

BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM CONTRA OF  
THE DAYTON POWER AND LIGHT COMPANY  
IN OPPOSITION TO APPLICATION FOR REHEARING OF  
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

The Dayton Power and Light Company (“DP&L”), pursuant to Ohio Rev. Code (“R.C”) § 4903.10 and Ohio Admin. Code (“OAC”) §4901-1-35, hereby answers and submits this memorandum in opposition to the application for rehearing filed by the Ohio Cable Telecommunications Association (“OCTA”) of the order issued by the Public Utilities Commission of Ohio (“PUCO” or “Commission”) on April 12, 2017.

OCTA takes the position that DP&L’s pole attachment rates cannot be made effective prior to April 12, 2017. In OCTA’s view, the Commission erred in ruling that tariff sheets filed on January 3, 2017, would be made effective as of January 3, 2017, in an order issued on April 12, 2017.

OCTA’s arguments fail to recognize a key salient fact: that DP&L’s pole attachment rates have been in effect with final tariffs in place and effective since October 1, 2016. On September 7, 2016, the Commission approved DP&L’s pole attachment and conduit rates and: “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.”<sup>1</sup>

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<sup>1</sup> 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 ¶ 86 (Sept. 7, 2016) (hereinafter “Sept. 7 Order”).

In compliance with that directive to file “final” tariffs, DP&L filed its pole attachment rates in Original Sheet No. 2 (two pages) on September 30, 2016, with an effective date of October 1, 2016. Within that same compliance filing, in Original Sheet No. 3, DP&L filed the General Terms and Conditions (10 pages) relating to pole attachments. Also filed were template service agreements in Original Sheet No. 4 (four pages) and the Table of Contents in Original Sheet No. 1 (two pages).

On October 5, 2016, OCTA filed an objection to one, and only one, paragraph of the General Terms and Conditions, that had been filed in Original Sheet No. 3. Significantly, OCTA did not seek rehearing, did not appeal, and did not object to the pole attachment and conduit rates set forth in Original Sheet No. 2.

Equally significantly, the Commission order of November 30, 2016, with respect to the one issue within Original Sheet No. 3, did not revisit or in any way disturb the Sept. 7 Order that was the final order approving the Original Sheet No. 2 pole attachment and conduit rates. And DP&L’s subsequent filing on January 3, 2017, in compliance with the November 30, 2016 Order, included only Original Sheet No. 3. When the Commission issued its April 12, 2017, order it was reviewing only the General Terms and Conditions collected within Original Sheet No. 3, and, more precisely, only ¶ 11 relating to unauthorized attachment fees of those General Terms and Conditions.

In short, DP&L’s pole attachment rate of \$8.05 and its conduit rate of \$0.42 per foot have been final and effective since October 1, 2016. The only tariff sheets that the Commission found in its April 12, 2017 Order would be effective January 3, 2017, were those associated with Original Sheet No. 3, General Terms and Conditions. OCTA is engaged in a collateral and retroactive attack on the rates within Original Sheet No. 2 by alleging months later that somehow

those rates could not become effective so long as one unrelated issue in another part of the tariff was still pending final resolution.

I. DP&L's Pole Attachment and Conduit Attachment Rates Were Approved in a Final Order and Validly Reflected in its Tariff Effective October 1, 2016.

In this proceeding, on September 30, 2016, DP&L made a compliance filing in accordance with an order issued by the Commission on September 7, 2016. The compliance filing included a Table of Contents (Original Sheet No. 1), a Rental Charge Schedule (Original Sheet No. 2, pages 1-2); Terms and Conditions (Original Sheet No. 3, pages 1-10) and template service agreements (Original Sheet No. 4, pages 1-4). Consistent with long-standing practices, DP&L's compliance filing was made in both the main docket and in DP&L's final tariff docket, Case No. 89-6004-TRF.

OCTA has alleged that the Commission's long-standing practice and the requirements of Ohio law are that no filing could have been made in this proceeding until sometime after April 12, 2017, when the Commission accepted the last change made to DP&L's tariff.<sup>2</sup> OCTA is mistaken both about long-standing practice and the requirements of Ohio law.

In its Sept. 7 Order, the Commission directed DP&L to file "final" tariffs within 30 days in compliance with its order. Consistent with long-standing practice, DP&L filed those final tariffs in both the main case and in its TRF docket. When the Commission intends to deviate from this practice, it knows exactly how to do that: it issues an order stating, "DP&L shall file proposed tariffs consistent with this Opinion and Order, subject to review and approval by the

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<sup>2</sup> OCTA Memorandum p. 8.

Commission.”<sup>3</sup> DP&L has located no precedent in Ohio law, and, of note, OCTA does not cite any such precedent for the novel proposition that OCTA asserts here that the Commission is powerless to allow final tariff sheets filed in compliance with a final order to become effective so long as there is one issue still outstanding.

OCTA represents that on September 7, 2016, the Commission reviewed DP&L’s tariff proposal and accepted some of the proposal, “but determined that further revisions were needed.”<sup>4</sup> That is technically true, but misleading in the context of the annual pole attachment in Original Sheet No. 2, since the Commission rejected all of OCTA’s objections with respect to the annual pole attachment rate,<sup>5</sup> with one minor exception that DP&L had agreed to,<sup>6</sup> and, in its ordering paragraphs stated:

“¶ 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.”

One and only one element of DP&L’s compliance filing was challenged by OCTA, which related to an unauthorized attachment fee within Original Sheet No. 3. OCTA did not

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<sup>3</sup> *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, et al., Opinion and Order, Ordering Paragraph 3 at p. 53 (Sept. 4, 2013)(emphasis supplied).

<sup>4</sup> OCTA Memorandum p. 5.

<sup>5</sup> *In the Matter of the Application of Dayton Power and Light Company to Amend its Pole Attachment Tariff*, Finding and Order at ¶¶ 11-38 (Sept. 7, 2016) (hereinafter September 7 Finding and Order).

<sup>6</sup> September 7 Finding and Order at ¶¶ 24-25. The effect of this minor change was to reduce the Pole Attachment rate from \$8.08 to \$8.05. The Conduit Attachment rate was unchanged.

seek rehearing or appeal or in any other way challenge the Rate Charge Schedule (Original Sheet No. 2) in the September 30, 2016, filing. After review of the OCTA objections to the single element of the unauthorized pole attachment fee within Original Sheet No. 3 and DP&L's answer to those objections, the Commission found on November 30, 2016, that: "DP&L is required to amend its pole attachment tariff as requested in OCTA's motion . . ."<sup>7</sup> DP&L then refiled on January 3, 2017, Original Sheet No. 3, and only Original Sheet No. 3, making that one modification to the unauthorized attachment fee language. No objections were lodged at that time by OCTA to the refiled language, which the Commission then approved on April 12, 2017.

OCTA now has created a truly unprecedented theory that if there is one element in a case that is still under review, then no other aspect of the case has actually been approved by the Commission. OCTA's claim is that because the Commission did not approve DP&L's second compliance filing adjusting language in the unauthorized pole attachment section of the Tariff until April 12, 2017, then it violates retroactive ratemaking principles for the Commission to recognize that all other aspects of DP&L's September 30, 2016, compliance filing were approved on November 30, 2016, and were unchanged by its second compliance filing on January 3, 2017.

II. OCTA's Legal Objections Now to the Rate Charge Schedule in Original Sheet No. 2 Are a Collateral Attack on the Sept. 7, 2016 Order and Are Inconsistent with the Procedural History of the Case.

OCTA represents that DP&L filed additional tariff revisions on September 30, 2017, that the Commission reviewed those revisions and again accepted some, "but determined that further revisions were needed." Again, this is technically true but misleading. OCTA did not raise any

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<sup>7</sup> 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 of Nov. 30, 2016, ¶ 18.

objections to the annual pole attachment or conduit attachment rates collected within Original Sheet No. 2; the Commission did not re-review those annual pole attachment or conduit attachment rates in Original Sheet No.2; and the Commission did not order DP&L to make any changes to Original Sheet No. 2.

In short, the Commission on September 7, 2016, ordered DP&L to submit “final” tariffs within 30 days, and with respect to Original Sheet No. 2, those tariffs have been “final” and unchallenged since they were filed September 20, 2016, with an effective date of October 1, 2016. Even if the Commission had used the alternative formulation of ordering proposed tariffs to be filed subject to review, the pole attachment rate and Original Sheet No. 2 would have become final as of November 30, 2016, when the Commission reviewed the compliance filing and left those tariff sheets undisturbed and “final.”

In this regard, OCTA also is misleading in citing of a DP&L transmittal letter for this January 3, 2017, where it was stated that the filed sheets were intended to supersede all preceding sheets.<sup>8</sup> OCTA fails to disclose that the sheets filed in January 3, 2017, did not include Original Sheet No. 2 where the pole attachment and conduit attachment rates are collected. The January 3, 2017 filing was intended to supersede all prior versions of Original Sheet No. 3 (Terms and Conditions), and only those prior versions of Original Sheet No. 3.

OCTA cites to the black letter law provision in R.C. 4909.17 that no rate can become effective until the Commission determines that it is “just and reasonable.”<sup>9</sup> DP&L agrees with that statement of law, but OCTA is badly misapplying it. The Commission did make the applicable findings necessary to establish that find that the pole attachment and conduit rates were just and reasonable in its September 7, 2016, order at ¶¶ 11-34 and 83-84. OCTA did not

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<sup>8</sup> OCTA Memorandum at 4, ft. 4.

<sup>9</sup> OCTA Memorandum at 5, ft. 7.

seek rehearing or appeal those findings or the end-result of those findings. Nor did OCTA object to the compliance filing made on September 30, 2016, to implement Original Sheet No. 2.

OCTA asserts that the Commission has set a date for the rate increase that is before the Commission approved the revised tariff on April 12, 2017.<sup>10</sup> That is incorrect for the same reasons described before: the only revised tariff before the Commission at that time was the compliance filing made on January 3, 2017, which did not include the pole attachment rate increase reflected in Original Sheet No. 2. Those rates within Original Sheet No. 2 were approved with one minor modification on September 7, 2016; reflected in a compliance filing on September 30, 2016; were unchallenged by any party; were not subject to additional review by the Commission in its order of November 30, 2017; and were not part of the second compliance filing made on January 3, 2017.

OCTA asserts that by setting an effective date of January 3, 2017, in an order issued April 12, 2017, the Commission has effectively authorized DP&L to rebill its pole attachment customers and taken an action equivalent to what would have occurred if the Commission had issued its order the same day that DP&L filed on January 3, 2017.<sup>11</sup> There are two factual errors here.

First, there is no rebilling. These are annual charges and the bills for calendar year 2016 pole attachments have not yet been issued. (DP&L typically issues its annual pole attachment invoices during the second quarter of each year for the prior calendar year.)

Second, DP&L did not file its pole attachment rates on January 3, 2017. Those were filed on September 30, 2016, with a proposed effective date of October 1, 2017. The January 3, 2017, filing did not include those attachment rates. Because those rates were unchallenged by

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<sup>10</sup> OCTA Memorandum at 6.

<sup>11</sup> OCTA Memorandum p.6.

any party and were not revisited by the Commission in its order of November 30, 2016, they became final and effective on October 1, 2016.

OCTA asserts that the Commission has engaged in unlawful retroactive ratemaking by “not ruling on the tariff revisions for months after they were filed” and then in its April 12, 2017 order setting “an effective date that erased the delay.”<sup>12</sup> Again OCTA fails to appreciate that the pole attachment rate was not part of the case that was still pending as of January 3, 2017, or April 12, 2017. That rate was filed in a compliance filing on September 30, 2016, and, because it was unchallenged by any party, has not been “pending” since at least the November 30, 2016, when the Commission reviewed that compliance filing and left that portion of it undisturbed.

OCTA asserts that the Commission violated its long-standing process for placing final, Commission approved tariffs on-file.<sup>13</sup> OCTA is incorrect regarding the Commission long-standing process. DP&L, in fact, followed the long-standing practice of waiting for a Commission order on the merits in the main proceeding and then making its compliance filing in both the main case docket and the TRF docket. In the vast majority of circumstances, there is no subsequent challenge and the changes go into effect as filed. In this particular case, OCTA objected to one element of one part of that compliance filing. It is now seeking to leverage its objection to an unrelated portion of the tariff as grounds to delay the effective date of the pole attachment rate.

OCTA similarly errs in its application of Ohio law requiring that only approved tariffs on file and in effect can be charged. In this case, DP&L’s pole attachment rates, collected in Original Sheet No. 2, were consistent with the just and reasonable findings made by the Commission in its September 7, 2016, order, were on file as of September 30, 2016, with an

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<sup>12</sup> OCTA Memorandum pp. 7-8.

<sup>13</sup> OCTA Memorandum p. 8.



effective date of October 1, 2016, and were left undisturbed by the Commission in its November 30, 2016, order reviewing the compliance filing.

For all the above reasons, OCTA is also wrong in its claim that it was the April 2017 order that approved DP&L's revised pole attachment rates.<sup>14</sup> In fact, it was the September 7, 2016, order that approved the revised annual pole attachment and conduit rates and those rates and their associated tariff sheets have not been at issue since. The April 2017 order only approved Original Sheet No. 3 and the revision therein to the unauthorized pole attachment charge – that was the only issue before the Commission.

The Commission should also reject OCTA's assertion of Commission error in not clarifying within its April 12, 2017, that DP&L is not authorized to charge the new rates until some unspecified future date when yet another TRF filing is made.<sup>15</sup> As noted above, DP&L made a valid filing on September 30, 2016, in DP&L's tariff docket in compliance with the Commission's September 7, 2016, order. The Commission reviewed the compliance filing and issued an order on November 30, 2016, leaving Original Sheet No. 2 and its pole attachment rates undisturbed.

III. DP&L's Annual Pole Attachment Rate Was  
Approved on September 7, 2016, and Reflected in  
Tariff Sheets that Were Accepted on November 30, 2016.

The Commission approved DP&L's annual pole attachment rate in its September 7, 2016.<sup>16</sup> DP&L made a compliance filing on September 30, 2016. No objections were raised by OCTA or any other party to that aspect of the compliance filing. The Commission did not require any changes to the tariff sheets that contained the annual pole attachment rate in its order

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<sup>14</sup> OCTA Memorandum p. 9.

<sup>15</sup> OCTA Memorandum, p. 10.

<sup>16</sup> September 7 Finding and Order at ¶ 83.

of November 30, 2016. The sole issue in dispute was with respect to a completely different part of the tariff (paragraph 11 of Original Sheet No. 3) and with respect to that issue and that issue only, the Commission required DP&L to modify and refile its tariff sheets. DP&L made this second compliance filing on January 3, 2017. Original Sheet No. 2 relating to the annual pole attachment rate were not included in the January 3, 2017, filing and thus, those tariff sheets have remained unchanged from the September 30, 2016 compliance filing.

OCTA did not seek rehearing of the Commission's order of September 7, 2016, establishing an annual pole attachment rate of \$8.08 and conduit rate of \$0.42 per foot. Nor did OCTA's motion and objections filed on October 5, 2016, address in any way the annual pole attachment rate of \$8.05 or conduit rate of \$0.42 per foot reflected in DP&L's compliance filing. In fact, OCTA made absolutely clear that its sole objection to the September 30, 2016, compliance filing was with respect to the unauthorized attachment penalty:

“On September 30, 2016, DP&L filed modifications to its pole attachment tariff, including a new, revised pole attachment rate and new revised language for several terms and conditions. The OCTA has reviewed the filing and objects to one limited aspect of the company's September 30 tariff filing. The objectionable language is in Section 11 of the September 30 tariff filing, which states in part:

11. UNAUTHORIZED ATTACHMENT. . . .”<sup>17</sup>

Throughout this proceeding, the annual pole attachment rate tariff and the computation of those rates have been regarded as presenting separate and discrete issues from general rules, terms and conditions of the tariff. DP&L placed the annual pole attachment charges into Original Sheet No. 2, while Terms and Conditions were collected into Original Sheet No. 3. In its very first filing, on August 3, 2015, OCTA filed objections that were broken out into two major categories: “Part III” of OCTA's objections were with respect to the methodology used by

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<sup>17</sup> OCTA Memorandum, pp. 4-5 (Oct. 5, 2016) (emphasis supplied, footnotes omitted).

DP&L to develop and propose an annual pole attachment rate of \$8.08. “Part IV” of OCTA’s objections identified eight separate issues with the terms and conditions within the tariff, including provisions for removal of attachments under some conditions, overloading, application fees, and an unauthorized attachment fee. DP&L responded to each of these objections.<sup>18</sup>

In its order of September 7, 2016, the Commission ruled with respect to each one of OCTA objections. As noted above, the Commission approved the \$8.08 annual pole attachment rate. The Commission also addressed the eight objections that OCTA had regarding other terms and conditions within the Tariff that were separate and distinct from the annual pole attachment rate calculation. Because it has remained the only non-final aspect of this case, it is worth noting that the Commission also approved the concept of an unauthorized attachment fee as proposed by DP&L, but ordered a cap be placed on the size of that fee consistent with the “benchmark established by the FCC.”<sup>19</sup>

DP&L made its compliance filing on September 30, 2016. When OCTA took issue with one and only one aspect of that compliance filing, the Commission addressed that single issue. And when the Commission ruled on November 30, 2016, and required DP&L to modify its tariff, it did so with respect to that single issue. The Commission did not require any changes to the Original Sheet No. 2 tariff relating to the annual pole attachment rate.

Thus, the annual pole attachment rate has been in effect since October 1, 2016, the day after a compliance filing was made that had been ordered by the Commission to be in “final” form. It is OCTA that seeks a retroactive change in the effective tariff based on the novel proposition that if a litigant challenges one aspect of a proceeding, then no other part of the case

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<sup>18</sup> See generally, September 7 Finding and Order, Procedural History ¶¶ 3-10; and Objections of OCTA filed Aug. 3, 2015, Table of Contents.

<sup>19</sup> September 7 Finding and Order at ¶ 66.

is final and approved. OCTA has cited no precedent, and DP&L is aware of none, that supports OCTA's newly minted argument that an unrelated issue that is still the subject of a dispute means that the Commission is powerless to issue a final ruling or allow tariff rates to go into effect with respect to other portions of a proceeding.

IV. OCTA Has Been on Notice Since September 30, 2016, that the Annual Pole Attachment Rate Would Be \$8.05.

OCTA and its members have known that that the \$8.05 pole attachment rate and the \$0.42 per foot conduit rate has been on file since DP&L made its compliance filing on September 30, 2016. DP&L respectfully submits that one of purposes of the prohibition against retroactive ratemaking and the filed rate doctrine is to ensure that utility customers are not charged for past services provided at a rate that is unknown to them because it is not on file. That underlying purpose has been fully met by the Commission's orders in this case. The Commission established the just and reasonable the pole attachment and conduit rate in its September 7, 2016 order, and the rates themselves were filed as a compliance filing on September 30, 2016. Neither OCTA nor any other party objected to that aspect of the compliance filing. On November 30, 2016, the Commission issued an order based on its review of the compliance filing and left that portion of the compliance filing undisturbed. OCTA and all pole attachers have had either actual or constructive notice since September 30, 2016.

V. CONCLUSION.

For the foregoing reasons, DP&L requests that:

- 1) the Commission reject OCTA's Application for Rehearing; and
- 2) the Commission clearly state that the pole attachment and conduit rates in Original Sheet No. 2 have been in effect since October 1, 2016.

On behalf of

Respectfully submitted,  
THE DAYTON POWER AND  
LIGHT COMPANY

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Its Attorney

Date: May 22, 2017

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been served either electronically or via first class mail, postage prepaid, this 22nd day of May, 2017 upon counsel to the parties of record.

ss/ *Randall V. Griffin*

Randall V. Griffin  
Chief Regulatory Counsel  
The Dayton Power and Light Company

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