BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of Ohio Adm. Code Chapter 4901:1-3, Concerning Access to Poles, Ducts, Conduits, and Right-of-Way	))))	Case No. 19-834-AU-ORD

REPLY COMMENTS OF THE DAYTON POWER AND LIGHT COMPANY

The Dayton Power and Light Company ("DP&L" or "Company") submits the following reply comments to respond to certain initial comments filed by other participants in the proceeding with respect to the Entry issued July 17, 2019, (the "Entry") by the Public Utilities Commission of Ohio ("Commission" or "PUCO") and the draft proposed changes to Ohio Administrative Code ("OAC") 4901:1-3.

DP&L has limited its reply comments to those areas that it believes are most significant. A lack of response with respect to other comments that may have been made by other participants should not be viewed as agreement with or acquiescence to those other comments.

I. The PUCO Should Reject All Proposals that Are Based on a Theory that the "FCC Knows Best"

A. The PUCO Should Assert and Preserve its Jurisdictional Powers and Modify Ohio Regulations Based on the Record Before It.

The PUCO, not the Federal Communications Commission ("FCC"), is the regulatory agency that has jurisdiction over pole attachment rules and regulations for utilities and attachers in Ohio. And it is the PUCO who is charged with the responsibility and can most

effectively balance the interests of internet providers, phone companies, electric utilities, customers of each type of entity, and the ultimate public interest. In order to balance those interests under the regulatory framework that is place under Ohio law, the PUCO's decisions must be rationally based on the record before it.

Several recommendations within the Initial Comments filed by the Ohio Telecommunications Association ("OTA"), Crown Castle Fiber, LLC ("Crown Castle"), and the Ohio Cable Telecommunications Association ("OCTA") boil down to "the FCC does it this way, so the PUCO should do that too." In some instances, there are explicit requests to cross-reference and incorporate by reference the federal regulation.

The Commission has seen such arguments before and rejected them. The last time these pole attachment regulations were reviewed, similar arguments were made to cross-reference by some of the same entities present here. The Commission set forth the following principle:

> The Commission notes that Ohio has a long-standing tradition of adopting its own law and regulations involving pole attachments, conduit occupancy, and right-for-way. Adoption of the position recommend by OTA and AT&T would represent a reversal of that long-standing practice as we would be agreeing to abide by, at the state level, any change adopted by the FCC without providing public notice of the proposed changes and without going through Ohio-specific rulemaking requirements.[1]

All such arguments presented in this proceeding should be similarly rejected. The FCC issued rules based on the record that was presented before it. That same record is not before the PUCO. The PUCO can certainly review what other agencies in other States or at the Federal level have done, but ultimately it should preserve and defend its own jurisdictional

[1] 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, Finding and Order at ¶ 14 (July 30, 2014) (hereinafter "2014 Regulations Order".

powers. Those powers cannot be ceded to another State or Federal agency. Nor can evidence not present here that might be in a record in another jurisdiction form the basis for changing regulations in Ohio.

B. 4901:1-3-03(B): Make Ready Time Periods Should Remain as Currently Established.

The OTA at p.4 has not presented any argument or substantial evidence justifying its proposed change to the PUCO's existing rules regarding the time periods for completion of make-ready work. Merely citing an FCC order and stating that the Ohio rule should be aligned with a federal rule is not substantial evidence nor persuasive argument. It is also significant that these time periods for make-ready work were heavily contested issues in the 2014 regulatory proceeding, and the PUCO promulgated its rules after carefully balancing the interest of all participants.[2] Among other praise-worthy aspects of the PUCO's decision in 2014 is that it recognized that projects that involve large numbers of make-ready work projects should have a different deadline (105 days than smaller projects (60 days).[3] Nothing OTA has presented other than "FCC knows best" would suggest that the 60 day period is too long for shorter projects or that the distinction between large and small projects is invalid or understandable to any regulatory agency who knows that an electric utility does not have scores of workers who sit idle most days but are ready to complete even the largest projects in thirty days. The FCC may not fully appreciate or may have little regard for the additional costs that an electric utility would incur to maintain such a workforce, but the PUCO has a

[2] See the extensive discussion in 2014 Regulations Order at ¶¶ 21-27, 30, 32-36 of the various proposals, positions taken in opposition, and resolution of virtually every time period set forth in the regulations.
[3] Id. at ¶ 30.

constituency that the FCC does not: electric utility customers who will bear the burden of the additional workforce necessary to meet such deadlines.

C. 4901:1-3-03(A)(4) Time for Evaluating Applications.

For the same reasons set forth above the PUCO should reject OTA's argument in Initial Comments at 5 regarding the process for evaluating an application. To summarize, that process was litigated in 2014, the Commission balanced the interests of the parties then, OTA has presented nothing suggesting that the current time periods have proven to be unworkable, and its basis for change is that the FCC has a different process and deadline.

D. 4901:1-3-03(b)(2) Estimates of Make Ready Costs.

Crown Castle in its Initial Comments at 8-9 has proposed that the PUCO incorporate FCC requirements for a detailed itemized estimate "pole-by-pole" for make-ready charges. Again, this is an argument grounded on the mistaken theory that the FCC knows best and the PUCO should just fall in line with the federal rule. There is no recognition by Crown Castle or the FCC that DP&L (and perhaps other Ohio electric utilities) have project costing software that, for a project covering a whole pole line, does not break out the costs of the project pole-by-pole. The intent of Crown Castle is made clear at as well – they are seeking to "review and challenge any costs they deem unreasonable." There is no proof presented by Crown Castle of any unreasonable estimate that has been made; there is merely the promise that there will be more disputes and potential litigation.

E. 4901:1-3-05(A) Complaint Deadlines

Crown Castle's proposal at 10 to "mirror" FCC timelines for complaint resolution should be rejected on the same grounds discussed above: there is a lack of any evidence or demonstration that the existing rules have been unworkable. OCTA in its Initial Comments at

15-17 has made much the same proposal on the same basis – the FCC's time period for resolving complaints are different and, therefore, PUCO should follow the FCC rule. These proposals to the PUCO should be troubling on two levels: first, Crown Castle and OCTA are asking the PUCO not to independently evaluate a position but rather simply to fall in line with the FCC; and second, they are doing so in an area that is uniquely within the PUCO's area of expertise – the appropriate length of time that the PUCO may need to resolve complaints. Crown Castle and OCTA are, in effect, saying that the FCC should tell the PUCO how quickly the PUCO must act on complaints.

II. There Is Merit in Proposals for One-Touch Make-Ready Programs If Limited to the Communications Space. DP&L Opposes Other Self-Help Proposals.

A. One-Touch Make Ready.

In their Joint Initial Comments at 21-22, Duke Energy Ohio, Inc. and the Ohio Power Company ("Duke/AEP") have proposed that the Commission consider adopting a One-Touch Make-Ready ("OTMR") Program that would apply within the communications space for so-called "simple" make-ready work. Crown Castle (at 2) proposes a similar program with similar limitations but expands it to include pole survey work. OTA similarly proposes (at 2-3) that the Commission adopt an OTMR approach.

DP&L has reviewed these proposals in light of its own experience and submits that it also believes that there is substantial merit in establishing an OTMR program along the lines of that proposed by Duke/AEP. DP&L would not go so far as proposed by OTA to adopt, in toto, every aspect of the federal rules regarding such a program. Instead, such an OTMR program should be tailored as appropriate to reduce unnecessary obstacles to getting make-ready work done while ensuring that safety and electric reliability are preserved.

Much of DP&L's support of this proposal is predicated on its experience that a large percentage of make-ready work falls into a category of work solely within the communications space that requires no outages to other attachers, no splicing of existing attachments, and no relocations. As long as all the work is being done within the communications space, there is no significant threat to electric utility reliability and no need for the specialized training necessary to work within the electric space. And by reducing the procedural hurdles for performing such work, a large percentage of the delays that attachers have allegedly faced may be resolved.

DP&L would not expand that program to include pole surveys as recommended by Crown Castle because it has had experience with pole survey contractors hired by attachers who have consistently failed to identify overload conditions. Even when overload conditions are identified, the work done generally needs to be re-done in order to engineer a make-ready solution.

The problem posed by existing overload conditions that have escaped detection in the past would only be exacerbated by allowing an OTMR program to include the pole survey work. If the contractor for an attachment under an OTMR program does fail to identify either a then-current or a resulting overload condition, the next proposed attacher will be claiming that it has no responsibility to remediate an existing overload and it is unclear how, if at all, the utility could go back after-the-fact to the OTMR attacher to seek replacement pole make ready costs.

B. <u>Self-Help for Complex Make Ready Work and in the Electric Space.</u>

DP&L strongly urges the Commission to take one step at a time here. The interim step of considering OTMR for the simple make ready work in the communication space may

prove to eliminate a great number of the concerns expressed about any delays regarding make ready work. If the experience gained under the OMTR program indicates that there is a further need to standards under which make ready work involving work in the electric space or more complex work done in the communications space, the Commission could take actions at a later date based on a record that could be fully developed.

DP&L urges the Commission to reject self-help proposals in this current proceeding that go beyond the OMTR program. In this regard, OTA's proposal is particularly troublesome. OTA does not even explain to the Commission what the scope of its proposal would entail. Instead, it proposes (Initial Comments at 5) that the PUCO incorporate by reference all of the aspects of the federal rule set forth in 47 CFR § 1.1411(i). As noted above, this provides no basis for the PUCO to amend its rules other than the "FCC knows best" rationale. Moreover, as proposed, this would establish a mechanism where even future changes that the FCC makes to its rules would automatically, without review by the PUCO, get rolled-into Ohio regulations.

Crown Castle has also proposed modifications in the self-help area that go beyond its recommendation for an OTMR program for simple make ready work in the communications space. Crown Castle has proposed (Initial Comments at 7-8) that any time a utility does not meet a deadline for complex make ready work above the communications space that an attacher should have the right to hire a utility-approved contractor to do that work. This proposal is intertwined with Crown Castle's proposal to shorten time limits for make-ready work to which DP&L has objected in reply comments above.

OCTA goes even a step beyond Crown Castle in proposing that it be allowed to add contractors to the list of approved utility contractors (Initial Comments at 8) and it further

creates a list of minimal criteria that would define a contractor as qualified (at 9). Nothing in that list OCTA presents recognizes the possibility of or need for additional training to comply with utility standards or procedures. Instead the list requires only that the contractor agrees to follow written safety and operational guidelines and safety and reliability thresholds. But reading standards and "agreeing" to comply is not the same as being trained in what is needed to comply.

The OTA, Crown Castle and OCTA proposals seriously jeopardize the strong safety record that DP&L has established through the years. DP&L's standards include that employees be AVETA-certified and that the contractor as a whole have a safety record better than the national average. The Total Incidents Recorded (TIR) metric must be 50% better than the industry average in order to work on DP&L lines without utility personnel on-site supervision. DP&L has had "approved contractors" fall below this standard and, as a result DP&L has required additional training and processes including weekly "safety walks" where a trained DP&L employee evaluates and critiques the work and safety procedures employed by each contractor crew.

Other potential problems arise merely due to the absence of coordination. There may be work being done elsewhere by crews on the same circuit that would jeopardize the safety of one or the other crew if one or both are working independently outside the utility's supervision. Merely having a utility-approved contractor is insufficient if the individual employees of that contractor have not gone through the proper training necessary to follow DP&L safety procedures for flagging, tagging, and switching, do not know that DP&L's construction standards that include the use throughout the service territory of Grade B poles,

and the work is being done without coordination with other crews that may be working nearby.

In short, DP&L strongly opposes having outside contractors working in the electric space under the direction of attaching entities rather than the utility. Before the Commission even considers such a step it should collect data to determine how often any of the delays alleged by attachers are actually attributable to delays in work being done in the electric space. DP&L has not assembled such data but has a good-faith belief that the percentage would be far below the level that would be necessary to justify taking the safety risks of having self-help work being done in the communications space.

III. Utility Customers Should Not Bear the Cost Burdens Caused by Attaching Entities.

As noted in DP&L's initial comments at 11-13, there are several aspects to the proposed rules regarding overlashing that create costs for the utility that should legitimately be borne by attachers, not subsidized by utility customers. DP&L agreed, for example, with the provision that recognized that post overlash inspections were necessary and appropriate. But no provision was included that recognized that there is a cost to such inspections and that those costs should be recoverable from the attacher making the overlash. There is no rational basis for assuming zero costs or for requiring utilities and their customers to subsidize these overlashing entities. The Initial Comments at 8 of Ohio Edison Company, The Cleveland Electric Illumination Company and the Toledo Edson Company (hereinafter "First Energy Companies") similarly propose an explicit recognition of fees charged to the overlashing entity for the inspection.

DP&L also supports the short but important modification proposed by the First Energy Companies (at 8) that requires an overlasher to pay to remediate any violations of <u>standards</u>

caused by the overlashing entity, which would be in addition to the requirement in the draft regulations to pay for remediation for damage caused or code violations. Such remediation work is legitimately charged to the overlasher and should not be subsidized by the utility or its ratepayers. DP&L notes that requirement, as initially proposed or as modified by First Energy Companies' proposal, is another reason for requiring an overlashing entity to execute a contract with the pole owner – how would this provision be enforced against an overlashing entity absent a contract?

DP&L also supports the position taken by Duke/AES (at 16-17) that the costs associated with evaluating an overlash proposal should be charged to the overlashing entity.

DP&L further notes its proposed in its Initial Comments at 11-13 that overlashing entities be subject to an annual charge like other attachers; they are receiving the benefit of a utility pole and should be required to pay some percentage of the annual rent paid by a regular attacher. DP&L did not propose a specific charge, but suggested the Commission consider a rental rate of between 50% and 100% of the normal attachment rate.

OCTA's Initial Comments (at 7) are 180 degrees apart from DP&L's. OCTA has proposed retention of the proposed provision that there be no charge for the review of the overlash or post-overlash inspection and also seeks additional language that would explicitly prohibit charging an annual rental rate. DP&L opposes OCTA's position here, reiterates the positions it took in the DP&L Initial Comments regarding an annual fee and supports First Energy Companies' and Duke/AEP's proposed regulatory language regarding other fees that should be charged to overlashing attachers.

IV. An Overlash Cannot Be Permitted on a Pole that Is Already Overloaded.

Duke/AEP (at 18-20) has identified what appears to be an extremely troublesome drafting error in the proposed regulations. The draft rule 4901:1-3-03(A)(7)(b) would prohibit a utility from preventing an overlash because there is a pre-existing violation cause be another existing attaching entity. The intent of the draft rule may be to ensure that a relatively minor violation of spacing by an existing attacher does not hold up an overlash to a different existing attachment. But as worded, the draft rule would prohibit a utility from denying access to an overlashing entity for a pole that is already overloaded. Permitting an overlash when in such a circumstance is dangerous and indefensible.

As set forth in detail in DP&L's Initial Comments at 3-5 and the Affidavit of Barry Lucas and Pole Loading and Overlash Analysis that was part of those Initial Comments, overlashing does add weight and loading to a pole particularly because it increases the cross-section of the attachment that collects ice and is subject to wind. An existing overload condition will unquestionably be made worse if an overlash were to be permitted to proceed notwithstanding the existing overload condition.

DP&L, therefore, supports the Duke/AEP proposed modifications that preserves the general concept of allowing an overlash to move forward expeditiously, but carves-out an exception where the review of the overlash proposal identifies a capacity, safety, reliability, or engineering problem.

DP&L also supports the Duke/AEP proposed language (Initial Comments at 20) that establishes a 15-day period for existing attaching entities to correct their existing violations. In DP&L's view, this proposal would substantially resolve many of the delays that attachers mistakenly ascribe to utilities; it is DP&L's experience that many of those delays are actually

caused by existing attachers who do not perform their obligations in a timely manner. An explicit deadline for attaching entities to perform their obligations would be a much needed improvement.

V. The Grossly One-Sided Proposal for the Benefit of Incumbent Local Exchange Carriers ("ILECS" Should Be Eliminated.

DP&L' Initial Comments at 16-17 identified policy and legal reasons for deleting the draft regulation provision in 4901:1-3-05(B), which create a rebuttable presumption in favor of ILECs so that they can retain all the benefits of their current Joint Use Agreement, with one and only one modification – lower tariff rates that are charged to non-ILEC attachers. DP&L's Initial Comments at 18-19 set forth a non-comprehensive list of benefits that ILECs already receive under Joint Use Agreements relative to entities who attach pursuant to tariff. In the interest of regulatory efficiency DP&L will not reiterate its arguments here.

DP&L does note, however, its support of the well-researched and persuasively presented arguments made by Duke/AEP in their Initial Comments at 1-11. In particular, DP&L urges the Commission to review the more detailed discussion Duke/AEP presents at 5-9 regarding the significant benefits that ILECs receive under their Joint Use Agreements compared to non-ILEC attachers subject to the tariff requirements.

DP&L opposes Crown Castle's oddly offered attempt (at 11-12) to give other attaching entities the same rebuttable presumption that the draft regulation would give to ILECs. Since the draft provision is designed to give ILEC's a clear path to obtaining the same rates that Crown Castle is charged for an attachment, DP&L is somewhat baffled by what Crown Castle may think the provision would offer it. Discrimination in rates, terms and conditions under the tariff is already prohibited, so Crown Castle or any other tariff customer does not need an additional provision to guarantee that. In any event, for all the reasons set

forth in the DP&L and Duke/AEP Initial Comments, a rebuttable presumption with a unique and burdensome evidential hurdle to overcome that presumption should not adopted for either the ILECs or those who attacher pursuant to tariff.

For reasons stated in DP&L's Initial Comments and in the Duke/AEP Initial Comments, DP&L urges rejection of that provision in the draft regulations and rejection of Crown Castle's proposal.

VI. Miscellaneous Reply Comments

A. 4901:1-3-01 Definitions.

The proposed regulations have a new definition of overlashing. First Energy Companies at 3; Duke Power/Ohio Power at 20-21 have proposed to delete or modify portions of that definition as overly broad and vague. Even OCTA (Initial Comments at 2) proposes to modify that definition so that all forms of cables are included, but the phrase "incidental equipment and fiber-splice closures" is deleted. In this regard, OCTA is correct that the attachment of "fiber-splice closures" is not typically considered to be overlash. DP&L supports OCTA's proposed modification, but would not oppose the language recommended by the First Energy Companies or Duke/AEP.

DP&L agrees with Duke/AEP that the term "incidental equipment" should be deleted because it is simply too vague and is overly broad in that it could be read to include equipment that is not credibly considered to be overlashes. Because that phrase should be deleted as overly broad, DP&L opposes Crown Castle's recommendation at 3-4 to expand it even further by the inclusion of a laundry list of equipment it suggests should be considered to be "incidental equipment," including strand-mounted wireless facilities. The PUCO should be aware that these strand-mounted wireless facilities do not neatly wrap-around or attach

along-side an existing cable as an overlash is commonly understood. Strand-mounted wireless facilities have a vertical antenna that results in the use of additional space beyond that which the existing cable is occupying. The other items on Crown Castle's list are similarly equipment that is typically associated with an overlash. DP&L recommends that the better approach is to delete the ambiguous phrase completely and refer, as OCTA recommends, only to cables.

B. 4901:1-3-02(G) Suspension Process

DP&L agrees with OCTA's Initial Comments at 4 that this provision is procedural in nature, specifically affects tariff applications, and should be moved to Rule 3-04.

C. 4901:1-3-02(H) Effects of Ex Post Facto Determinations.

DP&L does not oppose OTA's Initial Comments at 5-6 proposing clarifying language to how to address access if some portion of the tariff providing access is found to be in violation of law or PUCO rules.

D. 4901:1-3-03(A)(7)(c) Issues to be Resolved Prior to Overlashing.

DP&L agrees with Duke/AEP (Initial Comments at 15-16) that additional clarity is needed to ensure that if the review of an overlash proposal identifies a safety, capacity, reliability or engineering issue, then there is an explicit requirement to address and remediate that issue before the overlash is made.

E. 4901:1-3-03(A)(2) Customer Service Drops.

DP&L does not oppose OCTA's clarification (Initial Comments at 3) that no application is needed for access to a customer service drop pole. DP&L's non-opposition is contingent, however, on its understanding that this clarification would not remove the

attachment from the list of attachments who are charged an annual fee for attaching to a utility pole.

F. Sprint Proposal as a Third Party Overlasher without an Agreement.

Sprint Communications Company L.P., and listed affiliates, has proposed in Initial Comments at 1-3 that a third party overlasher be able to provide notice to an existing attacher and then overlash on that existing attacher's facilities without an agreement with or compensation to the existing attacher or the utility. Given DP&L's long experience with unauthorized attachers and with attachers who seek every opportunity to avoid paying for make ready work or access to our poles, there is a temptation to sit back and see how the other attachers might respond to a proposal allowing some third party to seize some value from their facilities without compensation or an agreement. DP&L will resist that temptation, however, and submit that the Sprint proposal is inappropriate. Any third party seeking to overlash on someone else's attachment should be required to execute agreements with both that attacher and with the pole owner. This is consistent with DP&L's Initial Comments at 6-7 providing examples of necessary obligations and information exchanges between an overlashing entity and the pole owner. The overlashing entity should be required to have a contractual relationship with both the existing attacher and the pole owner.

VII. Conclusion

For the foregoing reasons and those presented in its Initial Comments, DP&L urges the Commission to adopt the recommendations set forth in these Reply Comments and in DP&L's Initial Comments.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Reply Comments has been served via electronic service to Commission Staff and upon the parties to the service list this 9th day of September, 2019.

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Summary: Reply Comments of The Dayton Power and Light Company electronically filed by Mr. Randall V Griffin on behalf of The Dayton Power and Light Company