

**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,	)	
	)	
Respondent.	)	

**DIRECT TESTIMONY OF DAVID SMILEY  
ON BEHALF OF CINCINNATI BELL TELEPHONE COMPANY LLC**

1 Q. Please state your name and business address.

2 A. My name is David Smiley. My business address is 209 West Seventh Street,  
3 Cincinnati, Ohio 45202.

4 Q. By whom are you employed and in what capacity?

5 A. I am employed by Cincinnati Bell Telephone Company LLC ("CBT") as an  
6 Outside Plant Engineer in Network Operations.

7 Q. How long have you been employed by CBT and in what capacities?

8 A. I have been employed by CBT since Oct 24<sup>th</sup> 1990. From Oct. 24 1990-Nov.1995  
9 I was a Directory Assistance Operator; from Nov. 1995- Aug. 2011 I was an Outside Plant  
10 Technician; from Aug. 2011- Jan 2013 an Outside Plant Clerk, and from Jan. 2013-Present I  
11 have been a Specialist-Outside Plant Engineer.

12 Q. What are your current duties with CBT?

13 A. My current duties at CBT are to: 1) design Outside Plant facilities and develop  
14 work orders for construction forces; 2) coordinate work with other engineers; 3) assist planners  
15 and project managers with planning details and costs; 4) work with team members to devise the  
16 best network solutions; and 5) work closely with work order clerks to produce instructions for  
17 construction forces.

18 Q. Please describe your educational background.

19 A. I am a Graduate of Newport Central Catholic High School, the United States  
20 Marine Corps Field Radio Operations School, Twenty Nine Palms California, and the Ameritech  
21 Lineman School, Columbus Ohio.

22 Q. Have you every presented testimony before the Commission?

23 A. No.

1 Q. On whose behalf are you testifying in this proceeding?

2 A. CBT.

3 Q. What is the purpose of your testimony in this matter?

4 A. I was the Outside Plant Engineer responsible for the Batavia area at the time of  
5 the Main Street project. I am addressing the facilities that CBT had in the area of Main Street,  
6 the events that occurred during the course of the project, the facilities that CBT has in place  
7 today and the invoice sent by Batavia to CBT and whether the amounts billed in that invoice are  
8 properly attributable to CBT's occupation or use of Batavia's public right of way.

9 Q. What materials have you reviewed to prepare your testimony?

10 A. I have reviewed e-mail correspondence with Batavia and its contractor regarding  
11 the Main Street project, Batavia's responses to discovery propounded by CBT and various plans  
12 and drawings of the project.

13 Q. Were you personally involved in any of the events related to this case?

14 A. Yes. In February 2013, I assumed responsibility for outside plant engineering in  
15 the Batavia area. There had been some preliminary discussion of the project with my  
16 predecessor, Steve Tinch, beginning in the summer of 2012. I reviewed the status of the matter  
17 with Mr. Tinch when I assumed responsibility for Batavia and I was the outside plant engineer  
18 responsible for all design and construction work by CBT from that point forward.

19 Q. Describe the facilities that CBT had in place on Main Street at the beginning of  
20 the project.

21 A. As the incumbent telephone company in Batavia, CBT had facilities in place to  
22 serve every individual customer that fronts on Main Street. These facilities can be seen on the  
23 drawings attached as Exhibit A. CBT had both aerial lines on poles and underground lines in

1 conduit. Some of CBT's lines were attached to poles owned by Duke Energy and some were  
2 CBT's own poles. CBT's cable serving local customers ran along Main Street on poles, with  
3 aerial service drops to each business and residence on the street.

4 Q. Were these facilities in place on July 2, 2002?

5 A. Yes. The facilities are considerably older than that. Our records indicate that  
6 there are poles currently in place that date to 1940. Facilities have been in place along Main St  
7 since telecommunications started in Batavia.

8 Q. What was your initial understanding of what the project entailed?

9 A. I understood that Batavia was doing a streetscape project that would narrow Main  
10 Street and extend the curbs and sidewalks closer to the middle of the street. Batavia wanted to  
11 remove all overhead utility lines and relocate them underground in a conduit system that it would  
12 construct. Work was not just confined to Main Street. The Streetscape included South Second  
13 Street from Main to Broadway, as well as North Fourth Street from Main to Wood Street.

14 Q. Where did you get your understanding of the project?

15 A. My dealings were primarily with Donald Bezold of Burgess & Niple, which was  
16 Batavia's design engineer on the project. I sought out Steve Tinch, Mike Skaggs, Mark Conner  
17 and Rich Sweikata within CBT as to processes that needed to be followed

18 Q. How did CBT's involvement in the project begin?

19 A. Mr. Bezold sent preliminary sketches of the project to Steve Tinch in June 2012  
20 and asked for a preliminary cost estimate for switching overhead telephone lines to underground.  
21 On July 30, 2012, Mr. Tinch sent Mr. Bezold a preliminary estimate of \$184,000 for the cost to  
22 convert CBT's overhead facilities to underground, with the City installing the necessary conduit.

1 Mr. Tinch also provided prints for conduit and manholes/pullboxes that the City would have to  
2 provide.

3 Q. Was there discussion at that time about who would pay for what?

4 A. In January 2013, Mr. Bezold informed Mr. Tinch that the project was going  
5 forward. Mr. Bezold asked if they decided to relocate overhead to underground, how the billing  
6 would work with Cincinnati Bell and when would payment be due. Mr. Tinch informed him that  
7 CBT would have to be paid before work could be done and that there would be two bills, one for  
8 engineering charges and one for actual construction.

9 Q. Was there anything unusual about this approach to the project?

10 A. No. It was the standard method of operation in any case where a municipality  
11 asked CBT to relocate its lines for a streetscape type project. In every case I am aware of, the  
12 municipality pays CBT's costs, both for engineering and construction work. In many cases, the  
13 municipality actually has its own contractor do the work to install the underground conduit at  
14 CBT's direction, which is exactly what happened in Batavia. CBT usually does the work  
15 associated with actually moving of the telephone lines.

16 Q. How did Mr. Bezold react to Mr. Tinch's response?

17 A. On February 7, 2013, Mr. Bezold stated that Batavia had begun the design work,  
18 which would include relocating the overhead electric, telephone and cable service to  
19 underground from the bridge just west of Riverside Drive to Fifth Street. He stated that they  
20 understood that Batavia's contractor would have to install all of the underground duct banks and  
21 pull boxes. He asked what information CBT needed to start its design work on its part of the  
22 project. Mr. Bezold also acknowledged that the estimate for CBT's utility relocation work was  
23 \$184,000.

1 Q. How do you know these things?

2 A. It was all documented in e-mail correspondence that I reviewed. I assumed  
3 responsibility for this project on February 11, 2013 and the exchange I just described between  
4 Mr. Bezold and Mr. Tinch had all occurred in the prior month or so.

5 Q. What was your first contact with Mr. Bezold?

6 A. I received an e-mail on February 11, 2013 from Mr. Bezold in which he described  
7 the status. He specifically said that all overhead utilities would be moved to below ground. He  
8 also stated that he understood that Batavia's contractor would need to install all the underground  
9 duct banks and pull boxes and he sent a copy of the previous estimate of \$184,000 for CBT's  
10 part of the work.

11 Q. Did you have any concerns about the nature of the project at that time?

12 A. No. Everything seemed very standard. Batavia's contractor was going to install  
13 the underground conduit system and CBT was going to do the work to relocate its lines and be  
14 paid its cost by Batavia. In fact, I confirmed to Mr. Bezold on February 12, 2013 that CBT must  
15 be paid prior to performing any work.

16 Q. Did CBT proceed to work with Mr. Bezold on the design issues?

17 A. Yes, we did. At first there were only very general drawings available and we  
18 needed more detail in order to make a final design. There were a number of exchanges back and  
19 forth seeking more details in order to be able to do our work. We finally got a set of plans we  
20 could work from in May 2013.

21 Q. What happened next?

22 A. On June 3, 2013, I received an e-mail from Dennis Nichols, the Village  
23 Administrator of Batavia, which for the first time stated that in developing plans for the project,

1 Batavia had determined that all telecommunications ducts would have to be in shared facilities.  
2 He stated that there would be no utility poles allowed on the street, in the sidewalk or in the right  
3 of way along Main Street from Riverside Drive to Fifth Street. He said that the preferred  
4 transmission path would be underground, but that utilities could use existing rights of way,  
5 easements and poles on connecting streets and parallel alleys. On Main Street itself, he said all  
6 telecommunications lines would be required to co-locate in village duct banks.

7 Q. Was this consistent with how you had understood the project was going to  
8 proceed?

9 A. No. CBT does not share facilities with other telecommunications providers and  
10 installs its lines in separate systems that it controls and maintains.

11 Q. Did you discuss this issue with Mr. Nichols?

12 A. Yes. On June 11, 2013 I was on a conference call with Mr. Nichols and Mike  
13 Skaggs of CBT, when Mr. Nichols asked if CBT would share conduit with other utilities. We  
14 told him that we would not share conduit for our main lines, but that we could do so for the  
15 individual connections between the right of way and the buildings. Mr. Nichols asked that we  
16 speak with a Mr. Bob Olding, who I understand was a telecommunications consultant that  
17 Batavia was working with to try to build a fiber network in Batavia to provide high speed  
18 internet service.

19 Q. What happened next?

20 A. Mr. Nichols asked if CBT would participate in a shared Batavia fiber optics  
21 network, but Mr. Skaggs told him that CBT had no interest in doing that. Later, the same day  
22 Mr. Skaggs spoke with Mr. Olding, Mr. Olding made a complaint to the PUCO on behalf of

1 Batavia. Mr. Olding alleged that CBT was attempting to charge Batavia \$500,000 to run  
2 conduits.

3 Q. Was this allegation true?

4 A. No. The only estimate that had been given at the time was the rough \$184,000  
5 from Steve Tinch to relocate CBT's lines. Up to that time, we understood that Batavia was  
6 planning to build the conduit system and CBT's estimate had nothing to do with that part of the  
7 project.

8 Q. What happened with Mr. Bezold's complaint to the PUCO?

9 A. Our regulatory department responded to it and I never heard anything more about  
10 it. However, at that point our relations with Batavia became very strained. Batavia balked at  
11 compensating CBT for its relocation work.

12 Q. Have you learned more about what was going on since this case was filed?

13 A. I only recently became aware through discovery of a June 5, 2013 communication  
14 from Mr. Nichols to Mr. Bezold and Mr. Olding, where he said about CBT: "If they do not  
15 accept our offer, they cannot use our duct. We will not provide multiple ducts, and we will not  
16 permit them to bury their own facilities on Main Street. If a utility service provider cannot use  
17 poles on Main Street and will not use duct provided by the village, then I submit that the service  
18 provider bears the onus for finding another path and, moreover, that the village has authority to  
19 enact a new ordinance imposing new burdens on the provider. The answer is that we want them  
20 to use our duct. If they will not cooperate, we will complicate their lives."

21 Q. Was CBT able to use existing rights of way, easements and poles on connecting  
22 streets and parallel alleys to serve all of the customers on Main Street?



1           A.     No. For many of the customers on Main Street, CBT's only way to serve the  
2 customer was using lines that fed directly from Main Street. This meant that CBT would be  
3 forced to use shared facilities controlled by Batavia.

4           Q.     Have you identified the locations where it was necessary to serve the customer  
5 from the Main Street side?

6           A.     Yes. Attached as Exhibit B is a map of the area where I have circled all the  
7 properties that are still being served from Main Street frontage.

8           Q.     Had you ever encountered a situation like this before where a municipality  
9 demanded that CBT share facilities and refused to allow CBT to install its own separate conduit?

10          A.     No. This was unheard of.

11          Q.     Did CBT continue to work on the design of the system?

12          A.     Yes. My conduit engineer, Mark Conner, continued working on plans and  
13 drawings with Mr. Bezold through June and July 2013. Mr. Bezold had many questions about  
14 the details of CBT's requirements to use the underground conduit system to serve customers on  
15 Main Street. On July 25, 2013 Mark Conner of CBT wrote to Mr. Bezold on the status of the  
16 plans. He stated that CBT would provide drawings showing its proposed facilities and wanted  
17 Batavia's contractor to place the facilities according to CBT's specifications. CBT proposed to  
18 have sole use of the facilities and to assume responsibility for maintenance.

19          Q.     What happened next?

20          A.     On August 2, 2013, Mr. Nichols sent an e-mail to several CBT personnel stating  
21 that Batavia was preparing legislation to enact public way fees.

22          Q.     What was CBT's reaction to that?

1           A.     CBT viewed that as a threat that Batavia was not going to pay for the relocation  
2 work and suspended work on this project pending review of the situation with our regulatory and  
3 legal departments.

4           Q.     Did CBT continue working on the design of the conduit system?

5           A.     Yes. The design detail work continued through September and into October  
6 2013, but CBT would not agree to do any actual construction work until it received payment of  
7 the estimated cost in advance. On October 2, 2013, CBT sent Batavia a bill for custom work and  
8 requested prepayment of the estimated cost of \$217,355.00.

9           Q.     Why was the amount of the prepayment \$217,355.00, instead of the previously  
10 estimated amount of \$184,000.00.

11          A.     The initial estimate had been based on rough drawings provided by Batavia's  
12 contractor with very little detail and before any field investigation, so it was necessarily a rough  
13 estimate. As the project proceeded and CBT received the actual construction plan drawings and  
14 reviewed the situation in much more detail, it was better able to quantify the expected cost.

15          Q.     Did Batavia make the payment and authorize CBT to do the work?

16          A.     Yes, it did.

17          Q.     If Batavia had not made the prepayment and authorized the work, would CBT  
18 have gone forward with construction work?

19          A.     No. As I stated before, in this type of job it is customary for a municipality that  
20 requests utility relocations as part of a streetscape project to pay for the costs of the relocation. I  
21 do not know of any basis for a municipality to require a utility to move lines underground for  
22 aesthetic purposes without paying the cost. CBT would not have agreed to move the lines  
23 underground if it would have to bear the expense of doing so.

1 Q. Why do you say that this project was for aesthetic purposes?

2 A. This project involved narrowing the street, not widening it, so the change to the  
3 traffic lanes did not require any relocation of utilities. The utility poles that were removed were  
4 all located in the sidewalk or between the sidewalk and the street. While I understand that  
5 Batavia claims that the poles were removed to eliminate pedestrian obstructions, the result of the  
6 project was to add 50 new light poles that were placed directly in the sidewalk as well as a  
7 number of planter boxes surrounded by fencing. There were far more new obstructions created  
8 on the sidewalk than were eliminated by removing the utility poles. The only apparent purpose  
9 of removing the poles was for aesthetic purposes.

10 Q. Are you aware of any problems that had been caused by having utility poles on  
11 the sidewalk?

12 A. No. I know of no incidents or complaints associated with any poles on Main  
13 Street in Batavia.

14 Q. Did CBT perform the relocation work as it agreed?

15 A. Yes.

16 Q. What work was done and what facilities does CBT have in the Main Street area  
17 today?

18 A. All aerial lines between Riverside Drive and Fifth Street were removed from  
19 poles and the poles were removed. CBT rerouted service drops to the rear or sides of properties  
20 that it could reach without using Main Street. For those Main Street addresses that CBT could  
21 only serve from Main Street, shown on Exhibit B, the service drops were placed underground in  
22 2" conduit between the curb line and the building served. Some of those service drops come  
23 above ground in the front of the buildings and some enter the building through the basement.

1 The main distribution cables along Main Street are in underground conduit, some of which was  
2 CBT's existing conduit and some of which was new conduit placed by Batavia. All of the work  
3 done by CBT is shown on the work order attached as Exhibit C.

4 Q. Have you reviewed the Batavia invoice with respect to the line items that have  
5 been billed back to CBT?

6 A. Yes.

7 Q. Do you agree with the quantities that are stated on the invoice?

8 A. No. The invoice charges CBT for 9,557 feet of 4" duct bank. I have reviewed the  
9 as-built drawings, attached as Exhibit D, and calculate that only 8,962 feet of 4" conduit was  
10 installed for CBT. CBT occupies 3,583' feet of new 4" conduit. CBT did request Batavia to  
11 install an additional 5,379 feet of spare 4" conduit so that it would not be necessary to re-  
12 excavate the street in order to install future new capacity. Having this conduit installed will  
13 avoid having to cut into the new street and damaging the decorative stamped and colored  
14 pavement. The decorative pavement is at each intersection and runs the full length of Main  
15 Street and in front of the Courthouse from Market Street to 3<sup>rd</sup> Street. The invoice from Batavia  
16 also listed 2,027 feet of 2" conduit, but our records show that only 1,752 feet were installed.

17 Q. Was it your understanding that Batavia was going to bill CBT for the construction  
18 of the conduit?

19 A. No. From the very beginning of this project, it was our understanding that  
20 Batavia would pay the cost of constructing the new facilities, as well as CBT's relocation costs.

21 Q. Do you believe the charges that Batavia has billed to CBT are costs of CBT  
22 occupying the public way?

1           A.     No. All of those charges were directly caused by Batavia's decision to force all  
2   above ground utilities off of Main Street. Batavia was not incurring any costs because of CBT's  
3   aerial lines on Main Street before this project. The cost was incurred to create a new  
4   underground path for distribution in the existing public right of way, and to move CBT facilities  
5   into that underground path.

6           Q.     Does that conclude your testimony?

7           A.     Yes.

**CERTIFICATE OF SERVICE**

This is to certify that I served the foregoing upon the Village of Batavia by e-mailing it to counsel of record, Mark S. Yurick, Taft Stettinius & Hollister LLP, 65 East State Street, Suite 1000, Columbus, Ohio 43215 at [myurick@taftlaw.com](mailto:myurick@taftlaw.com) and upon Christopher L. Moore, Schroeder Maundrell Barbieri & Powers, 5300 Socialville-Foster Road, Suite 200, Mason, Ohio 45040 at [cmoore@smbplaw.com](mailto:cmoore@smbplaw.com) this 30<sup>th</sup> day of January, 2015.

/s/ Douglas E. Hart \_\_\_\_\_

**This foregoing document was electronically filed with the Public Utilities**

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Summary: Testimony of David Smiley electronically filed by Mr. Douglas E. Hart on behalf of Cincinnati Bell Telephone Company LLC