

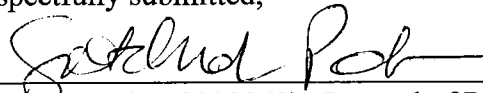
**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Cincinnati)	
Bell Telephone Company LLC to Add)	
Language and Rates for Access to Poles,)	Case No. 15-973-TP-ATA
Conduit, Rights-of-Way by Public Utilities to)	
the Access Tariff.)	

**THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION'S
MOTION FOR LEAVE TO FILE A REPLY *INSTANTER*
AND
MOTION FOR AN EXPEDITED RULING**

Now comes The Ohio Cable Telecommunications Association (“OCTA”), who seeks leave to file a reply *instanter* to the response filed by Cincinnati Bell Telephone Company LLC on August 24, 2015, in this proceeding. The OCTA makes this motion to (a) ensure that the Public Utilities Commission of Ohio has further information upon which to consider certain disputed issues in this matter and (b) present a proposal for the next procedural steps. The OCTA requests an expedited ruling on the motion for leave so that this motion can be considered expeditiously and not unduly delay the proceedings. The reasons supporting OCTA’s motion for leave and motion for an expedited ruling are set forth more fully in the attached Memorandum in Support.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT
OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION'S
MOTION FOR LEAVE TO FILE A REPLY *INSTANTER*
AND
MOTION FOR EXPEDITED RULING**

On February 25, 2015, as revised on April 22, 2015, the Public Utilities Commission of Ohio (“Commission”) ordered all public utility pole owners in Ohio to file amended tariffs that correspond with the Commission’s newly adopted administrative rules.¹ At the same time, the Commission established August 1, 2015, as the deadline for filing motions to intervene and objections in the tariff application dockets. Cincinnati Bell Telephone Company LLC (“CBT”) filed its tariff application on May 15, 2015, and the Ohio Cable Telecommunications Association (“OCTA”) timely filed a motion to intervene and its objections in this docket. By Entry issued August 7, 2015, the Commission granted the OCTA’s intervention request and allowed CBT the opportunity to respond to the OCTA’s objections.² CBT filed its response on August 24.

The August 7 Entry did not provide for an opportunity to reply to CBT’s response, or provide any indication as to how this matter would proceed after the pole owner’s response was filed. Now that the OCTA has reviewed CBT’s response (as well as those in the other pole attachment/conduit occupancy cases in which the OCTA is involved), the OCTA believes that a brief, targeted reply can complete the arguments in support of the remaining issues and assist the Commission in determining the next procedural steps in in this proceeding.

The OCTA stands by the arguments it made in its objections. In its objections, the OCTA raised a small number of concerns with CBT’s proposed pole attachment/conduit

¹ The Entry was issued in *In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-579-AU-ORD.

² The Entry was issued in this case, as well as ten other dockets involving applications to establish new pole attachment and conduit occupancy tariff provisions.

occupancy tariff revisions. CBT's responded to those objections, but CBT did not accept all of the OCTA's objections. Thus, there are issues remaining for Commission resolution. The OCTA wishes to reply regarding:

- Important issues involving (a) the scope of this proceeding, (b) ensuring consistency with the Commission's new rules, (c) overreaching, and (d) the 10 percent mark-up – replying to new information and arguments from CBT.
- Next procedural steps – suggesting that the Commission order an informal conference be held between CBT, the OCTA and the Commission Staff for possible informal resolution of the remaining tariff issues. In the event that a complete resolution is not reached, then a hearing may be held so that the parties can present the facts and arguments needed for determining the appropriate tariff provisions for the remaining issues.

The issues are technical and not straight-forward. CBT's response raised, for the first time, arguments to which the OCTA would like to reply. Also, the issues involve the inaugural tariff following the Commission's adoption of new industry-wide rules and regulations. As such, the OCTA believes that these disputed issues warrant careful deliberations so that CBT's pole attachment/conduit occupancy tariff will be fully compliant with the Commission's new rules and the public interest. The OCTA seeks leave to reply in a targeted manner to a few arguments made by CBT in its response. This brief additional reply can provide a fuller picture for the Commission to understand the complexities of these few issues. For these reasons, the OCTA seeks leave to reply to the new arguments.

In addition, in reviewing the pole owner's response in Case No. 15-971-EL-ATA (The Dayton Power and Light Company's pole attachment case), the OCTA believes there is merit to suggest an informal conference so that CBT, the OCTA and Commission Staff can discuss the outstanding issues. This is another avenue for resolving the disputed issues – as a means for

avoiding a hearing.³ In the event that a complete resolution is not reached, then a hearing may be necessary so that the parties have a full opportunity to present facts and arguments and the Commission can appropriately resolve the remaining disputed tariff provisions. Accordingly, the OCTA seeks leave to put forth that procedural suggestion to the Commission.

Nothing in the Commission's rules precludes the OCTA's leave request. Moreover, as has been found by the Ohio Supreme Court, the Commission has the discretion to manage its dockets, including allowing leave to file the requested reply:

As the Ohio Supreme Court has recognized, the Commission is vested with broad discretion to manage its dockets, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business.⁴

The OCTA's request is akin to the reply memorandum under the motion cycle set forth in in Rule 4901-1-12, Ohio Administrative Code:

Motion Cycle	Procedure Set Forth in this Case
Motion	Objections
Memoranda Contra	Response
Rely Memorandum	Reply (requested by OCTA)

Finally, the OCTA notes that its motion for leave will not *unduly* delay this proceeding. Automatic approval of the proposed tariff has been suspended and there is no timetable under which this matter will move forward. Moreover, the OCTA's Reply is being filed along with this motion for leave (as Attachment A) so that prompt consideration can be given.

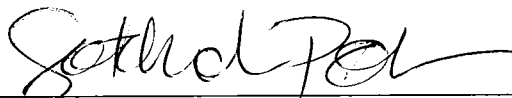
³ The OCTA's requested informal conference is an alternative dispute resolution option that seems appropriate when considering the Commission Staff's knowledge on the technical considerations involved. The Commission has incorporated another more formal alternative dispute resolution option for parties who are unable to agree on rates, terms, or conditions for a pole attachment/conduit occupancy agreement. *See*, Rule 4901:1-3-06, Ohio Administrative Code.

⁴ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO et al, Entry on Rehearing at 36 (May 28, 2015), citing *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 384 N.E. 2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St. 2d 559, 433 N.E. 2d 212 (1982).

In sum, the Commission has the flexibility and discretion to allow the filing of the reply. Also, OCTA's motion for leave to file a reply *instanter* is reasonable and presented for good cause. No harm will come from granting OCTA's request for leave. Rather, granting the OCTA leave will allow the OCTA to provide the Commission with more information regarding the disputed issues, and also suggest informal discussions among CBT, the OCTA and the Commission Staff, which could possibly resolve the remaining issues. Therefore, the Commission should grant the OCTA's motion.

Finally, the OCTA requests that the Commission issue an expedited ruling on this leave request. The OCTA has contacted CBT (the only other party in this proceeding) to determine if it objects to the issuance of an ruling on this motion without the filing of memoranda, as allowed under Rule 4901-1-12(C), Ohio Administrative Code. CBT does not object to the issuance of an immediate ruling on the motion for leave.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 10th day of September 2015 upon all persons/entities listed below:

Douglas E. Hart at dhart@douglasehart.com



Gretchen L. Petrucci

**ATTACHMENT A
to the OCTA Motion
for Leave to file a Reply**

**BEFORE
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**THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION'S
REPLY TO THE RESPONSE OF CINCINNATI BELL
TELEPHONE COMPANY LLC**

I. Introduction

Cincinnati Bell Telephone Company LLC ("CBT") filed its pole attachment/conduit occupancy tariff application on May 15, 2015, and the Ohio Cable Telecommunications Association ("OCTA") timely filed a motion to intervene and objections in this docket. By Entry issued August 7, 2015, the Public Utilities Commission of Ohio ("Commission") granted the OCTA's intervention request and allowed CBT the opportunity to respond to the OCTA's objections,¹ which it did on August 24.

The OCTA has reviewed CBT's response (as well as those in the other pole attachment/conduit occupancy cases in which the OCTA is an intervenor), and files this pleading to briefly reply to the CBT response. The OCTA believes that this targeted reply will assist the

¹ The Entry was issued in this case, as well as ten other dockets involving applications to establish new pole attachment and conduit occupancy tariff provisions.

Commission in determining the next procedural steps in this proceeding and ensure that the Commission has further information upon which to consider a few of the remaining issues.

II. Important Issues in Dispute

The OCTA raised a limited number of objections about the following in CBT's tariff:

- Definition of "Attachee's Communication Facilities"
- Overlapping
- Number of Poles in Multiple Applications
- Acceptance Period for Make-Ready Charges
- Period for Completing Make-Ready Work
- Ten Percent Mark-up on Work Performed

This will be the inaugural pole attachment/conduit occupancy tariff for CBT following the Commission's adoption of new industry-wide rules. Thus, these disputed issues warrant careful deliberations so that CBT's pole attachment/conduit occupancy tariff will be fully compliant with the Commission's new rules. These issues are technical and not straight-forward. In reply to the arguments made by CBT, the OCTA wishes to provide the Commission with further information for purposes of evaluating the issues raised in this matter regarding (a) the scope of this proceeding, (b) ensuring consistency with the Commission's new rules, (c) overlapping, and (d) the 10 percent mark-up.

Scope of this Tariff Proceeding: By Entry dated February 25, 2015, the Commission ordered all public utility pole owners to file company-specific tariff amendment applications.² The Commission elaborated that, "unless otherwise suspended by the Commission, the tariff revisions, including new rates, shall be automatically effective July 1, 2015." (Emphasis added)³ Then, the Commission issued an Entry on April 22, 2015, stating that interested stakeholders can

² *In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-579-AU-ORD (hereinafter referred to as the "Rules Docket").

³ *Id.*, Entry at ¶3 (February 25, 2015).

challenge the justness and reasonableness of the pole owners' tariffs by either seeking to intervene in the individual tariff proceedings or by filing a complaint.⁴ In that same Entry, the Commission also modified the timetable for the tariff filings, interventions, objections and automatic approval. In creating this process, the Commission never stated that the tariff applications can *only* propose new rates or that an intervening party can raise objections *only* as to the just and reasonableness of the new rates.

CBT, however, has taken a very myopic position in its response,⁵ claiming that this tariff proceeding is limited to only the rate calculations because the Commission only referred to Rule 4901:1-3-04, and "did not order pole owners to address any of the other rules in these tariff amendment applications." CBT's argument is wrong for several reasons. First, as just noted, the Commission did not limit the tariff applications to only proposing new rates or rule that an intervening party can raise objections only as to the just and reasonableness of the new rates. In fact, by stating "including new rates," the Commission indicated that it anticipated the tariff filings would cover more than rates. Second, Rule 4901:1-3-04 addresses rates, terms and conditions for poles, ducts, and conduits. That rule, itself, is not just the rate formula/calculations. Thus, CBT's reliance on that rule does not even support its argument.

Third, CBT's theory about the scope of the tariff proceedings is not shared by the other public utility pole owners who filed applications at the same time as CBT. A review of the more than 45 tariff revision applications filed in response to the Commission's decision in the Rules Docket illustrates that:

- In response to the Commission's directive, virtually every small telecommunications company in Ohio proposed brand new tariffs that

⁴ *Id.*, Entry at ¶13 (April 22, 2015).

⁵ CBT Response at 1, 3-4.

include multiple terms and conditions, as well as rates for pole attachments and/or conduit occupancy.

- Nearly every other public utility pole owner proposed specific new or revised language, in addition to proposed rate revisions, to incorporate specific aspects of the Commission's new rules.
- Many of the proposed language changes were extensive. For example, the Windstream companies proposed all new tariffs (Case Nos. 15-950-TP-ATA and 15-951-TP-ATA), The Dayton Power and Light Company proposed substantial revisions throughout its existing attachment tariff (Case No. 15-971-EL-ATA) and AT&T Ohio proposed substantial revisions throughout its existing attachment tariff (Case No. 15-920-TP-ATA).

Fourth, even if a public utility proposed only new rates, the Commission expressly stated that an intervenor can challenge the justness and reasonableness of the pole owner's tariffs in these tariff proceedings.⁶ The OCTA has, in fact, done that, arguing that several tariff provisions are unjust and unreasonable under the Commission's new rules.

Altogether, CBT's argument is wrong. Accordingly, it should be rejected.

Ensuring Consistency with the New Rules: In this case, CBT proposed revisions to one page (Page 40) of its Pole and Anchor Attachment and Conduit Occupancy Tariff (PUCO No. 1). In reviewing CBT's application, the OCTA considered whether, based on the proposal put forth by CBT, its Pole and Anchor Attachment and Conduit Occupancy Tariff (PUCO No. 1) would comply with the newly effective rules and be just and reasonable. But the OCTA could not determine if CBT's tariff would be just and reasonable by evaluating only one page of its tariff. As a result, the OCTA reviewed the existing tariff along with CBT's proposed revisions. CBT claims review of the entire tariff is unnecessary because Section 2.3.1(B) of its tariff states that CBT and all attaching parties are subject to all applicable laws, ordinances, and regulations.⁷ What this CBT argument ignores is the tariff should not contain any provisions not in

⁶ Rules Docket, Entry at ¶13 (April 22, 2015).

⁷ CBT Response at 4.

compliance with the new Commission rules. Moreover, it would **not** be just and reasonable for the Commission to continue terms and conditions that conflict with its own rules. It is for these reasons the OCTA has reviewed CBT's tariff in full, and specifically proposed changes for a limited number of those provisions.

Overlashing: The OCTA urges the Commission to expressly distinguish between an attachment and overlashing in CBT's tariff. CBT argues that it need not address overlashing in its tariff,⁸ all parties would benefit by a clear definition of overlashing and notice requirements. Overlashing is a simple and safe way for an attaching party with an existing attachment to add a wire or cable to its strand to allow the provision of new services or service to new customers. The cable operator adds a light fiber or coaxial cable to its existing facilities, without making a new attachment or creating any issues regarding use of pole space. While pole loading can be impacted, the typical increase in ice or windloading is minimal and can safely be reviewed by the pole owner after the fact. That is why the Federal Communications Commission ("FCC") has held that overlashing does not require permitting and does not even require prior notice.⁹ The OCTA believes that the definition of "Attachee's Communication Facilities" (Section 2.1) in CBT's tariff should be amended to include a sentence indicating that Attachee's Communication Facilities does not include a wire overlashed onto an existing attachment or riser cable.¹⁰ Additionally, even though the FCC has held that overlashing does not require prior notice,

⁸ CBT Response at 4.

⁹ See, *Implementation of Section 703(E) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6807, ¶¶ 59-69 (rel. Feb. 6, 1998); *Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd. 12103, 12141-12145 (rel. May 25, 2001) (overlasher is not required to obtain prior consent of the pole owner, but should provide notice); see also *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 578 (D.C. Cir. 2002) ("The Commission * * * clarified that an overlashing party does not need to obtain advance consent from a utility if that party has a primary wire attachment already in place * * * however * * * a utility is entitled to notice of the overlashing * * *." (internal citation and quotation omitted)); *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, 16340-41 (rel. Aug. 8, 2003) (affirming policy that no prior consent may be required for overlashing).

¹⁰ See, OCTA Objections at 3.

OCTA believes providing 15 days' notice prior to overlashing would best benefit all interests involved.

In addition, overlashing presents a critical competitive issue and it is important that the tariff not allow CBT to gain a competitive advantage through its pole ownership. For example, if a potential customer in an office park requests high-speed Internet access service from a cable operator attached to CBT's poles, a new fiber optic cable may be necessary. If CBT were allowed to delay the cable operator's overlashing without limit for "consideration" of possible issues, CBT would likely get the business itself, because it need not engage in the same type of "consideration" process and thus would have an unfair competitive advantage. Overlashing is simple and safe, and CBT should address it directly in its tariff as recommended by the OCTA.

Ten percent mark-up: The OCTA objected to Section 3.2.1, wherein the tariff adds an additional 10 percent onto the costs for all work performed under the tariff for (but not limited to) the pre-license surveys, make-ready works, inspections, removal of attachee's communications facilities and supervision. CBT claimed in its response that the 10 percent is for non-recurring costs that are not in the proposed rates.¹¹ However, CBT does not explain how the proposed rate, with the additional 10 percent every time it performs work under the tariff, complies with the new rate formula. Nor has CBT presented factual support for the 10 percent charge, meaning that it has not met its burden to justify the charge, and therefore it must be rejected. This additional 10 percent is a flat percentage and nothing in rate formula in Rule 4901:1-3-04(D), Ohio Administrative Code, allows for an additional mark-up. Moreover, the effect of this mark-up is to charge more than cost for pole attachments/conduit occupancies. Section 3.2.1 must be revised to delete "plus ten percent of such amount."

¹¹ CBT Response at 5.

III. Next Procedural Steps

The OCTA wishes to present a proposal for the next procedural steps in this matter. The OCTA suggests that the Commission order an informal conference to be held between CBT, the OCTA and the Commission Staff for further discussions and possible resolution of the remaining tariff issues. The issues in this matter are limited in number, but nonetheless important on a going-forward basis. The OCTA believes that this approach can be effective to work through the issues efficiently. This is another avenue for resolving the disputed issues – as a means for avoiding a hearing.¹²

In the event that a complete resolution of issues does not result from the informal conference, then a hearing may be necessary so that the parties have a full opportunity to present the facts and arguments needed and the Commission can appropriately resolve the remaining disputed tariff provisions. The issues herein are technical and important. The tariff provisions that will be established in this proceeding will have a significant impact on pole attachments and conduit occupancy for years to come. The OCTA strongly urges the Commission to order that informal discussions be held between CBT, the OCTA and the Commission Staff. To the extent a difference of opinion remains after the informal discussions, the OCTA suggests that a hearing be held.

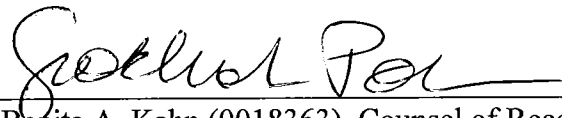
The OCTA further believes that this approach will help establish just and reasonable pole attachment/conduit occupancy tariff provisions on a going-forward basis that are compliant with the Commission's new rules.

¹² The OCTA's suggested informal conference is an alternative dispute resolution option that seems appropriate when considering the Commission Staff's knowledge on the technical considerations involved. The Commission has incorporated another more formal alternative dispute resolution option for parties who are unable to agree on rates, terms, or conditions for a pole attachment/conduit occupancy agreement. *See*, Rule 4901:1-3-06, Ohio Administrative Code.

IV. Conclusion

The OCTA appreciates the opportunity to reply to CBT's response in this docket regarding the four items detailed above. The OCTA urges the Commission to order that its Staff schedule an informal conference between CBT, the OCTA and the Commission Staff for further discussions and possible resolution of the remaining tariff issues. In the event that a complete resolution is not reached, then a hearing should be held so that the parties can present the facts and arguments needed to determine the appropriate tariff provisions for the remaining issues.

Respectfully submitted,



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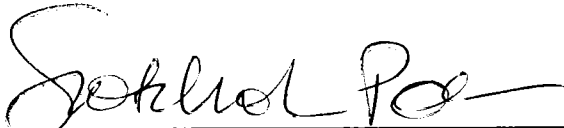
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Summary: Motion Motion for Leave to File a Reply Instanter and Motion for an Expedited Ruling electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable Telecommunications Association