

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. TO AMEND ITS
POLE ATTACHMENT AND CONDUIT
OCCUPANCY TARIFF, P.U.C.O. No. 1.

CASE No. 15-965-EL-ATA

ENTRY ON REHEARING

Entered in the Journal on July 26, 2017

I. SUMMARY

{¶ 1} The Commission grants the application for rehearing filed by the Ohio Cable Telecommunications Association, regarding the effective date of Duke Energy Ohio, Inc.'s pole attachment and conduit tariff amendments.

II. DISCUSSION

A. *Applicable Law*

{¶ 2} R.C. 4905.51 and 4905.71 authorize the Commission to determine the reasonable terms, conditions, and charges that a public utility may impose upon any person or entity seeking to attach any wire, cable, facility, or apparatus to a public utilities' poles, pedestals, conduit space, or right-of-way.

{¶ 3} Duke Energy Ohio, Inc. (Duke) is an electric light company under R.C. 4905.03 and a public utility under R.C. 4905.02 and is, therefore, subject to the Commission's jurisdiction.

{¶ 4} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

B. Procedural History

{¶ 5} On July 30, 2014, as revised on October 15, 2014, the Commission in Case No. 13-579-TP-ORD (*Pole Attachment Rules Case*), *In re the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, adopted new administrative rules regarding access to poles, ducts, conduits, and rights-of-way of the public utilities. The new rules became effective January 8, 2015. On February 25, 2015, as revised on April 22, 2015, the Commission, in the *Pole Attachment Rules Case*, ordered all public utility pole owners in Ohio to file the appropriate company-specific tariff amendment application, including the applicable calculations based on 2014 data. The automatic approval date for the pole attachment amendments was extended until September 1, 2015. 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.

{¶ 6} On May 15, 2015, as amended on July 28, 2015, Duke filed its tariff amendment application in this docket.

{¶ 7} On June 26, 2015, the Ohio Cable Telecommunications Association (OCTA) filed a motion to intervene in this proceeding.

{¶ 8} On August 3, 2015, OCTA filed its objections in this proceeding.

{¶ 9} Pursuant to the attorney examiner Entry of August 7, 2015, Duke's tariff amendment application was suspended and removed from the automatic approval process. Additionally, the motion to intervene filed by OCTA was granted.

{¶ 10} On August 24, 2015, Duke filed a response to OCTA's objections.

{¶ 11} On September 7, 2016, the Commission issued its Finding and Order establishing the rates, terms, and conditions to be incorporated into Duke's pole

attachment tariff. An Entry Nunc Pro Tunc was issued on October 5, 2016, to correct an error in the previously identified conduit rate.

{¶ 12} On October 11, 2016, Duke filed its revised pole attachment and pole conduit occupancy tariff.

{¶ 13} Pursuant Commission's Entry of April 12, 2017, the revised pole attachment and conduit occupancy tariff was approved with an effective date of October 11, 2016.

{¶ 14} On May 12, 2017, OCTA filed an application for rehearing regarding the Commission's Entry of April 12, 2017.

{¶ 15} On May 22, 2017, Duke filed its memorandum contra the application for rehearing.

{¶ 16} On June 7, 2017, the Commission issued an Entry on Rehearing granting rehearing for the limited purpose of further consideration of matters raised in the application for rehearing.

C. Assignments of Error Raised by OCTA

{¶ 17} As its first assignment of error, OCTA asserts that it was unjust and unreasonable for the Commission to grant a retroactive rate increase in violation of R.C. 4909.17, which provides that public utility rates and rate changes cannot be effective prior to the Commission finding that the rate or rate change is just and reasonable. Additionally, OCTA submits that R.C. 4905.30 requires that terms, conditions, and charges are required to be on-file with the Commission in schedules.

{¶ 18} OCTA points out that while the Commission reviewed Duke's tariff filings pursuant to its Order of September 7, 2016, it did not implement any part of the revised tariff at that time and did not approve the final tariffs until its Entry of April 12, 2017. As a result, OCTA contends that the Commission improperly established an effective date

of October 11, 2016, for the rate increase that is prior to the Commission approval of the revised tariff on April 12, 2017 and prior to the Commission-approved tariff being properly filed in the TRF docket. Therefore, OCTA asserts that the Commission has violated Ohio's law prohibiting retroactive ratemaking and requests that the Commission require that revised tariffs be effective no earlier than the date on which Duke properly files the Commission-approved revised tariff in its TRF docket.

{¶ 19} In support of its position, OCTA asserts that the Supreme Court of Ohio in *Lucas Cty. Commrs. V. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347, 348 (1997) has held that:

[W]hile a rate is in effect, a public utility must charge its consumers in accordance with the Commission-approved rate schedule. * * *

The General Assembly has attempted to balance the equities by prohibiting utilities from charging increased rates during the pendency of commission proceedings and appeal, while also prohibiting customers from obtaining refunds of excess rates that may be reversed on appeal. In short, retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme.

{¶ 20} As its second assignment of error, OCTA asserts that it was unjust and unreasonable for the Commission to substitute the newly approved tariff terms, conditions, and charges for the lawful terms, conditions, and charges specified in the tariff on file and effect in the prior period.

{¶ 21} According to OCTA, the Commission in *In re the Establishment of Tariff Filing Dockets and Tariff Filing Procedures*, Case No. 89-500-AU-TRF, Entry (July 6, 1989), established a process for placing final Commission-approved tariffs on file with the Commission. This process includes that (a) each company file one copy of tariff changes authorized by the Commission in its assigned TRF docket, and (b) only final Commission-approved tariffs are to be filed in the designated TRF docket.

{¶ 22} OCTA submits that R.C. 4905.32 mandates that public utilities can charge only in accordance with the approved tariff on-file and in effect at the time.

{¶ 23} Further, OCTA states that a tariff's effective date establishes the date upon which the new rate can be charged to customers as well as when the new terms and conditions can be applied to customers.

{¶ 24} Therefore, OCTA contends that, consistent with R.C. 4905.32, the Commission should have determined that its April 12, 2017 approval of the revised pole attachment rate does not render the rate in effect on September 7, 2016 to April 12, 2017 to be unlawful. Rather, OCTA avers that the only lawful rate in effect during the six months from October 11, 2016 to April 12, 2016 was the rate in the former pole attachment tariff.

{¶ 25} In its third assignment of error, OCTA states that it was unjust and unreasonable for the Commission to not clarify in its April 12, 2017 Entry that Duke is not authorized to charge the new rates prior to the date on which the newly approved tariff is properly on-file with the Commission. Further, OCTA requests that the Commission should direct Duke to review and correct any bills using the new rates prior to the tariff being properly on file and cease any improper billing and collection.

{¶ 26} In its May 22, 2017 memorandum contra in response to OCTA's first assignment of error, Duke asserts that the April 12, 2017 Entry did not grant a retroactive rate increase. In support of its position, Duke contends that the pole attachment and conduit occupancy rates were approved in the September 7, 2016 Finding and Order.

{¶ 27} Further, referencing R.C. 4903.15, Duke states that Commission orders are effective immediately upon issuance unless stated otherwise. Therefore, Duke opines that the Commission's approval of the rate increase for pole attachments (and decrease for conduit occupancy) was effective upon the issuance and journalization of the September 7, 2016 Order. According to Duke, based on the fact that the Commission's

ordered rate impacts were approved in September 2016 Order, they should not be considered retroactive as a result of the October 11, 2016 effective date. Additionally, Duke points out that the new tariff pages were properly on file as of October 11, 2016, in both this case and the Commission's approved tariff docket. Therefore, Duke insists that the April 2017 Entry did not have the effect of approving new rates and terms for a prior period.

{¶ 28} Duke also argues that the Entry of April 12, 2017, did not constitute an illegal retroactive rate increase because the Commission had already determined in *In re 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, Entry at 6 (Apr. 22, 2015) that the changes to pole attachment and conduit occupancy rates being considered here are not subject to the requirements applicable to proposed increases in rates charged to customers for electric services.

{¶ 29} Duke submits that the Entry of April 12, 2017, properly set the effective date for the approved tariff. In regard to OCTA's request for a Commission directive to Duke requiring the company to rebill any attachers that were billed under the new rate prior to the journalization of the April 2017 Entry, Duke responds that the September 2016 Order provided all of the necessary approvals of the applicable rates. Further, Duke insists that the September Order did not state that revised tariffs should be filed for subsequent review and approval by the Commission. Instead, Duke states that it only required that the rates should be revised and filed. To the extent there was any lack of clarity as to the Commission's intent, Duke asserts that the Commission has indisputably clarified its intent by establishing the effective date for the tariffs as the date they were filed in this docket and the Commission's "TRF" docket.

{¶ 30} Upon a review of the arguments set forth in OCTA's three assignments of error, the Commission finds that the application for rehearing should be granted.

{¶ 31} The record reflects that pursuant to the Commission Finding and Order of September 7, 2016, the Commission, in the context of approving Duke's tariff amendments, approved revised rates related to pole attachments and conduits. Additionally, the Commission required the filing of a final pole attachment tariff within 30 days of the Finding and Order. The record also reflects that on October 11, 2016, Duke filed its final pole attachment tariff, including the applicable rates, in response to the Finding and Order of September 7, 2016. No Commission action was taken with respect to the approval of the final tariff filing until its Entry of April 12, 2017.

{¶ 32} Pursuant to R.C. 4905.32:

No public utility shall charge, demand, exact, receive, or collect a different, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time * * * .

{¶ 33} Based on an analysis of this statute it is clear that Duke is only permitted to charge a rate that is both specified in its schedule filed with the Commission and that is also in effect at that time. While Duke filed the proposed pole attachment and conduit rates on October 11, 2016, with a stated effective date of October 11, 2016, these rates were not in effect at that time. In order to be effective, the final tariff sheets were required to be approved. As noted above, this did not occur until the Commission's Entry of April 12, 2017, when upon reviewing all of the pending pole attachment and conduit tariff pages, the Commission approved the final tariff sheets.

{¶ 34} While Duke asserts that consistent with R.C. 4903.15, Commission orders become effective immediately upon issuance unless stated otherwise, the Commission points out that the statute provides, in part, that "[u]nless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities

commission. * * *” Based on this statutory language it is clear that it must be read in conjunction with R.C. 4905.32, the application of which is discussed above. Additionally, the Commission notes that the automatic approval process for the filing of electric pole attachment tariff rates was suspended pursuant to the Entry of August 7, 2015. Therefore, the Commission finds that the directive in its Entry of April 12, 2017, regarding the October 11, 2016 effective date resulted in an inappropriate retroactive rate increase. Instead, the effective date should be April 12, 2017, which is the date of the Commission's approval of the revised tariff provisions.

{¶ 35} Consistent with the above determination, the company must refile revised tariff sheets reflecting the new effective date.

{¶ 36} Duke is directed to review and correct any bills using the new rates prior to the tariff being properly on file and cease any improper billing and collection.

III. ORDER

{¶ 37} It is, therefore,

{¶ 38} ORDERED, That the application for rehearing filed by OTCA be granted as set forth above. It is, further,

{¶ 39} ORDERED, That Duke refile its revised tariff sheets consistent with paragraph (35). It is, further,

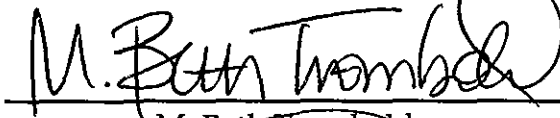
{¶ 40} ORDERED, That, consistent with the above determination, Duke is directed to review and correct any bills using the new rates prior to the tariff being properly on file and cease any improper billing and collection. It is, further,

{¶ 41} ORDERED, That a copy of this Entry on Rehearing be served upon Duke, OCTA, and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



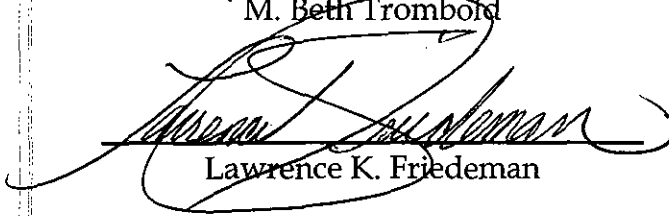
Asim Z. Haque, Chairman



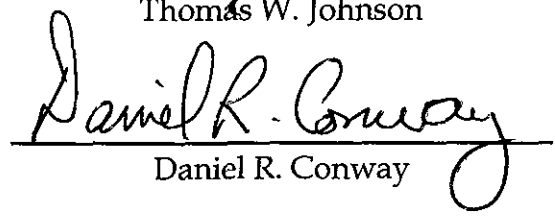
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Entered in the Journal
JUL 26 2017



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