

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Cincinnati)	
Bell Telephone Company LLC,)	
)	
Complainant,)	
)	
v.)	Case No. TP-PWC-14-1576
)	
Village of Batavia,)	
389 Main Street)	
Batavia, Ohio 45103)	
)	
Respondent.)	

COMPLAINT AND APPEAL FROM PUBLIC WAY ORDINANCE

Cincinnati Bell Telephone Company LLC (“CBT”) hereby submits this Complaint and Appeal from Ordinance No 1284-13 of the Village of Batavia (“Batavia”) pursuant to R.C. §§ 4905.26 and 4939.06, Revised Code. In support of this Complaint and Appeal, CBT states as follows:

PARTIES AND JURISDICTION

1. Chapter 4939 of the Revised Code establishes a state policy governing the use of public ways by providers of telecommunications and other public utility services to the residents of this state. R.C. § 4939.02(B) describes the policy embodied in this legislation as follows:

This policy establishes fair terms and conditions for the use of public ways and does not unduly burden persons occupying or using public ways or persons that benefit from the services provided by such occupants or users.

To effectuate this policy, Chapter 4939 requires, *inter alia*, that municipal corporations provide public utilities with “open, comparable, nondiscriminatory, and competitively neutral access to its public ways” (R.C. § 4939.04(A)(1)), limits the circumstances under which a municipal

corporation may impose fees for the occupancy or use of its public ways (R.C. § 4939.05), and specifies the manner in which any such public way fees are to be “determined and applied” (R.C. § 4939.05(C)).

2. R.C. § 4939.06 vests the Commission with jurisdiction to entertain appeals by public utilities alleging that the amount of a public way fee levied by a municipal corporation, any related classification of public way occupants or users, or the assignment or allocation of costs to the public way fee is unreasonable, unjust, unjustly discriminatory, or unlawful (R.C. § 4939.06(A)).

3. CBT is a telephone company pursuant to R.C. § 4905.03(A)(1) and a public utility pursuant to R.C. § 4905.02.

4. Batavia is an Ohio municipal corporation and, as such, any public way fees it levies or proposes to levy against public utilities are subject to the requirements of R.C. §§ 4939.04 and 4939.05. Batavia is subject to the Commission’s R.C. § 4905.26 complaint jurisdiction pursuant to R.C. § 4939.06, which vests the Commission with authority to determine if public way fees and related classifications imposed by Ohio municipal corporations company comply with these statutory requirements.

FACTS

5. For decades prior to 2013, CBT lawfully operated telephone lines above-ground in and through Batavia. As part of a downtown beautification project, in 2013 Batavia requested that all utilities relocate their lines underground.

6. CBT’s above-ground utility lines were lawfully placed above-ground in existing right of ways and did not interfere with any public use of the right of way.

7. Batavia sought to relocate all utilities in its downtown area underground for aesthetic reasons and not because of interference with the public right of way.

8. Batavia has no effective ordinance permitting it to order a utility to move its existing lines underground at its own expense for aesthetic purposes. CBT objected to relocating its lines underground unless Batavia paid CBT its cost of relocation.

9. Batavia agreed to pay CBT \$217,355.00 to induce CBT to move its above-ground lines into underground conduit being constructed by Batavia. Batavia paid CBT \$217,355.00 in October 2013 and, in reliance on that payment, CBT proceeded to perform its part of the relocation work.

10. The Village Council of the Village of Batavia adopted Ordinance No 1284-13, attached hereto as Exhibit A, on or about December 2, 2013. The Ordinance was first published in the Clermont Sun once a week for two consecutive weeks beginning on May 1, 2014. Ordinance No. 1284-13 purports to establish public way fees to be assessed against certain types of public utilities operating within Batavia.

11. CBT was first subjected to Ordinance No. 1284-13 when it received an invoice from Batavia, dated August 21, 2014, in the amount of \$513,329.10, attached hereto as Exhibit B. In that invoice, Batavia billed CBT \$295,974.10 for construction costs Batavia spent for the design and installation of an underground conduit system. Batavia also billed back to CBT the same \$217,355.00 that Batavia had already agreed to pay and had actually paid to CBT to induce CBT to move its utility lines underground.

12. Batavia is purporting to characterize its construction costs and those costs that it agreed to pay CBT to induce CBT to voluntarily move its utility lines underground as public way fees.

13. CBT was not required to move its lines underground and was lawfully occupying the public way with above-ground facilities. The amounts billed by Batavia in the August 21, 2014 invoice were not costs caused by CBT occupying the public way, but were incurred solely because of Batavia's unilateral decision to move utilities underground that were already lawfully placed in the public way.

14. Had Batavia allowed utilities to maintain their existing above-ground facilities in place, Batavia would not have incurred any construction or relocation costs.

15. Such relocation costs are not properly recoverable as public way fees because they were caused solely by the actions of Batavia to relocate utilities, not by the public utilities to occupy public right of way.

16. Ordinance No. 1284-13 would also impose annual right of way fees of \$1.00 per linear foot for buried lines and \$0.25 per linear foot for aerial lines for "administration and inspection."

17. CBT does not accept any of these purported public way fees. R.C. § 4939.06(A) provides that if a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance, an appeal may be taken from the ordinance "not later than thirty days after the date the public utility first becomes subject to the ordinance." CBT was first subject to the Ordinance upon receipt of the August 21, 2014 invoice, therefore, this Complaint and Appeal is timely filed and is properly before the Commission.

COUNT I (ORDINANCE INVALID)

18. CBT incorporates the allegations of paragraphs 1 through 17 above as if fully restated.

19. R.C. § 4939.05(E) provides that at least forty-five days prior to the date of enactment of a public way ordinance by a municipal corporation, the municipal corporation shall file with the Commission a notice that the ordinance is being considered.

20. The Commission has established a case code of PWN for the filing of notices required by R.C. § 4939.05(E).

21. While 60 separate notices of proposed public way ordinances have been filed with the Commission by 45 different Ohio municipalities, Batavia has never filed a single notice of proposed public way ordinance with the Commission, either with respect to Ordinance No. 1284-13 or any other proposed ordinance.

22. Ordinance No. 1284-13 is void and of no effect for failure to comply with R.C. § 4939.05(E).

COUNT II (FEES NOT BASED ON ACTUAL COSTS)

23. CBT incorporates the allegations of paragraphs 1 through 22 above as if fully restated.

24. R.C. § 4939.05(C) provides that “[p]ublic way fees levied by a municipal corporation shall be based on costs that the municipal corporation has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy of a public way.” To comply with this statutory requirement, public way fees must be based on costs that the municipal corporation has, in fact, incurred and the municipal corporation must clearly demonstrate that, in developing the fees, such costs are, or can be, properly allocated and assigned to the occupancy or use of the public right of way.

25. Ordinance No. 1284-13 purports to establish as public ways fees the “[a]ctual costs expended by the Village of Batavia for installation, relocation, maintenance, or

replacement of the company's facilities." Where such costs were incurred because of Batavia's unilateral request that a utility relocate its lines underground that were already lawfully placed in the public way, they are not costs caused by the occupancy or use of the public way and are not properly recoverable as public way fees.

26. The administration and inspection fees of \$1.00 per linear foot per year for buried lines and \$0.25 per linear foot per year for aerial lines, plus an additional \$100 annual charge for administration set forth in the Ordinance, do not reflect the actual costs Batavia has incurred due to the occupancy or use of its rights of way. Thus, such fees violate R.C. § 4939.05(C).

COUNT III (COSTS NOT PROPERLY ALLOCATED AND ASSIGNED)

27. CBT incorporates the allegations of paragraphs 1 through 27 above as if fully restated.

28. The public way fees set forth in the ordinance complained of are based on costs that have not been, and cannot be, properly allocated and assigned to the occupancy or use of Batavia's public rights of way, nor can Batavia clearly demonstrate that its method of allocation or assigning these costs complies with the statutory standard. Thus, the public way fees violate R.C. § 4939.05(C).

COUNT IV (COSTS NOT ALLOCATED ON A COMPETITIVELY NEUTRAL BASIS)

29. CBT incorporates the allegations of paragraphs 1 through 25 as is fully restated.

30. Ordinance No. 1284-13 requires that public way fees be paid to Batavia by any electric power, telecommunications, subscription television provider, electronic data, or other wire-line or similar company that requires underground or aerial use of space in the Batavia Village public ways.

31. Ordinance 1284-13 is unreasonable, arbitrary and discriminatory to the extent that Batavia is attempting to force utilities to bear the cost of relocating facilities that had been lawfully placed in existing above-ground right of ways to underground facilities.

32. R.C. § 4939.05(C) further provides that, in establishing public way fees, costs otherwise eligible for inclusion “shall be reasonably and competitively neutrally allocated among all persons occupying or using public ways owned or controlled by the municipal corporation, including, but not limited to, persons for which payments are waived as authorized by division (B) of this section or for which compensation is otherwise obtained.” Thus, otherwise eligible and properly assigned costs must be allocated among the occupants and users of the rights of way in a competitively neutral manner.

33. The Ordinance unreasonably and arbitrarily charges four times as much for administration and inspection of underground lines as it does for aerial lines.

34. The Ordinance fails to allocate any fees to the portion of the public way occupied by governmental entities and other types of utilities for which no fees are assessed.

PRAYER FOR RELIEF

WHEREFORE, CBT respectfully requests that the Commission cause a copy of this Complaint and Appeal to be served upon the Village of Batavia pursuant to O.A.C. § 4901-9-01, direct the Village of Batavia to answer in accordance with said rule, and schedule this matter for public hearing after providing a reasonable opportunity for discovery.

As its prayer for relief, CBT respectfully requests that the Commission find:

- A. That this Complaint and Appeal states reasonable grounds for complaint;
- B. That, pursuant to R.C. § 4939.06(B), Ordinance 1284-13 be suspended for the duration of the Commission’s consideration of this Complaint and Appeal;

C. That, pursuant to R.C. § 4939.05(E), Ordinance 1284-13 is null and of no effect for failure to file the required notice with the Commission prior to enactment of the ordinance;

D. That none of the amounts billed to CBT in the August 21, 2014 invoice are properly charged as public way fees;

E. That the public way fees established by Ordinance 1284-13 are unreasonable, unjust, unjustly discriminatory, and unlawful and in violation of Ohio law;

F. That, pursuant to R.C. § 4939.06(C), the Commission determine such public way fees and classifications that the record in this proceeding supports as cost-based, reasonably allocated, nondiscriminatory, and lawful; and

G. That CBT is entitled to such other and further relief as may be appropriate.

Respectfully submitted,

/s/ Douglas E. Hart

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Cincinnati, Ohio 45202
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dhart@douglasshart.com

Attorney for Complainant
Cincinnati Bell Telephone Company LLC

EXHIBIT A

Ordinance No. 1284-13Passed Dec. 2, 2013

Village of Batavia
Ordinance No. 1284-13

An Ordinance Establishing Public Way Fees

Whereas, Ohio Revised Code § 4939.05 provides that a municipal corporation may levy public way fees based upon the amount of public ways occupied or used, the type of utility service provided by a public utility, or any different treatment required by the public health, safety, and welfare; and

Whereas, such public way fees levied by a municipal corporation shall be based only on costs that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way; and

Whereas, the costs shall be reasonably and competitively neutrally allocated among all persons occupying or using public ways owned or controlled by the municipal corporation.

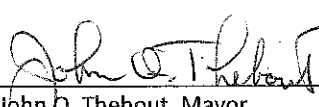
Thus be it ordained, that the Village of Batavia establishes the following Public Way Fee to apply to any electric power, telecommunications, subscription television provider, electronic data, or other wire-line or similar company that requires underground or aerial use of space in the Batavia Village public ways:

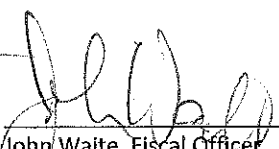
1. Actual costs expended by the Village of Batavia for installation, relocation, maintenance, or replacement of the company's facilities;
2. For buried lines, a charge of \$1.00 per linear foot per year for administration and inspection.
3. For aerial lines, a charge of \$0.25 per linear foot per year for administration and inspection.
4. An annual charge of \$100 for administration.

Be it further ordained that the Public Way Fee shall apply effective 30 days after passage by the Village Council.

Adopted: December 2, 2013

Attest:


John Q. Thebout, Mayor


John Waite, Fiscal Officer

I, John Waite, Clerk of Council of the Village of Batavia, Clermont County, Ohio, do hereby certify that the foregoing ordinance was published in the Clermont Sun once a week for two consecutive weeks beginning on May 1, 2014

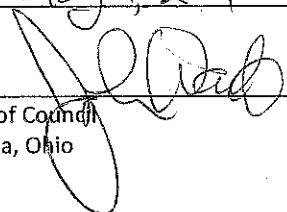

Clerk of Council
Batavia, Ohio

EXHIBIT B



VILLAGE OF BATAVIA

389 EAST MAIN STREET, BATAVIA, OHIO 45103

JOHN THEBOUT, MAYOR
DENNIS NICHOLS, ADMINISTRATOR
JOHN WAITE, FISCAL OFFICER

PHONE: 513-732-2020
FAX: 513-732-5696

August 21, 2014

Cincinnati Bell Telephone
Att'n.: Ted Heckmann, Director
Regulatory & Government Affairs
221 East 4th St., #103-1280
Cincinnati, Ohio 45202

Dear Sir:

Enclosed is an invoice for work that the Village of Batavia performed or contracted to have performed for Cincinnati Bell Telephone in the public ways of the Village of Batavia. All work pertained to establishing, maintaining, or relocating transmission lines, service, lines, or other facilities of Cincinnati Bell in the vicinity of Main Street, Batavia.

Also enclosed is a copy of Batavia Ordinance No. 1284-13, which Batavia registered in 2013 with the Public Utilities Commission of Ohio. We have previously discussed this issue with you.

The attached invoice should cover all direct costs incurred to date. If Cincinnati Bell will attend promptly to the payment, the Village of Batavia will waive any additional charges for administration, inspection, and ancillary costs.

Sincerely,

Dennis Nichols

Incl: Invoice
Ord. No 1284-13

Village of Batavia

389 E. Main Street
Batavia, OH 45103

Invoice

for

Cost of providing and maintaining public way

Village of Batavia Ord. No. 1283-13

Billing Date: Aug. 21, 2014

Cincinnati Bell Telephone

Att'n.: Ted Heckmann, Director

Regulatory & Government Affairs

221 East 4th St., #103-1280

Cincinnati, Ohio 45202

Ford Development and subcontractors completed the project June 11, 2014.

Design and construction by Batavia Village

Ford bid item	Description	Quantity	Cost
41	Pull box 36x60	4	\$ 12,800.00
43	Pull box 24x36	2	\$ 2,900.00
46	Comm mh 48x96	2	\$ 37,000.00
	Comm mh 48x48	1	\$ 8,132.25
49	Duct bank 4"	9,557 ft	\$ 181,583.00
51	Duct bank 2"	2,027 ft	\$ 45,607.50
	Total Construction		\$ 288,022.75
	Engineering		\$ 7,951.35
	Subtotal Cost		\$ 295,974.10

Design and construction by subcontractor to Batavia Village

Cincinnati Bell

Custom Engineering and Construction	\$ 217,355.00
Total cost	\$ 513,329.10

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/9/2014 2:16:43 PM

in

Case No(s). 14-1576-TP-PWC

Summary: Application Complaint and Appeal from Public Way Ordinance electronically filed by Mr. Douglas E. Hart on behalf of Cincinnati Bell Telephone Company LLC