 3, 2016, the Commission issued an Entry on Rehearing granting rehearing for the limited purpose of further consideration of matters raised in the application for rehearing.

*C. Assignments of Error Raised by DP&L*

{¶ 16} As its first assignment of error, DP&L asserts that the Commission erred in ruling that DP&L's unauthorized attachment fees should not exceed the benchmark established by the Federal Communications Commission (FCC).

{¶ 17} In support of its position, DP&L states that the FCC does not have a fixed benchmark but, instead, has only provided broad guidance with reference to a structure developed through regulations issued by the Oregon Public Utility Commission. Specifically, DP&L relies upon the FCC's April 7, 2011 Order, *In re the Implementation of Section 224 of the Act a National Broadband Plan for Our Future*, 26 FCC Rcd 5240, ¶¶113m, 115 (FCC Order) in which DP&L opines that the FCC did not adopt the Oregon system as federal law. Rather, DP&L avers that the FCC described a process where if there was a dispute over provisions in contracts, the FCC would generally find a penalty to be reasonable if it was consistent with the Oregon system. Further, DP&L submits that the FCC Order eliminated penalty caps for the explicit purpose of allowing significantly increased penalties in order to deter against unauthorized attachments.

{¶ 18} In its October 17, 2016 memorandum contra, OCTA, in response to DP&L's first assignment of error, asserts that the Commission reasonably and lawfully

adopted a clear FCC benchmark relative to what constitutes a reasonable unauthorized attachment fee. In support of its position, OCTA submits that, while the FCC Order did not establish a definitive cap on unauthorized attachment fees, it did establish a clear benchmark for reasonableness of penalties based on the Oregon Commission's Rules. According to OCTA, the FCC determined that any contract-based penalties for unauthorized attachments are presumptively reasonable if they do not exceed those implemented by the Oregon Public Utility Commission.

{¶ 19} OCTA believes that the adoption of the FCC benchmarks benefit both pole attachers and pole owners as pole attachers have a clear incentive to participate in pole attachment audits as well as to obtain authorization for attachments, while the penalties are not so severe as to create more disputes and conflict. OCTA notes that pursuant to the FCC benchmarks, an attacher is only charged an additional \$100 fee if the unauthorized attachments are identified during an audit in which it declined to participate.

{¶ 20} Specific to DP&L's first assignment of error, while the Commission agrees with DP&L that the FCC did not adopt the Oregon penalty system as federal law, it in essence established de facto benchmark caps based on the Oregon Public Utility Commission's rules, which it found to be reasonable. As set forth in the Commission's September 7, 2016 Finding and Order, while the Commission is not bound by the FCC's determinations regarding unauthorized attachment fees, the Commission independently determined that the unauthorized attachment fees for DP&L's tariff should not exceed the benchmark found to be reasonable by the FCC. Therefore, DP&L's application for rehearing with respect to this assignment of error is denied.

{¶ 21} In its second assignment of error, DP&L asserts that, to the extent that the Commission intended that the structure developed through regulations issued by the Oregon Public Utility Commission be followed, the Commission erred in rejecting DP&L's proposed noncompliance charge because the Oregon Public Utility Commission's regulations, as referenced by the FCC, do include a penalty charge for

noncompliance. Specifically, DP&L points to the fact that the Oregon regulations include a charge of up to \$200 per violation for installation of equipment beyond that authorized.

{¶ 22} Specific to DP&L's second assignment of error, OCTA asserts that DP&L is attempting to raise for the first time the argument that the Commission erred in rejecting DP&L's noncompliance charge because the Oregon regulations do actually include a noncompliance provision. OCTA avers that the Commission has no obligation to consider this argument since DP&L did not raise these grounds until after the Commission's September 7, 2016 Finding and Order.

{¶ 23} Further OCTA opines that DP&L has misstated the Oregon regulations inasmuch as they only allow for sanctions up to \$200 for noncompliant attachments if, after notice, the attacher fails both (a) to submit a plan for correction within 60 days and (b) to cure the violation within 180 days. OCTA highlights that these two conditions are absent from DP&L's tariff language. Rather, DP&L proposes that the violations must be cured within the time that DP&L unilaterally determines. OCTA also posits that DP&L's "Noncompliance Charge" of \$25 per day could quickly escalate beyond Oregon's \$200 fee cap.

{¶ 24} Specific to DP&L's second assignment of error, the Commission agrees that DP&L is raising, for the first time on rehearing, its argument that Oregon regulations establish a penalty for noncompliance. Similarly, the Commission notes that the September 7, 2016 Finding and Order limited our decision to the incorporation of the Oregon unauthorized attachment fees and did not address the Oregon regulations regarding noncompliance penalties since this argument was not raised for the Commission's consideration. Therefore, the application for rehearing with respect to this assignment of error is denied.

{¶ 25} In its third assignment of error, DP&L submits that, notwithstanding any regulation promulgated by any other state or the FCC, the Commission erred in

rejecting DP&L's proposed noncompliance charge, which is necessary to induce pole attachers to comply with their obligations under the tariff. In support of its position, DP&L contends that, absent a noncompliance charge, the attaching entity has no incentive to ever do the work necessary to bring the attachment into compliance and will instead just wait for the pole owner to perform the necessary work. Additionally, DP&L states that under some scenarios the attachments are too complex for DP&L to modify without disconnecting service to the attacher's customers or damaging the attacher's facilities. Therefore, DP&L contends that some financial inducement via a daily penalty is necessary to compel compliance.

{¶ 26} Specific to DP&L's third assignment of error, OCTA responds that the Commission reasonably and lawfully found that the proposed "Noncompliance Charge" does not comply with the Commission's rules. Specifically, OCTA states that, although DP&L believes that sanctions are necessary in order to induce a pole attacher to bring an attachment into compliance in a timely manner, the Commission's pole attachment rules do not provide the utility with any right to impose a fine in addition to correction costs.

{¶ 27} Specific to DP&L's third assignment of error, the Commission finds that the application for rehearing should be denied inasmuch as DP&L fails to raise any new arguments for the Commission's consideration that were not fully considered and addressed in the Commission's September 7, 2016 Finding and Order in this matter. See September 7, 2016 Finding and Order at 22, 23. The Commission notes that, to the extent that DP&L has a concern regarding the relocating of an attacher's specific equipment, it can file the appropriate complaint. Therefore, the application for rehearing with respect to this assignment of error is denied.

{¶ 28} Related to its response to DP&L's first assignment of error, OCTA contends that DP&L's September 30, 2016 tariff filing conflicts with the FCC's benchmarks and the Commission's September 7, 2016 Finding and Order inasmuch as

DP&L seeks to assess an additional charge whenever it discovers an unauthorized attachment, including possibly outside of a formal attachment audit, and regardless of whether it has provided notice and an opportunity to the attacher to participate. This assertion was similarly raised in the context of OCTA's October 5, 2016 motion objecting to DP&L's tariff language. This specific objection falls outside the context of this Entry on Rehearing and will be addressed in a separate entry.

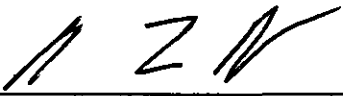
### III. ORDER

{¶ 29} It is, therefore,

{¶ 30} ORDERED, That the application for rehearing filed by DP&L be denied as set forth above. It is, further,


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

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
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Asim Z. Haque, Chairman

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Lynn Slaby

  
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M. Beth Trombold

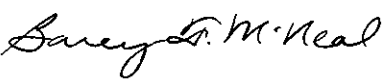
  
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JSA/dah

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Barcy F. McNeal  
Secretary