BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Time Warner NY Cable LLC,	:	
Complainant,	:	
		Case No. 09-379-TP-CSS
v.	:	
Cincinnati Bell Telephone Company LLC,	:	
Respondent,	:	
Relative to a Complaint Pursuant to Section 4905.26, Revised Code.	:	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

On May 4, 2009, Time Warner NY Cable LLC ("TWC") filed a Complaint pursuant to Revised Code §§ 4905.26 and 4905.71 against Cincinnati Bell Telephone Company LLC ("CBT") alleging that TWC had been overcharged for pole attachments in 2007, 2008 and 2009. TWC sought a declaration that CBT's filed tariff rates for those years exceeded the maximum permissible rates and claimed entitlement to a refund or credit towards future invoices for the alleged overcharges.

On June 3, 2009, CBT moved to dismiss TWC's Complaint because it fails to state reasonable grounds for complaint. TWC's Complaint attempts to change CBT's tariffed rates retroactively and the Commission only has authority to modify a tariff rate prospectively. With respect its request to set new prospective rates, TWC lacks standing to challenge CBT's Cable Only attachment rate because the Complaint assumes that all of TWC's pole attachments are used for telecommunications purposes.[1] With respect to the prospective rate for All Other

[1] See Complaint, n. 1.

attachments, the FCC's telecommunications rate formula authorizes a maximum rate in excess of $8.00, so there is no basis for TWC's requested relief. The Complaint should be dismissed in its entirety.

In its opposition to CBT's Motion to Dismiss, TWC makes a number of unfounded arguments. But this case basically boils down to three issues: 1) whether the filed rate doctrine precludes TWC's from challenging CBT's rates; 2) whether the Commission has adopted the FCC's telecommunications rate formula for Ohio; and 3) whether that formula permits CBT to charge TWC an $8.00 pole attachment rate for 2009. CBT submits that TWC is wrong on all three of these issues and its Complaint must be dismissed.

I. TWC Has Alleged No Proper Basis For Avoiding the Filed Rate Doctrine.

TWC contends that CBT's pole attachment rates are not subject to the filed rate doctrine because the Commission did not expressly approve those rates for the years 2006-2009. There is no such limitation on the filed rate doctrine. The filed rate doctrine is not dependent upon how the filed rate came into being. There is no requirement that the rate be prescribed by the Commission for it to become the filed rate. And, where the Commission has approved a rate, that rate does not cease to be the filed rate merely due to the passage of time.

Revised Code § 4905.30 requires every public utility to file schedules with the Commission showing all rates for every kind of service furnished by it.[2] Revised Code § 4905.32 prohibits a public utility from charging a different rate for any service than that applicable to such service as specified in its schedule filed with the Commission. While the Commission may, pursuant to a complaint filed pursuant to Revised Code § 4905.26, find a rate

[2] Pursuant to Chapter 4927, the Commission has removed the requirement to file tariffs with respect to certain services. Pole attachments are not among the services that have been detariffed.

unreasonable, it may only prescribe the rate to be charged prospectively thereafter.[3] It is black letter law in Ohio that the Commission may not retroactively change a filed rate.[4]

A. The Filed Rate Doctrine Is Not Dependent Upon the Commission Setting Rates.

TWC argues that the filed rate doctrine does not apply because CBT's rate has not been "established or approved" by the Commission, citing *Ohio Edison v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 419, 384 N.E. 2d 283. Wrong.

The filed rate doctrine in Ohio is not dependent upon specific Commission approval of the filing. This was demonstrated in *Correll v. Ohio Bell Tel. Co.* (Stark Cty. 1939), 63 Ohio App. 491, 17 O.O. 211, 27 N.E.2d 173, where the court enforced a limitation of liability in a telephone company's tariff to preclude a customer from recovering damages for being omitted from the telephone directory. The court followed the logic of Justice Brandeis in *Western Union Telegraph Co. v. Esteve Bros. & Co.* (1921), 256 U.S. 566, 571-7265 L.Ed. 1094, 41 S.Ct. 584. Western Union was not required to include the liability provisions in its tariff by law or any order of the Commission. Nevertheless, Justice Brandeis enforced the terms of the tariff as part of the filed rate:

> But the rate, long before established, then formally adopted and filed, was thereafter the only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent. * * * The company could no more depart from it than it could depart from the amount charged for the service rendered. * * * Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but as a matter of law by which a uniform liability was imposed.

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[3] *Lucas County Commissioners v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 686 N.E.2d 501; *Ohio Util. Co. v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 153, 157-58, 12 O.O.3d 167, 169-70, 389 N.E.2d 483, 486-87.

[4] *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St3d 125, 130, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27.

> Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect.[5]

The plaintiff argued that the filed rate doctrine, which had developed with respect to railroad tariffs which had to be approved by the ICC, should not apply to telegraph companies who faced no such requirement. Justice Brandeis rejected that argument as ignoring the principal goal of the filed rate doctrine – to promote non-discrimination and uniformity of rates. Once a tariff is filed, all parties are bound by its terms. Accordingly, the *Correll* court applied the filed rate doctrine to enforce a similar limitation of liability without any showing that the Commission had approved the tariff conditions, only that the telephone company had filed the schedule with the Commission as required by law.

TWC erroneously relies on Justice Brandeis' opinion in *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922), to construct an argument that the filed rate doctrine only applied because of approval of the filed rate by the ICC. The relevance of ICC rate approval in *Keogh* was to preclude an antritust claim that railroads conspired to charge higher rates than otherwise would have prevailed. The Court found that there could be no antitrust claim because the ICC had found the rates reasonable and non-discriminatory. It did not find rate approval a necessary condition to the filed rate doctrine. The published tariff established the legal rights between the shipper and carrier unless and until suspended or set aside.[6] The stringent filed-rate doctrine prevailed "because otherwise the paramount purpose of Congress – prevention of unjust discrimination – might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a

[5] 256 U.S. at 571-72.
[6] 260 U.S. at 163.

preference over his trade competitors."[7] Thus, regulatory approval was not a necessary ingredient to enforcing the filed rate doctrine – it was to prevent discrimination and promote uniformity of treatment.

The fallacy of TWC's reliance on *Keogh* is shown directly in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), also cited by TWC in support of its argument that rate approval is a condition of the filed rate doctrine. "In this case, unlike *Keogh*, respondents' rates, established in the tariffs that had been filed with the ICC, were not challenged in a formal ICC hearing before they were allowed to go into effect. They were, however, duly submitted, lawful rates under the Interstate Commerce Act in the same sense that the rates filed in *Keogh* were lawful."[8] The allegations of the complaint, assumed to be true for purposes of the opinion, were that "[a]lthough the ICC has the power to determine those rates, the rates are set by the carriers, not the ICC, in the first instance."[9] The Court declined to overrule *Keogh* and essentially expanded it to include any filed rate, whether or not the rate was approved.

Similarly, in *Suburban Power Co. v. Pub. Util. Comm.* (1931), 123 Ohio St. 275, 175 N.E. 202, the Ohio Supreme Court found that an electric customer with a contract incorporating the standard terms and conditions of service in schedules on file with the Commission could not avoid them. There was no indication that the Commission had approved the terms and conditions of service, only that they were contained in the schedules on file.

Even one of the cases TWC relies upon for its contention that only Commission-approved rates are worthy of the filed rate doctrine, *Green Cove Resort I Owners' Ass'n v. Pub. Util. Comm.* (2004) 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, involved stipulated

[7] *Id.*
[8] 476 U.S. at 417.
[9] 476 U.S. at 413.

rates. As recited in the procedural history of that case,[10] the Commission Staff and the utility entered into a stipulation, which the Commission approved in a January 20, 2000 Entry in Case No. 99-78. The Commission did not establish the rate, which was reached through negotiation by the parties. Nevertheless, the Ohio Supreme Court still prohibited any refund of the previously approved rates based upon *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 2 O.O.2d 85, 141 N.E.2d 465, "[w]here the charges collected by a public utility are based upon rates which have been *established* by an order of the Public Utilities Commission of Ohio."[11] Note the use of the word "established." The *rates* in *Green Cove* were not established by the Commission in the sense that the Commission determined the amount; the rates were established by virtue of an order that approved a stipulation, exactly what happened with CBT's pole attachment rates in 1998. Those rates were "established" by the Commission when it approved the stipulation of the parties in Case No. 96-899-TP-ALT. The Commission expressly found that "[t]he rates, terms and conditions set forth in tariffs filed pursuant to the stipulation [we]re consistent with this opinion and order"[12] and approved CBT's proposed tariffs, subject to the terms set forth in the opinion and order.[13]

Of course, the exact tariff pages approved with the Stipulation would only have contained the pole attachment rates applicable in 1998. However, CBT was further ordered to comply with the terms of the plan and the stipulation approved in Case 96-899, which included pre-approved rate increases in each year from 1998 through 2005. CBT filed tariff changes showing these rate increases every year until it reached the maximum stipulated rate of $8.00 in 2005. That rate has remained unchanged since.

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[10] 2004-Ohio-4774, at ¶ 3.
[11] 103 Ohio St.3d at 130, ¶ 27 (emphasis added)
[12] Order, p. 21, paragraph (6).
[13] Order, p. 22, Fourth Ordering Clause.

B. The Filed Rate Doctrine Is Applicable to CBT's Pole Attachment Rates for 2006-2009.

TWC concedes that, if applicable, the filed rate doctrine bars any retroactive attack on CBT's filed tariff rates. Hence, TWC concocts arguments why the filed rate doctrine should not apply here. TWC bases these arguments mainly on its contention that the Commission has not "established or approved" CBT's pole attachment rates. First, as discussed above, it is not a requirement of the filed rate doctrine that the Commission establish or approve a rate; all that is required is that the rate be the filed rate, about which there is no dispute here.

On its claim that CBT's pole attachment rates have not been approved, TWC is simply wrong as a matter of fact. The Commission undoubtedly approved CBT's pole attachment rates in 1998 when it approved the stipulation in Case No. 96-899-TP-ALT. The Commission noted in its order approving the stipulation that, under Alternative Regulation Rule IX(G)(1), because the stipulation was unopposed, the plan could have gone into effect automatically 31 days after it was filed with the Commission.[14] Nevertheless, the Commission "believe[d] it is important for the stipulation to be reviewed through this opinion and order to consider the reasonableness of the agreement and to ensure that is in the public interest." The Commission reviewed proposed new tariff pages CBT had filed to implement the terms of the stipulation and found "that the tariffs conform to this opinion and order and should be approved."[15] In its Findings of Fact and Conclusions of Law, the Commission authorized CBT to withdraw its current tariffs and to file in final form the tariffs it had approved.[16] CBT was ordered to comply with the terms of the plan and the stipulation.[17] With respect to pole attachments, that meant CBT was required to establish

[14] Opinion and Order, at p. 6.
[15] *Id.*, p. 20.
[16] *Id.,* p. 21, ¶ (10).
[17] *Id.*, p. 22.

rates in accordance with the schedule set forth on page 42 of the stipulation.[18] The Commission's order further provided that "[t]he rates in the new tariffs shall be applicable to all service rendered *on or after the effective date*."[19] Nothing said that any tariff would expire at the end of the alternative regulation plan if not withdrawn or replaced. To the contrary, the Stipulation expressly stated that all rates would continue in place.[20] Tariff rates continue in force and effect until something happens to change them, either a company initiated request for a rate increase or a customer complaint seeking to establish a lower rate. Nothing occurred to change the pole attachment rates from the time CBT filed its last rate increase to the $8.00 rate in 2005, so that rate remained the lawful approved rate. The $8.00 rate is and has been the filed rate for all relevant time periods covered by TWC's complaint.

TWC dwells on the fact that the stipulation only established rates for the years 1998-2005. This argument is specious at best. The stipulation called for the transition of CBT's pole attachment rates over a period of seven years. However, at the end of 2005, the rates would not simply "go away." There was nothing temporary about the rate increases or any indication that the 2005 rates would not remain in place indefinitely thereafter until changed by a new filing. No changes have been made to the tariff rates since CBT's 2005 tariff filing, so the $8.00 rate

[18] Stipulation, § VI.3.v.
[19] *Id.*, p. 22 (emphasis added).
[20] The initial term of CBT's alternative regulation plan in Case No. 96-899-TP-ALT was only three and a half years. Stipulation, § VI.A, p. 17. The Plan also contained provisions detailing how the plan could be extended or terminated. In the event CBT withdrew from the Plan, "all rates for services will be fixed at the levels in effect on the date the Request was filed pending further order of the Commission. Any rate change thereafter, except switched access rate changes due to mirroring, will be made in accordance with the requirements of Sections 4909.18 and 4909.19, Revised Code, or through a new alternative regulation plan under Chapter 4927, Revised Code, or any other manner as provided by law." Stipulation, § VI.D, pp. 21-22.

has remained the filed rate in effect. Tariff rates remain in effect until they are affirmatively changed.[21] There is no requirement to file a new rate schedule when the rates do not change.[22]

Therefore, there is no reasonable ground for complaint with respect to the amount TWC has paid CBT for pole attachments. TWC has had the opportunity since 2006 to contest the reasonableness of CBT's tariff rates, but failed to do so until May 2009. Having waited until several months after the due date of the 2009 pole attachment invoice,[23] TWC has no basis to avoid paying the filed rate for 2007, 2008 or 2009. The $8.00 rate was in effect on the due date and must be paid.[24]

II. The FCC's Telecom Pole Attachment Rate Formula Does Apply in Ohio.

TWC's Complaint alleges that the Commission has not approved of the use of the FCC's telecommunications rate formula in Ohio. Contrary to TWC's assertions, this Commission has approved the use of a higher non-cable pole attachment rate in Ohio, both in CBT's alternative regulation proceeding, Case No. 96-899-TP-ALT, and in the rules generally applicable to local exchange carriers. TWC's argument that the Commission uses only the FCC's cable formula for all kinds of pole attachments is unfounded and has grown stale.

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[21] See Ohio Admin. Code § 4901:1-7-23(B) ("Any change in the public utility's tariffed rates, terms, and conditions for access to poles, ducts, conduits, or right-of-way shall be filed in a UNC proceeding.").

[22] *Gene Slagle, Inc. v. Pub. Util. Comm.* (1977), 50 Ohio St.2d 88, 362 N.E.2d 652.

[23] Pursuant to § 3.1.1.C of CBT's tariff, charges for pole attachments are payable in advance annually on the first day of January.

[24] *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 259, 141 N.E.2d 465 ("a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates"); *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 130, 2004-Ohio-4774, 814 N.E.2d 829, at ¶ 27 ("Neither the commission nor this court can order a refund of previously approved rates . . .").

A. The Commission's Rules Governing Local Exchange Carriers Call for the Application of the FCC's Telecommunications Pole Attachment Rate Formula.

As already discussed, in Case No. 96-899-TP-ALT, the Commission approved a Stipulation in which CBT's pole attachment rates moved from its then unitary rate to a dual rate system. Had the Commission truly intended in 1983 (as TWC claims) to cap all pole attachment rates forever at the FCC cable formula, it could not have approved the rates in the stipulation. Furthermore, TWC omits the entire regulatory history of pole attachment rates in Ohio between the 1983 rate case order that it prefers and the 2007 rules that it does not. Unfortunately for TWC, that history also supports the use of both FCC rate formulas.

TWC clings to the notion that the Commission has forever adopted the FCC's "Cable Formula" to set the maximum rates for all kinds of pole attachments. There have been a number of changes since the 1983 decision cited by TWC[25] that render it no longer applicable (even if it *ever* meant what TWC claims). Section 4905.71 and the regulation of pole attachments was relatively new in the early 1980s, so the proper methodology to set pole attachment rates was an open issue. Despite extensive testimony on the issue from CBT and the OCTA, the Commission declined to discuss it in detail because it had "decided to adopt the formula used by the Federal Communications Commission (FCC) in setting such rates."[26] Contrary to TWC's implication, the Commission did not select the "Cable Rate" formula over the "Telecom Rate" or any other FCC formula. At the time there was only one FCC formula – the 1996 Telecommunications Act and the FCC rules that established the dual rate scheme did not yet exist. And, while the Commission stated that it would use the FCC formula "in all cases," it did not mean that in the

[25] *Application of Cincinnati Bell Inc. for Authority to Adjust its Rates and Charges and to Change its Tariffs*, No. 81-1338-TP-AIR.
[26] Opinion and Order (Jan. 7, 1983).

context that TWC now implies. It meant that the formula would be used in all individual rate cases in which pole attachments were an issue, so that the Commission would not have to individually decide in each company's rate case how it should price pole attachments. The Commission did not indicate that the FCC's 1981 formula would apply forever to all types of pole attachments if circumstances changed (as they have).

TWC is technically correct that, because Ohio is a certifying state, the Commission decides whether to adopt changes in federal law. However, it is incorrect in its assertion that the Commission has not done so. In 1995, in advance of the passage of the 1996 Act, the Commission conducted a proceeding in which it established rules for local telephone competition.[27] In Staff's original rules proposal, released September 27, 1995, it proposed that pole attachment rates "be set based on the FCC formula unless the carrier can demonstrate the need to deviate from that formula."[28] After the 1996 Act went into effect on February 8, 1996, the Commission released a revised set of Local Competition Guidelines on June 12, 1996. Section 224(e) of the 1996 Act had directed the FCC to issue new rules within two years governing pole attachments used for non-cable television purposes. Anticipating such new rules, in the second iteration of the Local Competition Guidelines pole attachment prices were to "be set based upon the prevailing FCC formula, unless either LEC can demonstrate the need to deviate from that formula."[29] The Commission noted in its Order: "[I]n light of the fact that the FCC will not promulgate rules to govern the compensation of local carriers for providing access to poles, ducts, conduits, and right-of-way for up to two years, staff's recommended

[27] Case No. 95-845-TP-COI.
[28] Proposed Rule IX.B.2.
[29] Proposed Rule XII.B.2.

compensation method is a reasonable proposal."[30] The Commission further stated: "Under the terms of the 1996 Act, any increases in the rates for pole attachments that result from adoption of the requirements of the act are to be phased in over a period of five years following the date of enactment."[31] This referenced the requirement in Section 224 of the 1996 Act that the rates for pole attachments used for telecommunications purposes would not be fully effective for five years. These comments clearly anticipated and accommodated the FCC rule changes that the Commission knew would be coming.

In late 1996, the Commission released yet another revised draft set of Local Competition Guidelines, which now stated that "prices for pole attachments shall be set at a rate that does not exceed the maximum amount permitted by the *prevailing* FCC formula."[32] The use of the word "prevailing" is important. The Commission recognized that the 1996 Act called for the FCC to establish two sets of pole attachment rates; one for cable only and one for telecommunications usage. The FCC had announced that it would be initiating a separate rulemaking proceeding to carry out the mandate of Section 224(e)(2).[33] The Commission's order anticipated that there would be more than one formula and/or that the existing formula might change, hence, the need to apply the "prevailing" formula. Otherwise, that word would be surplusage, as there cannot be a "prevailing" formula unless there is more than one. Notably, the Commission never said that it would use only the "Cable" formula as TWC now contends. This evidences that the Commission was not stuck on the singular FCC formula that it had adopted in the early 1980s.

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[30] Finding and Order (June 12, 1996), p. 59.
[31] *Id.*, fn 36.
[32] Proposed Rule XII.B.4 (emphasis added).
[33] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, First Report and Order, FCC 96-325 (released Aug. 8, 1996), at ¶ 1192.

The FCC finally announced its new formula for pole attachments in early 1998, while CBT was still negotiating the terms of the stipulation in Case No. 96-899.[34] Application of the new dual rate formulas became an issue in the negotiation of CBT's stipulation – in fact, at least one draft exchanged between the parties included verbiage adopting the telecommunications formula prescribed by the FCC in its February 6, 1998 Report and Order in Docket 98-20. However, the parties to the stipulation were ultimately able to agree on actual prices, so citation to the formula was replaced with the schedule of actual price increases. Despite its contention that the Commission has not approved of the use of dual rates, one for cable only and one for all other uses of pole attachments, TWC has no explanation why the Commission would have approved such dual rates, one set of which exceeded the maximum rate that could be derived using the FCC's cable only formula. Thus, the Commission necessarily accepted the notion of applying the FCC's telecommunications formula to establish pole attachment rates. In any event, by virtue of the FCC's 1998 rulemaking, its new telecommunications formula became the "prevailing" formula for attachments not used solely for cable and would have applied even if the parties had not agreed on actual rates.

Of course, the Commission rendered all argument over this moot when it adopted its new local competition rules in 2007. Rule 4901:1-7-23(B) specifically adopts the "formulas" in FCC Rule 1.1409(e). TWC now contends that the reason for the plural "formulas" is so that the conduit formula would be included,[35] but that the Commission did not intend to use the telecommunications formula. There is no legal or logical basis for this conclusion. FCC Rule

[34] Report and Order, *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, FCC 98-20 (released Feb. 6, 1998).

[35] Note that the Stipulation in Case No. 96-899 already adopted the FCC's methodology for calculating conduit rates on an ICB basis for new conduit occupancy. Stipulation, p. 43, § VI.3.w.

1.1409(e) contains *three* formulas: (1) the formula for cable operators providing cable services (which also applied to telecommunications services until February 8, 2001); (2) the formula for attachments by telecommunications carriers or cable operators providing telecommunications services (effective February 8, 2001); and (3) the formula for use of conduit. TWC absurdly contends that the Commission only intended to adopt formulas (1) and (3), but to skip formula (2) in order to cling to a statement made in 1983. The only basis for this argument is that, because the Commission adopted the FCC's *only* formula in 1983, it must have intended to stick with that formula forever with respect to poles and only to adopt the conduit formula.[36] For the Commission to have selectively chosen to use only two of the three FCC formulas, Rule 4901:1-7-23(B) would had to have adopted only "the formulas in 47 C.F.R. 1.1409(e)(1) and (3)," not "the formulas in 47 C.F.R. 1.1409(e)." Remember, even in 1998, the Commission's then-existing local competition rules called for application of the "prevailing" FCC formula. The word "prevailing" connotes the possibility of there being more than one formula (and everyone knew from § 224(e) of the 1996 Act that a new formula was coming). Thus, the Commission anticipated that there would be a future choice as to which formula to use. With the 2007 rules, the Commission confirmed that *all* of the FCC formulas were to be used. And FCC Rule 1.1409(e)(2) plainly states that it applies to cable operators when providing telecommunications services.[37] For purposes of this proceeding, TWC has asked the Commission to assume that it is providing telecommunications services. Therefore, the telecommunications formula in 1.1409(e)(2) applies and governs the rate that CBT may charge TWC for pole attachments.

[36] The current FCC cable formula is not even the same as the one in place in 1983.

[37] This also debunks TWC's claim that the "cable" rate applies to cable companies as entities, regardless of the services they offer. The FCC rules distinguish between attachments used by cable operators only for cable purposes [Rule 1.1409(e)(1)] and those used by cable operators for telecommunications services [Rule 1.1409(e)(2)].

TWC argues that the Commission should follow the lead of several other "non-FCC" states and use only the cable formula for all pole attachments. CBT submits that to follow the lead of those few states would be to follow the minority approach. Congress and the FCC have established a policy that providers of telecommunications services that attach to poles should bear some of the cost of the unusable space. While eighteen states have certified that they regulate pole attachments, the other thirty-two have yielded to the FCC, making the FCC rules applicable in at least 64% of the states. Even among those eighteen states, TWC only identifies five that have declined to apply the FCC's telecommunications formula, hardly suggesting a unanimity of thought. Through its adoption of Rule 4901:1-7-23(B), this Commission has affirmatively chosen to follow the majority policy set by the FCC, as well it should. Cable companies enjoy a subsidized pole attachment rate because they avoid paying any of the cost of the unusable space on poles. Now that cable companies are providing phone service in direct competition with telephone companies using the telephone companies' property, it is wholly fitting and proper that they share in those costs. Otherwise, the rates would be discriminatory in favor of cable operators providing phone service.[38] While a rate that only covers marginal costs might meet the constitutional minimum standard for compensation, it hardly represents good policy or fairness.

[38] The FCC has a pending notice of proposed rulemaking proceeding in which it is reconsidering pole attachment policies. *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments,* FCC 07-187 (released Nov. 20, 2007). The FCC expressed skepticism of TWC's assertion that the cable rate should apply to all pole attachments, particularly because the cable rate does not include an allocation of the cost of unusable space. *Id.*, ¶22. The FCC sought comment on whether TWC's arguments in support of a unitary pole attachment rate "necessarily suggest that we should adjust the cable rate 'up' to resemble the telecom rate." *Id.,* ¶ 31. The FCC also reached the tentative conclusion that rates for pole attachments used for broadband Internet access should be higher than the cable rate, yet no greater than the telecommunications rate. *Id.*, ¶ 36.

III. There Is No Reasonable Basis For Reducing CBT's 2009 Pole Attachment Rate Below $8.00.

TWC criticizes CBT's calculation of the permissible telecommunications rate on grounds that CBT allegedly uses the wrong data, that the data source is unknown, and that CBT does not provide enough information to overcome the presumption that there are five attaching parties. None of these arguments is valid or sufficient to reduce the maximum pole attachment rate CBT may charge TWC below $8.00. Therefore, there is still no reasonable basis for complaint.

TWC acknowledges that CBT can overcome the FCC's presumption of five attachers by showing that the average number of attachers is lower, using either a statistically valid survey or actual data. CBT did so by providing actual data, shown at the bottom of its Exhibit B. TWC questions this data because it is labeled as the number of "attachments" rather than the number of "attachers." CBT's data represented the number of attaching parties, not the number of attachments, so this was a mere labeling error. However, even if TWC had been correct, this would have been a criticism without substance. Even if CBT's data had reflected attachments, it would have overstated the number of attachers by treating multiple attachments by the same party on the same pole as multiple attachers. Thus, any error in the calculation would have been skewed in TWC's favor and would not have been a basis for discarding the data.

Second, TWC argues that data should not be accepted unless it is regularly updated. TWC asserts that CBT "offers no hint as to how recent its data might be." Apparently, TWC did not read CBT's description of the data in its Motion to Dismiss. As CBT stated in footnote 11: "Since responding to TWC's Motion to Prevent Termination of Service, CBT has updated its calculation of the average number of attachees to use the most current data." CBT filed that response on May 14, 2009, obviously meaning that the data used was more recent than May 14. In point of fact, the queries of CBT's pole tracker database were performed on May 29, 2009 for

the June 3, 2009 filing, so the data could not have been any more recent. Furthermore, this was no "sample" or "survey" of data but a complete picture of all Ohio poles in its database (note the total number of poles was 98,953).

Thirdly, TWC challenges CBT's calculation of the average number of attaching parties, contending that the minimum possible number of attachers is two. With respect to the cited case, *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 17 FCC Rcd 19859 (2002), the FCC found that Georgia Power had erred by not including its own attachments in the calculation of the average.[39] Here, CBT has included all of its own attachments, so this criticism is invalid. The presumption of two attachers should not apply in TWC's case because this is not a situation where TWC is seeking its first pole attachment. The logic behind the presumption is that the prospective attacher is not yet on the pole, so to allocate costs appropriately it should be assumed that they will be. However, in this case TWC's usage of poles is quite mature, as it is already present on more than 53,000 poles and its number of attachments only changes marginally from year to year. To assume that every pole will have at least two attachers would overstate the average because there is no reason to expect that each of those poles with a single attacher will acquire a new attacher.

Nevertheless, even indulging TWC's point for the sake of argument, it still does not lower CBT's pole attachment rate below $8.00. As shown in the data at the bottom of Exhibit B

[39] TWC's citation to FCC rulings on whether other entities met the FCC's proof requirements under its complaint procedure are inapplicable to a complaint before this Commission. In Rule 4901:1-7-23(B), the Commission did not adopt FCC Rules 1.1404 or 1.1407, governing complaints and responses and associated FCC evidentiary practices. In FCC practice all evidence is submitted with complaints, answers and replies and there are no other opportunities for the parties to make evidentiary submissions. Thus, the failure of the utilities in cases before the FCC to follow its rules and submit evidence in the form it requires has no bearing on whether CBT can demonstrate the merits of its position before this Commission. In the event the Commission needs to hear evidence in this case, it has the opportunity to hold an evidentiary hearing, something that is not contemplated in FCC practice.

to CBT's Motion to Dismiss, 24,883 of CBT's 98,953 poles have no attachers other than CBT. There are two ways to treat this category of poles: they could be excluded from the calculation as TWC suggests or, more appropriately, the Commission should simply assume that there are two, not one, attachers on each of them. All of CBT's poles should be included in the calculation because all of CBT's pole costs are included. Under TWC's extreme approach of excluding all single attachment poles, the average number of attachers increases from 2.2001 to 2.6033.[40] Assuming that all of the 24,883 single attachee poles would have two attachees and including them in the calculation, which is more reasonable than ignoring them, would only increase the average to 2.4516. These recalculated averages would only have the effect of reducing the "charge factor" in the calculation from 22.06% to 19.06% or 20.07% respectively. Even these smaller charge factors would only reduce the maximum telecommunications pole attachment rate from $11.75 to either $9.03 (using TWC's assumptions) or $10.69 (using CBT's), both well above the $8.00 rate CBT charges. In fact, the charge factor could be as low as 15.01% (which translates to an average number of attachees of 3.4566) and still justify an $8.00 rate. Thus, the Commission could even assume one additional attachee on *every* pole in CBT's inventory and still not reduce the rate below $8.00. Thus, under no set of circumstances postulated by TWC can it justify a rate lower than the one charged by CBT and the complaint should be dismissed.

[40] Attached hereto as Exhibit A is a recalculation of the maximum telecommunications attachment rate showing the effects of the treating poles with only one attaching party differently. The calculation of the average number of attaching parties is shown at the bottom of page 2. The resulting average is then used in the calculation of the pole attachment rate. The TWC column uses all of its original assumptions except for the presumption of five attaching parties. The CBT column uses its method for addressing the poles with only one attaching party and also corrects the ARMIS data errors.

Finally, TWC criticizes CBT's update of its 2008 ARMIS data on file with the FCC. TWC argues that this "new" data is unsupported and it intends to test the reliability in discovery and at hearing. Apparently, TWC had no problem accepting the reliability and veracity of CBT's previous ARMIS submissions. However, closer inspection reveals that TWC "made up" one of the numbers it used in its calculation. TWC attached copies of the versions of CBT's ARMIS filings that it used in its calculations with its Complaint. The 2008 ARMIS report shows a total "Telecommunications Plant-in-Service" of $198,524,000, which is obviously wrong given that the same figure for 2006 and 2007, respectively was $1,752,299,000 and $1,779,043,000. Instead of questioning the accuracy of the 2008 figure, TWC simply multiplied it by a factor of ten and used $1,985,240,000 in its calculations. The real number, shown in CBT's corrected 2008 ARMIS filing was $1,799,316,000, very similar to the 2006 and 2007 numbers. In verifying the correct investment figure to use, CBT rechecked all of the other figures and discovered that "Accumulated Deferred Taxes" and "Accumulated Deferred Taxes (Poles)" were also erroneously reported, so it corrected those figures. TWC has no basis for asserting that CBT's corrected ARMIS data is incorrect. Yet, even assuming that the figures TWC used were correct (and they are not), so that its "carrying cost" rate is used in the calculation, CBT's rate would still be more than $8.00.

Even if the Commission accepted TWC's "carrying charge" factor of 11.57% which was based on the erroneous ARMIS data, the $8.00 rate is sustained with a "charge factor" as low as 16.88%. To reduce the "charge factor" that low would require that the average number of attachers be at least 3.0019, far higher than the number derived from TWC's calculation excluding all single attachment poles. Thus, any way the data is viewed – eliminating single user

poles or treating them as having two attachees; or using the original or the corrected ARMIS data – the FCC's telecommunications rates formula still justifies CBT's $8.00 rate.

CONCLUSION

A complaint for a refund cannot be used to contest the legality of a past rate (which the Commission may only change prospectively). The only basis for a refund complaint is that the incorrect charges were billed. Having agreed for purposes of this case that all of its pole attachments are used to provide telecommunications services, and there being no room for dispute as to the applicable tariff rate, TWC has no basis for not paying the 2009 pole attachment invoice in full.

For all of these reasons, the Commission should dismiss TWC's Complaint and order TWC to remit the balance owed, plus late charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following counsel by electronic service at the e-mails listed below, this 25th day of June, 2009.

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Exhibit A

Calculation of Maximum Rates
With Adjusted Number of Attachers

	TWC Adjusted	CBT Adjusted
NET INVESTMENT PER BARE POLE		
=Net Investment per Bare Pole	$409.51	$409.51
CARRYING CHARGES		
Maintenance	0.26%	0.26%
Depreciation	8.90%	8.90%
Administrative		
Administrative Expenses	68,903,000	68,903,000
Total Plant in Service	1,985,240,000	1,799,316,000
Administrative Carrying Charge	3.47%	3.83%
Taxes		
Normalized Tax Expense	58,175,000	58,175,000
Total Plant in Service	1,985,240,000	1,799,316,000
Tax Carrying Charge	2.93%	3.23%
Return		
FCC Default Rate	-3.99%	-3.21%
TOTAL CARRYING CHARGES	11.57%	13.01%
ALLOCATION OF ANNUAL CARRYING COSTS		
Space Occupied by Cable	1	1
/Total Useable Space	13.5	13.5
Charge Factor	7.41%	7.41%
FCC "Telecommunications" Rate		
Unusable Space Allocated to Telecom		
Total Unusable Pole Space	24	24
/Number of Entities	2.6033	2.4516
* Statutory Apportionment Factor (2/3)	0.67	0.67
= Unusable Space Allocated to Telecom	6.15	6.53
+ Usable Space Allocated to Telecom	1	1
= Total Space Allocated to Telecom	7.15	7.53
/Total Pole Space	37.5	37.5
Charge Factor	19.06%	20.07%
Net Investment Per Bare Pole	$409.51	$409.51
*Carrying Charges	11.57%	13.01%
*Charge Factor	19.06%	20.07%
=Maximum Telecom Rate	$9.03	$10.69

DATA ENTRY AND SOURCE		
Gross Investment in Pole Plant	$42,970,000	$42,970,000
Gross Investment in Total Plant	$1,985,240,000	$1,799,316,000
Depreciation Reserve for Pole Plant	$50,012,000	$50,012,000
Depreciation Reserve for TPIS	$1,594,348,000	$1,594,348,000
Pole Maintenance Expense 6411	$227,000	$227,000
Pole Rents	$115,000	$115,000
Chargeable Pole Maintenance	$112,000	$112,000
Depreciation Rate for Poles	8.90%	8.90%

Total General and Administrative	$68,903,000	$68,903,000
Taxes	$58,175,000	$58,175,000
Accumulated Deferred Taxes	-$1,149,000	$24,863,000
Accumulated Deferred Taxes (Poles)	$8,200,000	$5,234,000
Overall Rate of Return	11.25%	11.25%
Number of Poles	99,684	99,684

Conversion Data for ROR Element in Gross Calculation

Gross Investment in Pole Plant	$42,970,000	$42,970,000
-Depreciation Reserve for Poles	$50,012,000	$50,012,000
-Accumulated Deferred Taxes	$8,200,000	$5,234,000
=Net Investment in Pole Plant	-$15,242,000	-$12,276,000

Number of Attaching Entities per Pole - Current Ohio Data

Number of Attachments including CBT	Number of Poles	% of Poles	Number of Attachers
1	24,883	25.15%	24,883
2	30,814	31.14%	61,628
3	41,937	42.38%	125,811
4	1,215	1.23%	4,860
5	100	0.10%	500
6	4	0.00%	24
Total	**98,953**	**100%**	**217,706**

Attachments per Pole - Average 2.2001

Number of Attaching Entities per Pole - Eliminating Single Attachment Poles

Number of Attaching Parties including CBT	Number of Poles	% of Poles	Number of Attachers
1	0	0.00%	0
2	30,814	31.14%	61,628
3	41,937	42.38%	125,811
4	1,215	1.23%	4,860
5	100	0.10%	500
6	4	0.01%	24
Total	**74,070**	**75%**	**192,823**

Attachments per Pole - Average 2.6033

Number of Attaching Entities per Pole - Assuming Two Attachment Minimum

Number of Attaching Parties including CBT	Number of Poles	% of Poles	Number of Attachers
1	0	0.00%	0
2	55,697	56.29%	111,394
3	41,937	42.38%	125,811
4	1,215	1.23%	4,860
5	100	0.10%	500
6	4	0.00%	24
Total	**98,953**	**100%**	**242,589**

Attachments per Pole - Average 2.4516

Summary: Reply Memorandum in Support of Motion to Dismiss electronically filed by Mr. Douglas E. Hart on behalf of CINCINNATI BELL TELEPHONE COMPANY