

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
DAYTON POWER AND LIGHT COMPANY TO
AMEND ITS POLE ATTACHMENT TARIFF.

CASE NO. 15-971-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 Dayton Power and Light Company'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} Dayton Power and Light Company (DP&L) 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 June 12, 2015, DP&L 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, DP&L'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, DP&L 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 DP&L's pole attachment tariff.

{¶ 12} On September 30, 2016, DP&L filed its final pole attachment tariff.

{¶ 13} On October 5, 2016, OCTA filed a motion objecting to language incorporated in DP&L's tariff filing.

{¶ 14} On October 7, 2016, DP&L filed an application for rehearing regarding the Commission's Finding and Order of September 7, 2016.

{¶ 15} On October 17, 2016, OCTA filed its memorandum contra the application for rehearing.

{¶ 16} On November 3, 2016, the Commission issued an Entry on Rehearing granting rehearing for the limited purpose of further consideration of matters raised in the application for rehearing.

{¶ 17} On November 30, 2016, the Commission issued its Second Entry on Rehearing denying the substantive assignments of error raised in DP&L's application for rehearing.

{¶ 18} Also on November 30, 2016, the Commission issued an entry granting OCTA's motion of October 5, 2016, and ordering that DP&L refile its final revised tariff consistent with the Commission's determinations.

{¶ 19} On January 3, 2017, DP&L refiled its revised pole attachment and pole conduit occupancy tariff.

{¶ 20} Pursuant Commission's Entry of April 12, 2017, the revised pole attachment and conduit occupancy tariff was approved with an effective date of January 3, 2017.

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

{¶ 22} On May 22, 2017, DP&L filed its memorandum contra the application for rehearing.

{¶ 23} 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

{¶ 24} 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.

{¶ 25} OCTA points out that while the Commission reviewed DP&L tariff filings pursuant to its Orders of September 7, 2016 and November 30, 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 January 3, 2017, 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 DP&L properly files the Commission-approved revised tariff in its TRF docket.

{¶ 26} 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.

{¶ 27} 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.

{¶ 28} 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.

{¶ 29} 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.

{¶ 30} 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.

{¶ 31} 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 these seven months was the rate in the former pole attachment tariff.

{¶ 32} 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 DP&L 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 DP&L 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.

{¶ 33} With respect to OCTA's arguments relative to the applicability of R.C. 4909.17, DP&L contends that the Commission, in its September 7, 2016 Finding and Order did determine that the pole attachment and conduit rates are just and reasonable. Further, DP&L points out that OCTA did not seek rehearing regarding these determinations. Therefore, DP&L contends that OCTA has been on notice since September 30, 2016, as to the applicable annual pole attachment and conduit rates.

{¶ 34} DP&L asserts that its pole attachment rates have been in effect with final tariffs in place since October 1, 2016. In support of its position, DP&L references the Commission's Finding and Order of September 7, 2016, in which the Commission approved DP&L's pole attachment and conduit rates and required the filing of the final pole attachment tariff within 30 days of the Finding and Order. DP&L points out that consistent with the Finding and Order of September 7, 2016, it filed its final pole attachment tariff sheets, including rates on September 30, 2016, with an effective date of October 1, 2016. DP&L avers that the pole attachment rate of \$8.05 and the conduit rate of \$0.42 per foot have been final and effective since October 1, 2016.

{¶ 35} DP&L notes that while OCTA filed an objection on October 5, 2016, it pertained only to one paragraph in the General Terms and Conditions and did not pertain to the pole attachment and conduit rates. Additionally, DP&L asserts that the Commission's Order of November 30, 2016, did not revisit or in any way disturb the Commission's September 7, 2016 Finding and Order approving the pole attachment and conduit rates. Finally, DP&L asserts that when the Commission issued its Entry of April 12, 2017, it was reviewing only ¶11 of the General Terms and Conditions related to unauthorized attachment fees. Therefore, DP&L contends that the only tariff sheets that

the Commission found in its Entry of April 12, 2017, to be effective January 3, 2017, were those associated with Original Sheet No. 3, General Terms and Conditions, and did not include Original Sheet 2, which addresses pole attachment and conduit rates.

{¶ 36} DP&L rejects OCTA's claim that no filing could have been made in this proceeding until after April 12, 2017, when the Commission accepted the last change made to DP&L's tariff. Further, DP&L rejects OCTA's assertion that the Commission is powerless to allow final rate-related tariff sheets previously filed in compliance with a final order to become effective so long as there is one non-rate issue still outstanding.

{¶ 37} DP&L asserts that on September 30, 2016, it made a compliance final tariff filing in both this case and in Case No. 89-6004-TRF, consistent with the Commission's September 7, 2016 Finding and Order requiring the filing of final tariffs. DP&L argues that to the extent that the Commission did not intend for these to be final tariffs, it would have required DP&L to file proposed tariffs consistent with the September 7, 2016 Finding and Order, subject to review and approval by the Commission.

{¶ 38} Further DP&L contends that OCTA's current legal objections to the rate charge schedule are a collateral attack on the September 7, 2016 Finding and Order and are inconsistent with procedural history in this case. In support of its position, DP&L highlights that, consistent with the September 7, 2016 Finding and Order, it filed final tariffs, including rates on September 30, 2016, with an effective date of October 1, 2016. DP&L notes that even if the pole attachment rates set forth in the filing in Original Sheet No. 2 were considered a proposed rate, they would have become final as of November 30, 2016, when the Commission reviewed the compliance filing and left the rate tariff sheets undisturbed and final. Therefore, DP&L avers that the Commission is not engaging in retroactive ratemaking through the implementation of the disputed rates.

{¶ 39} In response to OCTA's argument that the Commission has violated its long-standing process for placing final Commission approved tariffs on file, DP&L states that

it followed the practice of waiting for a Commission order on the merits and then making its compliance filing in both the applicable "ATA" and "TRF" dockets.

{¶ 40} 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.

{¶ 41} The record reflects that pursuant to the Commission Finding and Order of September 7, 2016, the Commission, in the context of approving tariff amendments for DP&L, approved revised rates for DP&L pole attachments and established a new conduit attachment rate. 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 September 30, 2016, DP&L 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. Instead, immediately following the filing of the final tariffs, on November 30, 2016, the Commission addressed an application for rehearing filed by DP&L and a motion filed by OCTA, which are both summarized above.

{¶ 42} 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 * * * .

{¶ 43} Based on an analysis of this statute it is clear that DP&L 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 DP&L filed the proposed pole attachment and conduit rates on September 30, 2016, with a stated effective date of October 1, 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. This determination is especially true in light of the fact that the pole attachment automatic approval process for the filing of electric pole attachment tariff rates was suspended pursuant to the Entry of August 7, 2015. As a result, the final tariff rate sheets must be approved. Therefore, the Commission finds that the directive in its Entry of April 12, 2017, regarding the January 3, 2017, 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.

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

{¶ 45} DP&L 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

{¶ 46} It is, therefore,

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

{¶ 48} ORDERED, That DP&L refile its revised tariff sheets consistent with paragraph (44). It is, further,

{¶ 49} ORDERED, That, consistent with the above determination, DP&L 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,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO



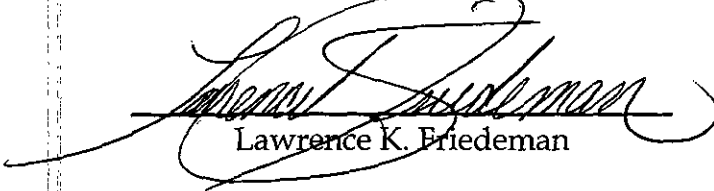
Asim Z. Haque, Chairman



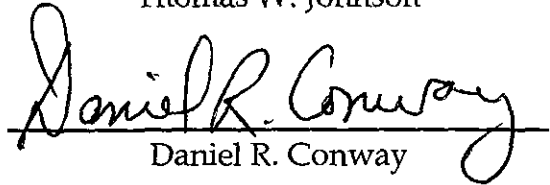
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