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, and Conduits, and Right-of-Way.	))))	Case No. 19-834-AU-ORD

THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION'S MEMORANDUM CONTRA THE APPLICATION FOR REHEARING OF THE DAYTON POWER AND LIGHT COMPANY D/B/A AES OHIO

I. Introduction

The Ohio Cable Telecommunications Association ("OCTA") files this memorandum contra to the application for rehearing filed by The Dayton Power and Light Company d/b/a AES Ohio ("DP&L"). DP&L first alleges multiple errors with the April 7, 2021 decision by the Public Utilities Commission of Ohio ("Commission") to adopt the well-established and well-functioning federal rules associated with overlashing. DP&L seeks to dismantle the tried-and-true, notice-only overlashing framework that the Commission has adopted, and substitute it with a byzantine permitting and application contraption that would nullify the Commission's considered overlashing decision and rule. DP&L's changes range from a lengthy set of mandated information for the advance overlash notice, to denying an overlash, to charging an overlashing fee. Collectively and individually, DP&L's proposed overlash rules fly in the face of decades of overlashing practice and the Commission's desire to promote efficacy and consistency within the industry, alleviate burdens on the public utilities and attaching entities, and reduce the rules' impact on businesses. Finding and Order at ¶ 48. Since the Commission has already considered and rejected each of DP&L's overlash-related arguments in this proceeding, DP&L first five assignments of error should be rejected outright.

As to DP&L's final assignment of error, DP&L seeks an additional rule that allows up to 30 more days to complete make-ready work if the work involves a pole replacement. DP&L presupposes that when make-ready work involves a pole replacement: (1) a permanent, longer time limit is "needed" and (2) the language adopted by the Commission that allows a utility to deviate from the make-ready time limits is problematic. Neither supposition is correct. Equally detrimental to this DP&L request is the fact that attachers would unnecessarily have fewer protections when the make-ready work involves pole replacements under DP&L's language because it omits the many protections that the otherwise available general deviation language provides.

The Commission adopted rules that strike the right balance (with the definitional clarification recommended by the OCTA in its May 7, 2021 application for rehearing). The OCTA strongly supports the direction the Commission has taken as it has recognized how critical the rules are for enabling the increased services and deployment of facilities that Ohioans need and want. The rules will allow OCTA members to expand and enhance their broadband services for customers. The unreasonable burdens in DP&L's application for rehearing should be denied.

II. Argument

A. DP&L's first five assignments of error improperly attempt to create an onerous Ohio-specific overlash framework, contrary to the Commission's stated desires for fewer burdens, less redundancy, more consistency, and fewer adverse impacts on stakeholders.

Overlashing is not a new technique. In use for decades, overlashing has been and still is a routine, widely adopted and deeply embedded field practice used by telecommunications companies, cable operators and others. It allows for the near-seamless expansion and upgrades of

networks and services, as well as system maintenance and repair. It also is critical to the continued rollout of broadband services, not to mention mobile services and other applications.

DP&L expresses its hostility to the Commission's adoption of the federal overlashing framework proposing that the Commission do away with it and instead implement a detailed permitting process that makes the pole owner the gatekeeper and ultimate arbiter of how communications providers should be able to design, modify and expand their networks. *See* DP&L Application for Rehearing at 3. DP&L proposes this scheme in the face of an overwhelming record of overlashing's widespread adoption and its well-documented benefits and successes. Each DP&L proposed overlash rule is unnecessary, onerous and prohibitive—and antithetical to the Commission's framework, and policy foundations for that framework. The Commission thoroughly considered the record comments and relevant overlashing precedent before making its decision to adopt the federal approach.[1] DP&L's application raises nothing new and its positions should be rejected. Again.

1. "Clarification" of the overlash notice is unnecessary.

DP&L's application for rehearing states that it is asking for clarification of the rule requiring advance notice of an overlash. DP&L Application for Rehearing at 2. DP&L is not seeking clarification; it is seeking wholesale replacement based on arguments that it already has made and already has lost. The essence of the Commission's overlashing framework is reasonable notice. DP&L seeks to replace notice with a full-blown permit application procedure that would

[1] Finding and Order at ¶ 49 ("After much consideration and in response to the comments the Commission received to modify [the rule on access to poles, ducts, conduits, and rights-of-way], we adopt the following [federal] provisions.…").

require an attacher (an applicant, really, under the DP&L scheme) to provide the following information:

- Pole numbers or coordinates;
- Identification of the entity owning the facilities to be overlashed;
- Diameter (including conduit) of the overlashed facilities;
- Weight per 100 feet of the overlashed facilities;
- Description of the method by which the overlashed facilities are securely attached to an existing attachment; and
- Description of other overlashed facilities that are not a cable or cable within a conduit.

DP&L Application for Rehearing at 3.

DP&L's proposed rule, however, is so onerous and so detailed it would make the Commission's rule a nullity. DP&L seeks nothing less than to be the gatekeeper when there simply is no legitimate reason for it (or any pole owner) to perform that function. The Federal Communications Commission ("FCC") framework that the Commission has adopted already places the responsibility for overlashing on the communications attacher. Under the Commission's rule, for example, the overlasher is already responsible for its own equipment and, importantly, ensuring that it will comply with reasonable safety, reliability, and engineering practices. *See* 4901:1-3-03(D)(1), which adopts 47 CFR § 1.1415(d). Also, DP&L's proposed rule would enable the utility to readily reject overlash notices and require the overlasher to justify the overlash. For example, the utility would be able to allege noncompliance, even for an inadvertent omission of information in the notice, and then delay or deny an overlash. That is not notice. It is an application and the Commission should reject it. *See* 4901:1-3-03(D)(1), which adopts 47 CFR § 1.1415(a).

2. Default loading values are unnecessary.

DP&L proposes the establishment of a rule allowing the utility to use "default" values for cables when analyzing the load on an existing pole associated with a noticed overlash. The language proposed is much more than just approving default loading values. DP&L's proposed language is below in red.

> 4901:1-03(D)(1)(a) A public utility may not prevent an overlashing party from overlashing because another overlashing party has not fixed a preexisting violation; unless the overlashing will exacerbate the violation or create a capacity, safety, reliability, or engineering issue. For purposes of determining whether the overlashing may exacerbate the violation or create a capacity, safety, reliability, or engineering issue, a public utility may apply either actual loading values if it performs a new study or, if there is an existing pole loading analysis that was previously performed, the determination may be based on the use of default increased loading values as set herein:
>
> | Size of Overlashed Cable (including Conduit) | Default Value Increase in Loading |
> |---|---|
> | ½ inch | 1.7% |
> | 1 inch | 3.0% |
> | Other sizes | Proportional to above |
>
> In the event that the use of these default increased loading values indicate a pole loading of above 100% of the recommended maximum loading, the utility may deny the overlash until a separate pole loading analysis is paid for and performed. If that analysis confirms an overload condition or some other condition that would require make-ready work, then the overlash may be denied until the make-ready work is paid for and completed.

DP&L Application for Rehearing at 4.

On close review, the language gives the utility broad, virtually unchallengeable gatekeeper authority. Left to DP&L, any overlash project would require advance utility evaluation and analysis, require utility approval/denial, require further studies, and require corrections for any condition before an overlash can occur. Again, that is not notice, it is an application. And it is

based on a murky set of standards that presumes non-compliance and is intended to delay upgrades and expansion, not facilitate them. DP&L's proposal is flawed in multiple, specific respects, including:

- The proposed language makes clear that the utility would be able to "deny" an overlash. That implies the utility the right to approve overlashing, which is contrary to 47 CRF § 1.1415(a).

- The proposed language states the overlash would be denied until another pole loading analysis occurs and could be further denied until after make-ready is paid for and completed, which is directly contrary to adopted Rule 4901:1-3-03(D)(1) and adopted 47 CFR § 1.1415(c) and (e) that allow an overlash to modify an overlash, an attacher to explain why the modification is not necessary, and the utility to complete remedial work post-overlashing.

- The proposed language allows denial if there is "some other condition" and it is not corrected, which is directly contrary to both adopted Rule 4901:1-3-03(D)(1)(a) and adopted 47 CFR § 1.1415(b) that prohibit the utility from preventing an overlash due to preexisting conditions.

Collectively, DP&L seeks to create an entirely different framework from what the Commission adopted, under the guise of seeking authority to use default loading values. The Commission should not be swayed.

As to the proposed loading values themselves, they are in the OCTA's experience unprecedented. Neither the FCC nor any other regulatory agency to the OCTA's knowledge that has addressed overlashing considered, let alone *approved* of a scheme like the one DP&L proposes. Doing so would not only seem to make the Commission the first to do so, it would also place the Commission in the role of an engineering-standards rulemaking and enforcement agency.

The Commission should not adopt DP&L's default loading values or revised authority language reflected above because (again) it would arm the utility with rule-based authority to approve and deny an overlash.

3. Mandating removal of unused facilities is unnecessary and unreasonable.

DP&L advocates that unused facilities be removed before an overlash is permitted. DP&L Application for Rehearing at 5. If an overlasher cannot represent that the facilities to be overlashed are still providing service (which DP&L describes as used and useful), DP&L proposes that the existing facilities have to be removed. If, in addition, the facilities that were overlashed stop providing service, they and the overlash have to be removed. In that instance, the overlash would then have to become an attachment. DP&L's proposal is as follows (again in red):

> 4901:1-3-03(D)(3) If a public utility requires advance notice of a planned overlash, the notice shall contain a certification by the existing attacher of the facilities to which the overlash is to be made that the existing facilities are still providing service to transmit information. If such existing attachment is or will be no longer in service to transmit information, then it must be removed prior to the installation of new facilities by the existing attaching entity or a third party.

DP&L's proposal is unreasonable for several reasons. First, DP&L's proposal is a blatant attempt by the utility to mandate – through a rule – how the networks of communications providers must be deployed, used and designed. The Commission rules have rightly left the deployment, use and design of the communications providers' networks to those providers' discretion. There is no reason to alter that approach. Second, an overlashed facility will not always provide service immediately on installation and may be placed for a variety of purposes, including for emergencies, system and customer growth and technology changes. Communications providers must be able to rollout facilities to meet their needs, but DP&L seeks to burden providers' critical design and deployment functions with this unnecessary requirement. Third, and finally, under the Commission's rules as written, the attacher is responsible for ensuring that its overlashing complies with applicable safety and engineering standards. Bluntly stated, as long as the attacher

is fulfilling those requirements, the utility's interests are met and DP&L has no legitimate interest in stating what should and should not be part of communications providers' systems. In sum, nothing that DP&L states on rehearing should merit further consideration of this unreasonable proposal.

4. Requiring payments for overlashing is a backdoor attempt to regulate overlashing as an attachment.

DP&L next advocates for the rules to allow the utility to charge an annual fee for overlashing. DP&L Application for Rehearing at 6. It proposes that the fee be between 50-100 percent of the utility's pole attachment fee. *Id.* This is another attempt to treat overlashing like a mainline attachment to a pole.

DP&L's position is contrary to decades of practice and multiple regulatory decisions. In 2016, the Commission ruled that a "wire overlashed to an existing facility/pole attachment is not an attachment subject to an attachment fee."[2] The FCC also ruled that overlashing is not an attachment – it only involves a physical connection to other wires and not the pole itself and "no additional usable space [is] occupied" – and a pole owner cannot charge overlashing parties for pole space.[3] In addition, the U.S. Court of Appeals for the D.C. Circuit unanimously affirmed the FCC's conclusions as "permissible construction[s]" of the federal Pole Attachment Act that "show due consideration for the utilities' statutory rights and financial concerns."[4] In 2018, when the

[2] *In the Matter of the Application of Ohio Power Company to Amend Its Pole Attachment Tariff,* Case No. 15-974-EL-ATA, Finding and Order at ¶ 25 (Sep. 7, 2016).

[3] *2001 FCC Pole Order*, 16 FCC Rcd. 12142 ¶ 76.

[4] *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

FCC codified its longstanding policy that "utilities may not require an attacher to obtain its approval for overlashing," the rules did not allow rental fees for overlashing.[5]

Given the Commission's own determination and the long-standing and court-affirmed federal policy against fees for overlashing, this DP&L assignment of error should be denied.

5. The rules adequately address payment for newly discovered overloads.

In its last assignment of error related to overlashing, DP&L cites to adopted Rule 4901:1-3-03(D)(1)(a), which states in part "[a] public utility may not prevent an overlashing party from overlashing because another overlashing party has not fixed a preexisting violation…." DP&L contends that the Commission's adopted overlashing rule will "exacerbate" a problem with how to charge for discovered overloads or other safety and reliability situations. DP&L Application for Rehearing at 7. DP&L proposes to resolve with a new rule (in red) applicable to pole attachers and overlashers:

> 4901:1-3-04(E)(2) If in connection with a new request for attachment or an advance notice of overlash, a public utility determines that there is an existing overload condition or other capacity, safety reliability, or engineering issue, the public utility may deny the request for attachment or overlash until the existing condition or issue is rectified and the costs incurred to rectify the existing condition or issue shall be charged to and paid by either: 1) the last attacher(s) or overlasher(s) who caused the condition or issue; or 2) if records are inadequate to determine who caused the condition or issue, then all attachers and overlashers and the public utility shall pay proportional to their use.

DP&L's proposed rule is unnecessary. As to an overlash, the adopted federal rules address the issue. When the utility discovers a violation caused by an overlash on equipment belonging to the utility, the utility can complete the remedial work and bill the overlashing party or the utility

[5] *2018 FCC Pole Order*, 33 FCC Rcd. 7761 ¶ 115 (2018); *see also* 47 C.F.R. § 1.1415.

can require the overlasher to fix the issue. *See* 47 CFR § 1.1415(e). As to an attachment, the Commission's rules adequately address the issue by requiring all attachers with access to the facility as a result of the modification and all that directly benefit from the modification to share proportionately in the cost of the modification (except for costs involving rearrangement or replacement). *See* Ohio Adm.Code 4901:1-3-04(E).

DP&L's proposed rule would prevent the overlash until after the violation is fixed and payment is made. DP&L's language would have the effect of needlessly delaying overlashes (and attachments) and subjecting those parties to the mercy of the violator's payment schedule. Like each of the overlashing proposals above, this DP&L proposal is unjustified as well as harmful to the communication providers. It too should be denied.

B. A special, lengthier deadline for make-ready work involving pole replacements is unnecessary and creates an opportunity for abuse.

DP&L argues that the adopted time limits for make-ready work (30 days or 75 days, as applicable) should be longer by up to 30 days when the make-ready work involves a pole replacement. DP&L Application for Rehearing at 8-9. DP&L recognizes that the Commission's adopted time limits include the ability to deviate from the 30-day or 75-day period. The adopted general deviation for the make-ready time limits states in part:

> A utility may deviate from the time limits specified in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified in this section. A utility that so deviates shall immediately notify, in wiring, the new attacher and affected existing attachers and shall identify the affected poles and include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles and shall resume make-ready without discrimination when its returns to routine operations.

DP&L contends that the above deviation language is vague and subject to debate. DP&L Application for Rehearing at 9. This argument does not hold water. The deviation language cannot be vague and subject to debate when make-ready work includes a pole replacement, but acceptable for other make-ready work. DP&L's request should fail for this reason alone.

There is, however, an additional reason to reject DP&L's request for another separate exception to the make-ready time limits allowing the utility up to 30 more days when the make-ready work includes a pole replacement. DP&L's language omits numerous protections for attachers that the general deviation language provides, including:

- Deviation shall be for good and sufficient cause.
- The utility must be unable to complete the make-ready work within the applicable time limit.
- The utility must notify the new attacher and affected existing attachers.
- The notice must identify the affected poles and explain in detail the reason for the deviation.
- The notice must provide a new completion date.
- The additional period shall be no longer than necessary.
- When resuming make-ready work, it must be done without discrimination.

Without these protections, DP&L's proposal would introduce an opportunity for abuse that is not needed. Because the general deviation language would be available if a pole replacement causes the utility to be unable to complete the make-ready work within the applicable time limit and DP&L's proposal is inconsistent and potentially harmful, the Commission should deny it.

III. Conclusion

The Commission recognized the need and importance of a set of consistent overlashing rules for Ohio. The OCTA strongly supports the adopted rules, subject to the definitional clarification raised in the OCTA's May 7, 2021 rehearing application. DP&L, however, is advocating for onerous and unfair overlashing rules that are contrary to the Commission's approach as well as the long-standing federal overlashing framework. None of DP&L's proposed overlashing rules should be adopted. In addition, DP&L's special time limit for make-ready work that involves pole replacements is unjustifiable and likely harmful to attachers. It too should be rejected.

Respectfully submitted,

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Summary: Memorandum Contra the Application for Rehearing of The Dayton Power and Light Company d/b/a AES Ohio electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable Telelcommunications Association