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

CROWN CASTLE FIBER LLC'S MEMORANDUM CONTRA THE APPLICATION FOR REHEARING OF DAYTON POWER AND LIGHT COMPANY

I. INTRODUCTION

Pursuant to Ohio Administrative Code § 4901-1-35,[1] Crown Castle Fiber LLC ("Crown Castle") files this opposition to Dayton Power and Light Company's (DP&L) Application for Rehearing ("Application")[2] filed in the above-captioned proceeding on May 6, 2021 in response to the Public Utilities Commission of Ohio's ("Commission" or "PUCO") *Finding and Order* issued April 7, 2021 ("Order").[3]

Crown Castle supports the Commission's treatment of overlashing in the Order. The Order reflects the reality of modern telecommunications infrastructure—overlashing is an essential and well-established component of the rapid deployment of competitive broadband networks in Ohio. Furthermore, as part of its administrative review, the Commission wisely determined that establishing only a single set of rules attachers must follow, rather than two—

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1 Ohio Admin. Code § 4901-1-35.

2 Dayton Power and Light Company, Application for Rehearing and Memorandum in Support, Case No. 19-834-AU-ORD (filed May 6, 2021) ("Application").

3 *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*, Finding and Order, Case No. 19-834-AU-ORD (Apr. 7, 2021)

federal and state—would eliminate administrative costs and burdens as well as boost deployment of critical broadband infrastructure.[4]

Crown Castles opposes DP&L's Application because the Commission considered and adequately addressed DP&L's concerns in its Order, and DP&L raises no new argument or evidence showing the Commission erred in its findings. In almost every issue in its Application, DP&L merely restates the arguments it made earlier in the proceeding—arguments the Commission, correctly, already rejected.[5] Furthermore, for the same reasons the arguments were rejected the first time, DP&L's proposals for modifying the Commission's new rules are unfounded and contravene both the Commission's and Federal Communications Commission's ("FCC") purposes and findings in adopting the new rules.

For these reasons, as explained more fully below, the Commission should deny DP&L's Application for Rehearing in its entirety.

II. REHEARING IS UNNECESSARY AND UNWARRANTED

A. The Commission Adequately Addressed Overlashing in the Order

1. Advanced Notice of Overlashing

DP&L requests rehearing on PUCO's adoption of federal rules governing overlashing on the ground that the federal rules do not clearly indicate what information an overlasher must provide in its overlash notice.[6] DP&L argues that PUCO should revise its adopted rules to require overlashers to provide pole locations, size and weight of the overlashed cable, and a description including size and weight of any other equipment that would be attached when

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4 *See* Order ¶ 49.

5 *See id.* ¶ 10 (noting that if an argument is not specifically addressed it should be considered rejected).

6 *See* Application at 2-3.

providing advanced notice of overlashing.[7] Essentially, DP&L's argument seeks to require a full application for overlashing, rather than notice. DP&L's argument fails for two reasons. First, in adopting Section 1.1415,[8] the FCC addressed and rejected similar proposals and in adopting the federal rules here, the Commission should follow suit.[9] Second, DP&L raised these concerns during the comment period and presents no novel argument or new evidence to suggest the Commission erred in its decision so as to justify rehearing.

In its 2018 Order adopting Section 1.1415 of its rules, the FCC explicitly rejected nearly identical arguments to those DP&L makes here. Like DP&L in this case, utilities had argued to the FCC to impose requirements that would essentially nullify the point of allowing overlashing based only on notice to the utility by demanding the submission of essentially the same level of data that would accompany a normal attachment application. In adopting its rules the FCC "emphasize[d] that utilities may not use advanced notice requirements to impose quasi application or quasi pre-approval requirements" on overlashers.[10] This included proposals from some commenters to permit utilities to require overlashers to "submit specifications of the materials to be overlashed with the notice of overlashing."[11] The FCC explained that pre-certifications, engineering studies, or detailed information gathering—like what DP&L is proposing—simply slow down deployment by unduly burdening overlashers with little added benefit to the utility since overlashers are ultimately responsible for the costs for any necessary

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7 *Id.* at 3.

8 *See* 47 C.F.R. § 1.1415.

9 *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 7705 ¶¶ 115-17, 119 (2018) ("*2018 Order*").

10 *2018 Order* ¶ 119.

11 *Id.* ¶ 119 n.444.

or subsequent repairs discovered by the pole owner.[12] The same rationale applies here, as the Commission has chosen to adopt the FCC's Section 1.1415 rules. Since overlashers will be responsible for any necessary repairs or problems discovered in any post-work inspection,[13] DP&L's proposal will just slow down deployment and create added burdens for overlashers with little legitimate benefit to the utilities.

DP&L relies on a 2016 Commission decision[14] to support its notice proposal. However, the Commission did not actually find that requiring additional and specific information from an overlasher was reasonable, as DP&L implies. Rather, the Commission found only that DP&L's voluntary proposed tariff language, requiring advanced permission, was reasonable at that time and in that case.[15] The Commission also found that attachers may negotiate separate agreements pertaining to the issue of overlashing.[16] Even if the Commission's 2016 finding did directly support DP&L's proposal, which it does not, it would be irrelevant. The Commission can change course when presented with new evidence and arguments, or when it is seeking a new policy goal, as was the case here. In this case, the Commission decided to adopt the rules in Section 1.1415 after careful consideration, including evaluating DP&L's arguments.[17] But more to the point, the Commission's rules do not necessarily conflict with the Commission's 2016 ruling; they do not prevent DP&L from making a determination as to whether existing facilities can safely accommodate additional load. Section 1.1415 of the FCC's rules explicitly states that

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12 *Id.*

13 *See* 47 C.F.R. § 1.1415(d).

14 *In the Matter of the Application of Dayton Power and Light Company to Amend Its Pole Attachment Tariff,* Finding and Order, Case No. 15-971-EL-ATA ¶ 82 (2016) ("*2016 PUCO Order*").

15 *Id.* (stating that "DP&L's voluntary proposed tariff language require advanced permission was reasonable" but making no comment on the required contents of the application).

16 *Id.*

17 *See* Order ¶ 50.

"[i]f after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 15 day advance notice period and the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary."[18] Giving the utility time to make this determination is precisely the point of the 15-day advance notice period. Nothing in the rule prevents DP&L from inspecting its facilities and ensuring that they can handle new overlashing without unduly burdening overlashers by forcing them to do the work for the utility to make this determination.

2. Default Load Values

Similarly to its advanced notice proposal, DP&L proposes to modify the Commission's rules by adding "default load values" that it may use to determine whether an overlash "exacerbate[s] or create[s] a capacity, reliability or engineering issue."[19] DP&L argues that these values are necessary because given the potential number of poles on which an overlash may be planned, utilities need to be able to use some basic values to quickly determine if the overlash will create overloads.[20] But again, rehearing is unnecessary on this issue. First, this issue was addressed during the comment and reply comment periods.[21] DP&L has provided no new argument or additional evidence supporting its proposal; it has merely restated this argument

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18 47 C.F.R. § 1.1415(c).

19 *See* Application at 3-4.

20 *See id.* at 4.

21 *See* Initial Comments of Dayton Power and Light Company, Case No. 19-834-AU-ORD, at 9-10 (filed Aug 15, 2019) ("DP&L Comments") (proposing identical default load values and identical proposed rule language).

again in the Application.[22] An application for rehearing cannot simply be used as a vehicle for a second or third bite at the apple.[23] DP&L had ample opportunity to present evidence persuasive to the Commission. The Commission rejected DP&L's assertions and adopted the new rules.[24] DP&L's simple re-submission of previously presented arguments and assertions cannot be the basis for rehearing.

Second, the proposal itself lacks merit and runs counter to the Commission's goals in adopting these rules. Crown Castle disputes the accuracy of DP&L's proposed 1.7% and 3% presumptions, but even if they were correct, they do not justify DP&L's proposal. The only poles that would be put out of compliance by this relative load increase are: (A) already out of compliance prior to the overlash; or (B) are so close to 100% of load that they should have already been addressed by the pole owner anyway. The process of notifying pole owners prior to an overlash provides the opportunity to check those poles and address any existing issues in a timely fashion.

The purpose of the Commission's rules are to streamline deployments and reduce regulatory burdens.[25] While this proposal may make calculation of the load easier on utilities, it would effectively nullify the rules' prohibition on applications and extensive information gathering for overlashers.[26] DP&L's proposal would put overlashers back to square one by

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22 *See* Application at 3-4.

23 *See In The Matter of The Commission's Implementation Of Substitute House Bill 402 of The 132nd Ohio General Assembly*, Entry on Rehearing, Case No. 19-173-TP-ORD ¶ 17 (2019) ("*2019 Rehearing*") (denying rehearing on the ground that "OCTA has failed to raise any new arguments for the Commission's consideration that have not already been addressed by the Commission.").

24 *See* Order ¶ 29 (recounting DP&L's list of proposals); *see also id.* ¶¶ 49-50 (adopting no proposal submitted by DP&L).

25 *See id.* ¶ 49.

26 *See* 47 C.F.R. § 1.1415(a); *see also 2018 Order* ¶¶ 119, 119 n.444.

requiring them to submit extensive notices indicating the size of the cables they intend to overlash. While DP&L advances this proposal as streamlining its own opportunity for review, in reality, the proposal is simply an application or approval process in disguise. This is evident from the latter part of its proposed rule change which would allow the utility to "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."[27] Simply put, DP&L's proposal would defeat the purpose of the Commission's rule change in the first place.

Moreover, the proposal seeks to solve a problem that does not actually exist. Overlashing has been safely used for decades. In those rare cases where an overlash may have caused an issue, it can be remediated—at the overlasher's expense—during the post-overlashing review provided in the Commission's rules.[28] Moreover, conducting load studies for every pole or overlash is excessive and will typically only serve to increase costs and delay the availability of added bandwidth to businesses, municipalities, and residents of Ohio. Poles should be audited on a routine basis; these inspections are more useful in determining which poles are healthy versus those that are old or deteriorating. Performing load studies on healthy poles over and over again will not help identify overloaded poles, though it may provide a false feeling of comfort without addressing lurking issues elsewhere. Thus DP&L's arguments regarding default load values and its proposal to add them to the Commission's rules have not only been duly addressed

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27 Application at 4.

28 *See* 47 C.F.R. § 1.1415(e).

and rejected, but even if the Commission were to consider them again, they lack merit and nullify the purpose of the new rules.

3. Removal of facilities

DP&L also expresses concerns with the Commission's rules regarding unused facilities.[29] DP&L suggests that rather than installing new poles, obsolete and unused facilities should be removed, and proposes that "[a]ny notice of a planned overlash, should be accompanied by a representation that the existing facilities to which the overlash will be overlashed remain used and useful. If that representation cannot be made, then the existing facilities should be removed and the new facilities would become the primary attachment."[30]

Again, DP&L's argument here is not appropriate for, and does not merit, rehearing. DP&L presents no new or additional argument supporting rehearing that it did not already make in its initial comments. Nor does DP&L point out any way in which the Commission erred in its decision making. DP&L is simply repeating its initial argument, nearly verbatim, that overlashers should support this proposal, without explaining why or providing any support for putting the burden on overlashers for the removal.[31] The Commission already considered and rejected this argument.[32] DP&L presents no new argument from what the Commission already considered and ruled on, and DP&L articulates no explanation or basis for where the Commission may have erred in its analysis. Accepting DP&L's proposal to add removal of unused facilities as a condition of overlashing, now, would contravene the Commission's purpose in harmonizing state and federal regulations—reducing burdens on facilities deployment

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29 Application at 4-5.

30 *Id.* at 5.

31 DP&L Comments at 8

32 *See, e.g.*, *supra* note 24.

through overlashing. Therefore, the Commission should deny DP&L's Application for Rehearing on this issue.

4. Annual Overlashing Fee

DP&L proposes to modify the Commission's rules by adding a provision that would allow utilities to charge an overlashing party an "annual fee per affected pole equal to 50%-100% of the current tariff rate applied to other attachers."[33] Again, and as DP&L notes,[34] this is another recycled argument from its initial comments[35] that the Commission considered and rejected.[36] As stated previously, an application for rehearing is not an additional opportunity to comment on a proposed rule.[37]

Here, once again, DP&L provides no new evidence or support for its proposal or why it believes the Commission erred, other than the fact that the Commission rejected DP&L's proposal in the Order. For example, DP&L offers no basis for charging an overlasher an attachment fee other than saying that the utility poles, which would exist whether there was overlashing or not, are there and the overlasher "benefits" from them.[38] DP&L proceeds to argue that an existing attacher "should not view its existing attachment as creating the possibility of a windfall, second line of business."[39] But, in addition to presenting no evidence that attaching

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33 Application at 6.

34 *See id.* ("As in its initial Comments, [DP&L]'s recommendation is that the Commission establish an appropriate level of compensation somewhere between 50% and 100% of what other attachers are charged.").

35 *See* DP&L Comments at 11-13.

36 *See supra* note 24 ("DP&L . . . recommends that Ohio Admin. Code 4901:1-3-03(A)(7) be amended to . . . (6) charge a non-discriminatory annual fee to new overlashing entities." Order ¶ 29.).

37 *See 2019 Rehearing* ¶ 17.

38 *See* Application at 6.

39 *Id.*

parties engage in this type of arbitrage, it ignores the fact that DP&L's proposal would allow *utilities* to have a windfall profit by charging double fees for the same space on the pole.

Nothing DP&L states with regard to its fee proposal is novel in this proceeding, supported by anything more than DP&L's own assertions, or warrants rehearing in this case. Thus, DP&L's Application for Rehearing on this issue should be denied.

5. Pre-existing Violations

DP&L expresses concerns that a long standing problem with the Commission's rules, in general, has been issues regarding who bears the responsibility for correcting "newly discovered" pre-existing violations among utility pole attachments.[40] DP&L notes that in some cases, before a new attacher has even commenced the work of attaching its equipment or facilities, the utility discovers the pole is already overloaded or there is some other pre-existing problem with the attachments.[41] Furthermore, DP&L notes that often the new attacher resists paying for any of the make-ready work of correcting those existing violations, but also that existing attachers also refuse to pay for the corrections.[42] DP&L asserts that the new regulations do nothing to solve this problem and a mechanism is needed to address this problem.[43]

The problem with DP&L's proposal is not that it demands payment for correction by the party that caused the pre-existing condition. The problem is that DP&L's proposal uses the newly discovered condition as grounds to deny attachment or overlashing.[44]

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40 *See id.* at 7.

41 *See id.*

42 *See* Application at 7.

43 *See id.*

44 *Id.*

To the extent DP&L's proposal raises any new argument that the Commission did not already consider in adopting this rule, DP&L's argument is meritless. As the FCC explained in its *2018 Order*, there is good reason to reject the kind of proposal DP&L asks the Commission to adopt. First, as the FCC explained, while a new attacher or overlasher "may precipitate correction of the preexisting violation . . . it is the violation itself that causes the costs, *not the new attacher*."[45] DP&L's proposal would unfairly penalize and hold new attachers or overlashers responsible for problems they did not cause and, in doing so, deter deployment. Second, denying new attachers and overlashers access to facilities based on concerns from preexisting violations does nothing to correct the issue and effectively halts new broadband deployment. If there is an existing problem with a pole (or poles), the problem should have been addressed already; it is unjust to penalize the potential new attaching or overlashing party. DP&L makes no argument and provides no support refuting either of these arguments.

Thus, DP&L's proposal is without merit, and the Application for Rehearing should be denied.

B. The Existing Deadlines For Pole Replacements Are Reasonable And There Is No Need To Add Additional Time

The Commission also adopted new deadlines for make ready work, among other things.[46] These new deadlines harmonize Ohio's timelines for application review, surveying, engineering, and other steps with the federal timeframes in Sections 1.1411(g) and 1.1411(h) of the FCC's rules.[47] DP&L takes issue and seeks rehearing on these new deadlines arguing that prior deadlines align more closely with the public interest and better balance all stakeholder interests

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45 *See 2018 Order* ¶ 121 (emphasis added).

46 *See* Order ¶ 50.

47 *See id.*; *see also* 47 C.F.R. § 1.1411(g), (h).

in facilities deployment and maintenance.[48] Furthermore, DP&L argues that the language of Section 1.1411(h) is vague and subject to debate since with unlimited resources anything could be feasible.[49] DP&L threatens to raise rates on utility customers to meet the Commission's new deadlines unless the Commission amends its adopted rule to make clear that make-ready work that requires pole replacement is one of the permitted deviations under Section 1.1411(h)(2).[50] Thus, in lieu of raising utility rates to cover "unlimited" costs, DP&L proposes that the new rules should add a provision that would allow a 30-day extension for proposals that require pole replacements.[51]

Crown Castle does not oppose DP&L's Application for Rehearing on this issue insofar as it provides more certainty and predictability to the amount of time that may be added for projects requiring pole replacements due to "infeasibility."[52] Crown Castle believes that the rules as adopted have the benefit of adding flexibility to the process of infrastructure deployment. However, Crown Castle recognizes that the specific language granting a utility the ability to deviate from the timelines in the rules for "no longer than necessary"[53] is open to potential conflict. This language can add uncertainty and unexpected delays to the process of completing make-ready work and ultimately deploying broadband networks. DP&L's proposal of adding up to an additional 30 days to projects requiring pole replacements[54] would remove this certainty and likely eliminate unnecessary and time-consuming negotiations and delays.

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48 *See* Application at 8.

49 *See id*. at 9.

50 *See id.* at 8-9.

51 *See id* at 9.

52 *See* 47 C.F.R. § 1.1411(h)(2).

53 *Id.*

54 *See* Application at 9.

The rules as adopted provide flexibility for extending make-ready timelines, but rather than giving utilities an automatic or generally applicable, straight forward extension, the rules take a more case-by-case approach. Crown Castle does not oppose DP&L's proposed amendment on this point to the extent it imposes clear and well-defined cap on the amount of time a utility may extend the timeline to complete make-ready work when a pole replacement is required.

III. CONCLUSION

Crown Castle appreciates the opportunity to once again participate in this proceeding and thanks the Commission for its commitment to broadband deployment and simplifying its rules to facilitate that deployment. For the foregoing reasons, the Commission should deny DP&L's Application for Rehearing.

Respectfully Submitted

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CERTIFICATE OF SERVICE

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

/s/ *Rebecca L. Hussey*
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Summary: Memorandum Memorandum Contra Application for Rehearing of DP&L electronically filed by Ms. Rebecca L Hussey on behalf of Crown Castle Fiber LLC