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 Rights-of-Way	))))	Case No. 19-834-AU-ORD

MEMORANDUM CONTRA OF
THE DAYTON POWER AND LIGHT COMPANY
IN OPPOSITION TO SPECIFIED APPLICATIONS FOR REHEARING

The Dayton Power and Light Company, d/b/a AES Ohio (the "Company" or "AES Ohio") hereby submits its Memorandum Contra in Opposition to the Rehearing Applications filed by the Ohio Telecom Association ("OTA") and Ohio Bell Telephone Co. d/b/a/ AT&T Ohio ("ATT Ohio"). OTA and ATT Ohio both seek modifications on rehearing to the regulations set forth in the Finding and Order issued April 7, 2021, ("2021 Order") by the Public Utilities Commission of Ohio ("PUCO" or the "Commission").

AES Ohio does not oppose the Rehearing Application filed by the Ohio Cable Telecommunications Association ("OCTA"), but does have a brief comment with respect to that Application, which is set forth at the end of this pleading.

MEMORANDUM IN OPPOSITION.

I. Response in Opposition to OTA and ATT Ohio Rehearing Memoranda.

A. Introduction.

AES Ohio opposes those portions of the OTA and ATT Ohio rehearing memorandum that seek to provide Incumbent Local Exchange Carriers ("ILECs") with a double-dip benefit – all the benefits they receive from their existing joint pole or joint use agreements with electric utilities, plus a presumption that they are entitled to a reduced cost to attach to an electric utility

pole equal to the tariff rate charged to non-ILEC attachers. It is noteworthy that neither OTA nor ATT Ohio proposes to allow AES Ohio or any other electric utility the same treatment, i.e., the benefits of the existing joint pole or joint use agreement plus a reduced cost to attach to a pole owned by an ILEC.

The Commission reached the proper conclusions in its 2021 Order when it found that the existing Incumbent Local Exchange Carriers ("ILECs"), like ATT Ohio, are not similarly situated to the non-incumbent pole attachers.[1] The Commission was equally clear and correct in finding that the existing Joint Use Agreements are presumptively just and reasonable and unilaterally modifying them to adjust the price paid by an ILEC to the electric utility pole owner would "conflict with the policy concerning the allowance for negotiated agreements between utilities we expressly condoned five years ago."[2]

B. Arguments Based on an Alleged Lack of Negotiating Power Are Implausible and Unfounded.

OTA and ATT Ohio present no persuasive argument for overturning the Commission's findings. Both make the implausible argument that ILECs and electric utilities do not have equal negotiating power because electric utilities own larger percentages of joint use poles.[3] This, and the related assertion that the disparity in ownership has been growing over time, is alleged to have been considered by the FCC and to underlie its decision to modify its rules to create a presumption that ILECs situated to non-ILECs.[4] And it is further alleged that the Commission's

[1] 2021 Order at ¶ 69.
[2] *Id.*
[3] OTA Memorandum at 8-11, ATT Ohio Memorandum at 5.
[4] OTA Memorandum at 8.

Order is deficient because "it did not address the disparity in bargaining power that the FCC rule and the Staff proposal were intended to address."[5]

The Commission should not be fooled by such implausible claims. ILECs are exceptionally large corporations with well-staffed legal departments who cannot reasonably be viewed as being at a disadvantage in any negotiation. And the decreasing percentages of joint use poles owned by ILECs are solely a function of their own business strategy. In general, ILECs have virtually eliminated their in-house line crews and have chosen at almost every opportunity not to install a new pole that they would own, but instead have chosen to rely on requests that the electric utility install almost all new poles. And because electric service is an essential utility service, the electric utility has no negotiating power to force the ILEC to install the pole. The remedy for this alleged lack of bargaining power is in the ILECs hands – all they need to do is start installing and owning more joint use poles.

This is not a new phenomenon: In 2006 and 2007, ATT Ohio and The Dayton Power and Light Company engaged in nearly a year of administrative litigation with DP&L initially filing a complaint in State court and ATT Ohio subsequently filing a complaint before the Commission, where the case was ultimately resolved. The entire dispute arose because ATT Ohio had, for decades, failed to install 50% of the joint use poles as required by the then-existing agreement and the rate for a "pole deficiency" (i.e., ownership below 50%) had also not changed for decades and was no longer compensatory. The two utilities, with the help of a Commission Attorney Examiner who acted almost as a mediator, helped us reach a settlement that updated the Joint Use Agreement and related agreements, established a new (lower) percentage ownership obligation of 37.7% for ATT Ohio and established new joint use attachment rates that reset every

[5] OTA Memorandum at 9.

five years based on the investment shown in DP&L's FERC Form 1 filed annually and the investment in ATT Ohio's equivalent "ARMIS" filing made each year before the FCC.[6] Even with that lower percentage requirement, virtually every year ATT Ohio falls even farther below the contracted percentage ownership level and, therefore, makes net payments to DP&L. Establishing a presumption, rebuttable or not, that ATT Ohio deserves the same tariff rate that non-ILECs receive would upend the carefully crafted settlement that the Commission approved as reasonable.[7]

C. ILEC's Are Not Similarly Situated with non-ILECs and ILECs Do Receive Benefits from the Joint Use Agreements that non-ILECs Do Not Receive.

OTA tries to assert simultaneously that: 1) there is no real proof that ILECs get benefits relative to non-ILECs as a result of their Joint Use Agreements with electric utilities; and 2) ILECs pay much higher rates per attachment than non-ILECs.[8] But this argument can be eviscerated by asking one question: If Joint Use Agreements Are So Burdensome, Why Don't the ILECs Terminate their Joint Use Agreements?

Additionally, while this may not be universally true, AES Ohio is unaware of any requirement in its Joint Use Agreements that prohibits an ILEC from declining the designation of a Joint Use Pole and, instead, seeking to attach through the tariff using the process that the non-ILECs use. Currently, when AES Ohio plans to set a new pole, it contacts the ILEC and asks if it wants to have the pole designated as a Joint Use Pole, which would then cause AES Ohio to install a pole that could accommodate the ILEC's attachment without any further need for an

[6] *In the Matter of the Complaint of AT&T Ohio v. The Dayton Power and Light Company*, Case No. 06-1509-EL-CSS, Settlement (Public Version), §§ 3.1, 3.9 (filed Sept. 20, 2007).

[7] *In the Matter of the Complaint of AT&T Ohio v. The Dayton Power and Light Company*, Case No. 06-1509-EL-CSS, Finding and Order at ¶¶ 21-22 (Nov. 7, 2007).

[8] OTA Memorandum at 10-11, 13-14.

application, post-installation inspection or make-ready costs. But the ILEC could, if it chose, be treated exactly like a non-ILEC. It could decline to designate the pole as a Joint Use Pole and instead make an application under AES Ohio's tariff procedures to attach to a pole, incur whatever charges would apply for the application, engineering and any make-ready work and, at the end of the process, be charged the tariff attachment rate.

The reason that ILECs do not exercise their termination rights or seek to attach the same way as a non-ILEC is straight-forward – Joint Use Agreements provide ILECs with substantial benefits that non-ILECs do not receive. The Commission recognized the existence of such benefits as set forth in comments filed by the electric utilities in this proceeding and correctly concluded that it would be "one-sided" in favor of ILECs relative to electric utilities to allow the ILECs to retain those benefits while simultaneously seeking lower charges than set forth in the Joint Use Agreements.[9] In its Initial Comments, DP&L identified and described in succinct but sufficient detail the following benefits: Additional Space beyond the one foot typically provided to a non-ILEC attacher; Larger and stronger poles installed for the ILECs benefit with no make-ready costs; no charges for application fees, engineering or pole inspections; and a preferential location at the lowest point of the pole, which reduces the ILECs costs of maintenance, repairs and replacement relative to the non-ILEC attacher.[10]

D. No Distinction Should Be Drawn Between Existing and So-called New or Renewed Joint Use Agreements.

OTA, recognizing the Commission's general policy not to interfere with existing and already approved contracts between utilities, has attempted to save its one-sided proposal to retain all the benefits of a Joint Use Agreement and get a tariff attachment rate, by proposing for

[9] 2021 Order at ¶¶ 63, 69.
[10] DP&L Initial Comments, Case No. 19-834-AU-ORD, at 19-20 (Aug. 15, 2019).

the first time that its proposal be applied to new and renewed Joint Use Agreements and not to "existing" agreements.[11]

This is nothing more than a ploy that seeks to have the Commission adopt a proposal favoring ILECS that will be triggered, in some agreements within only a year, whenever an "evergreen" provision is operating that automatically renews the Joint Use Agreement from year-to-year unless terminated by either party. For Joint Use Agreements without such a clause, OTA's proposal would encourage ILECs to terminate the existing Joint Use Agreement, followed by a demand to re-contract with the same terms and conditions on the attachment process, but with new pricing provisions at the tariffed rate for non-ILECs. But, the ILECs already have the power under the Joint Use Agreements to terminate upon whatever notice is required in the Agreements and renegotiate. What they are seeking here is the Commission's thumb on their side of the scale so that one of the most critical elements of any contract -- the price -- is a non-negotiable term.

E. Broadband Development Is Not Dependent on Whether or Not ILECs Can Obtain Reduced Attachment Rates for Their Attachment on an Electric Utility Pole.

OTA and ATT Ohio assert that the Commission should adopt their one-sided proposal as a means to further federal and state policies to encourage broad band deployment.[12]

But there is no basis for assuming that broad-band deployment will be impeded in any way by leaving in place the existing Joint Use Agreements without rewriting the pricing term via a presumption that any existing price that is higher than the tariff rate for a non-ILEC is unjustified. For any existing "joint use pole" that has an ILEC attachment on it, the ILEC could overlash its own facilities with broad-band capable cable at no additional charge. And if the pole

[11] OTA Memorandum at 6, 14.
[12] OTA Memoranda at 10, 12. ATT Ohio Memoranda at 5.

is not a joint use pole, an ILEC has the equal right along with all the non-ILECs to attach without regard to the Joint Use Agreement. The ILEC would apply to attach using exactly the same tariff procedures as the non-ILECs and would be charged exactly the same tariffed rate for that attachment.

II. Additional Comment on OTA and ATT Ohio Rehearing Memorandum.

OTA and ATT Ohio also identified a drafting error with respect to "one-touch" make ready work where there is a cross-reference in the 2021 Order made to FCC rule 1.1411(g), when 1.1411(j) was likely intended. AES Ohio does not oppose that modification, but notes only that, the "one-touch" make ready concept has often proven to be more attractive in theory than in reality. Other states that have implemented such an approach have had mixed results, at best.

III. Comment on OCTA's Rehearing Application.

OCTA has sought rehearing to offer one amendment to the regulations established in the Order, which modified the process by which an entity could overlash fiber optic cable to existing communications wires, cables, or supporting strands already attached to poles. OCTA's amendment would expand this definition to include the overlashing of any type of cable including "coaxial, fiber optic, or other cables".[13]

AES Ohio does not oppose this amendment, but notes that overlashed coaxial and "other" cables may be considerably heavier than a fiber optic cable. That in turn makes it even more important that the Commission on rehearing adopt one of the proposals made in AES Ohio's rehearing application to require that the overlashing entity provide detailed information to the pole owner including the diameter and weight of the overlashed equipment. In particular, AES Ohio proposed that the Commission add a new subsection 4901:1-3-03(D)(2) that reads:

[13] OCTA Rehearing Memorandum at 2, ft. 2.

> 4901:1-3-03(D)(2): If a public utility requires advance notice of a planned overlashing, the overlashing party shall provide the following information in its notice: pole numbers or coordinates, identification of the entity owning the facilities that will be overlashed, diameter (including any conduit) and weight per 100 feet of the overlashed facilities, a description of method by which the overlashed facilities are to be securely attached to the existing attachment, and a description of any other overlashed facilities that are not solely a cable and/or cable within a conduit.[14]

IV. Conclusion

For the foregoing reasons, AES Ohio respectfully requests that the Commission on rehearing reject the modifications proposed by the Ohio Telecom Association and ATT Ohio.

Respectfully Submitted,

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[14] AES Ohio Rehearing Memorandum at 2-3.

CERTIFICATE OF SERVICE

On this date, May 24, 2021, and in accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of the foregoing on the interested persons on May 24, 2021. In addition, I certify that service by email has been given to the parties listed below who have entered an appearance in this proceeding.

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Summary: Memorandum Contra of The Dayton Power and Light Company in Opposition to Specified Applications for Rehearing electronically filed by Mr. Randall V Griffin on behalf of The Dayton Power and Light Company