

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Commission finds:

- (1) On July 30, 2014, the Commission issued its Finding and Order in this proceeding adopting rules concerning access to poles, ducts, conduits, and rights-of-way by public utilities, as set forth in the appendix to the Finding and Order. Pursuant to its July 30, 2014 Finding and Order in this case, the Commission adopted Ohio Adm.Code 4901:1-3-04 requiring that a single pole attachment rate formula be adopted consistent with the cable television (CATV) rate formula and allocated based on the percentage of usable space occupied by the attachment. Additionally, the Commission concluded that the current Federal Communications Commission (FCC) presumptive inputs for the pole attachment be adopted for the purpose of calculating the single rate formula. The Commission noted that these presumptions are rebuttable and that parties may challenge these presumptions in the future on a case-by-case basis through the filing of a complaint case.

Additionally, the Commission determined that, with respect to the calculation of conduit occupancy rates, the definitions, assumptions, and methodologies set forth in 47 C.F.R. 1.1409(e)(3) should be adopted, including those related to net conduit investment and carrying charge rates.

- (2) Applications for rehearing to the July 30, 2014 Finding and Order were filed on August 29, 2014.
- (3) On October 15, 2014, the Commission issued its Entry on Rehearing granting in part and denying in part the applications for rehearing.

- (4) On February 25, 2015, the Commission issued an Entry which, among other things, directed utility pole owners to each file the appropriate company-specific tariff amendment application, including the applicable calculations based on 2014 data, on or before May 1, 2015. Unless otherwise suspended, the tariff revisions are to be automatically effective on July 1, 2015.
- (5) On March 27, 2015, the Ohio Cable Telecommunications Association (OCTA) filed a motion for clarification or, in the alternative, application for rehearing.

Specifically, OCTA requests that the Commission clarify its Entry of February 25, 2015, by indicating that if a pole attachment rate or conduit rate that is filed by an electric distribution utility or telephone company on or before May 1, 2015, results in an increase of its existing tariffed pole attachment or conduit occupancy rate, then the electric distribution utility or telephone company must follow the statutorily mandated provisions of R.C. 4909.18 for the filing of a rate increase application or the provisions of R.C. 4905.26 for the filing of a self-complaint case. OCTA submits that, to the extent that the Commission's Entry allows for an electric distribution utility or telephone company to increase its pole attachment rate or conduit rate without following the statutorily mandated procedures for a rate increase or a self-complaint process, the Entry is unreasonable and unlawful.

Further, OCTA avers that the Entry is unreasonable and unlawful due to the fact that the July 1, 2015 automatic effective date does not provide sufficient time for those entities affected by the tariff amendments to review and comment on the filings. Rather, OCTA recommends that the effective date should be extended until at least August 1, 2015.

- (6) On April 2, 2015, the Ohio Rural Broadband Association (ORBA)<sup>1</sup> filed a motion to extend the tariff amendment filing

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<sup>1</sup> The ORBA consists of the following entities: Arcadia Telephone Company, Arthur Mutual Telephone Company, Ayersville Telephone Company, Bascom Mutual Telephone Company, Benton Ridge Telephone Company, Buckland Telephone Company, Chillicothe Telephone Company, Columbus Grove Telephone Company, Conneaut Telephone Company dba GreatWave Communications, Continental Telephone Company, Doylestown Telephone Company, Farmers Mutual Telephone Company, Fort Jennings Telephone Company, Germantown Independent Telephone Company, Glandorf Telephone Company, Kalida Telephone Company Inc., Little Miami Communications

date to June 1, 2015. In support of its request, ORBA states that the requested extension is necessary in order for its members to prepare the calculations for its tariff amendments due to the fact that 2014 data required to prepare the tariff amendments may not be available until the April 30, 2015 annual report deadline. ORBA represents that many of its members use the same accounting firm and that the May 1, 2015 tariff amendment deadline will cause an undue burden to complete the required calculations and prepare the tariffs.

- (7) On April 6, 2015, The Ohio Bell Telephone Company dba AT&T Ohio, AT&T Corp., Teleport Communications America LLC, and New Cingular Wireless PCS, LLC dba AT&T Mobility (jointly, AT&T Entities) filed a memorandum contra OCTA's motion for clarification.

Specifically, AT&T Entities contend that OCTA has failed to provide any legal support for the contention that public utilities must follow the rate increase application procedure in R.C. 4909.18 or follow the self-complaint process in R.C. 4905.26 if they want to increase existing pole attachment and conduit occupancy rates. According to AT&T Entities, while R.C. 4905.71 requires the tariffing of reasonable charges, terms, and conditions for pole attachments and occupancy, the statute does not specify the manner in which the Commission must implement such regulation. Further, AT&T Entities assert that the Entry of February 25, 2015, established an appropriate automatic tariff approval mechanism for the establishment of new rates. AT&T Entities note that, consistent with the process approved by the Commission, an application may be suspended. Additionally, an adversely affected entity can avail itself of the complaint process once a rate increase becomes effective.

- (8) On April 6, 2015, Ohio Power Company, Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, The Dayton Power and Light

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Corporation, McClure Telephone Company, Middle Point Home Telephone Company, Minford Telephone Company, New Knoxville Telephone Company, Oakwood Telephone Company, Orwell Telephone Company, Ottoville Mutual Telephone Company, Pattersonville Telephone Company, Ridgeville Telephone Company, Sherwood Mutual Telephone Association, Sycamore Telephone Company, Telephone Service Company, Vanlue Telephone Company, Vaughnsville Telephone Company, and Wabash Mutual Telephone Company.

Company, and Duke Energy Ohio, Inc. (jointly, the Electric Utilities) filed a memorandum contra OCTA's motion for clarification.

- (9) On April 13, 2015, OCTA filed a reply to the two memoranda contra.
- (10) First, the Electric Utilities assert that, although styled as a motion for clarification, OCTA's filing is actually an untimely challenge to the rules adopted in the July 30, 2014 Finding and Order in this case.

In support of this objection, the Electric Utilities note that OCTA failed to file for rehearing in response to the Commission's adoption of Ohio Adm.Code 4901:1-3-03(B)(5)(2) which requires that utilities must provide no less than sixty days written notice to attaching entities of an increase in rates. The Electric Utilities also note that OCTA failed to file for rehearing in response to the Commission's adoption of Ohio Adm.Code 4901:1-3-04(D)(2) or 4901:1-3-04(D)(3) which established use of the rate formulas set forth in 47 C.F.R. 1.1409(e)(1) and 47 C.F.R. 1.1409(e)(3). Further, the Electric Utilities point out that OCTA did not challenge the Commission's determination in its July 30, 2014 Finding and Order that a future entry would address the filing of tariffs consistent with the adopted rule.

Specifically, the Electric Utilities consider OCTA's March 27, 2015 filing to effectively request the Commission to modify the above provisions by inserting the requirement of a full rate case proceeding whenever applying the cable rate formula results in an increase in the tariff rate. To the extent that this was a concern of OCTA, the Electric Utilities aver that it should have been raised in response to the Commission's July 30, 2014 Finding and Order.

- (11) Next, the Electric Utilities contend that the Commission should reject OCTA's request to consider the *tariff compliance filing* as an application for an increase in rates without following that statutorily mandated procedure for a rate increase contained in R.C. 4909.18 - 4909.19, or through a self-complaint process provided in R.C. 4905.26. The Electric Utilities emphasize that the regulation of pole attachments does not pertain to the

provision of public utility service to retail consumers but, rather, is the means of ensuring nondiscriminatory access by other retail service providers to utility structures located in the public right-of-way.

Further, the Electric Utilities assert that there is no requirement in R.C. 4905.71 to treat a change in pole attachment tariff charges as an application for a rate increase under R.C. 4909.18 triggering the mandatory Standard Filing Requirements. The Electric Utilities consider the Commission's February 25, 2015 Entry to be nothing more than the implementation and tariff compliance process of the Commission's July 30, 2014 Finding and Order. The Electric Utilities opine that the 60-day tariff review process is consistent with the 60-day notice period provided to all attaching entities.

The Electric Utilities consider OCTA's current position to be in conflict with its past position in this proceeding in which OCTA supported the adoption of the FCC formula. The Electric Utilities question the validity of OCTA's current position to allow for the use a formula-based rate and expedited approval process when the result is a rate decrease while objecting to such an approach when the result is a rate increase. According to the Electric Utilities, if OCTA's position is upheld, utilities could also not implement the FCC formula to create a pole attachment decrease without triggering the same statutes. The Electric Utilities submit that there is a clear distinction between the implementation of a rate formula and application of that formula rate to adjust annually the rental fees calculated under the formula.

- (12) The Electric Utilities also argue that the Commission should reject OCTA's request to delay the effective date of tariffs amended pursuant to the Commission's February 25, 2015 Entry. In support of their position, the Electric Utilities note that the Commission considered the amount of time required to review rates calculated from established formulas using publicly-available data. Further, the Electric Utilities submit that the volume of tariff filings with substantive amendments will be minimal, especially in light of ORBA's request, discussed *supra*, to extend the tariff filing date. Additionally, the Electric Utilities note that the utility's tariff amendments are subject to suspension and that the complaint provisions under

Ohio Adm.Code 4901:1-3-05 could be utilized if specific terms in an amended tariff are subsequently found to be inconsistent with the pole attachment rules.

- (13) Upon considering the arguments raised by OCTA and all memorandum contra, the Commission finds that OCTA's motion for clarification, or, in the alternative, application for rehearing should be denied with regard to the issue of an electric distribution utility or telephone company being required to follow the statutorily mandated procedures for a rate increase or a self complaint process in order to increase its pole attachment or conduit rate. Although there is question as to whether a motion for clarification or in the alternative an application for rehearing is appropriate at this time, the Commission will provide some clarification to the issue raised by OCTA.

The Commission concluded in the July 30, 2014 Finding and Order in this matter that a single rate formula consistent with the CATV rate formula should be adopted as the default tariff rate subject to the parties' ability to negotiate the terms and conditions of a pole attachment agreement individually. The Commission further noted that the CATV rate formula has been deemed to be compensatory by the courts. *See, e.g., Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 44 L.Ed.2d 282 (1987). Adopted Ohio Adm.Code 4901:1-3-04(D) reflects that the Commission shall determine whether a pole attachment or conduit rate is just and reasonable in complaint proceedings or in tariff filings. The February 25, 2015 Entry now being challenged by the OCTA directed all pole owners in Ohio to file an application to amend it tariff on or before May 1, 2015. Thus, the Commission has specifically set forth two avenues for interested stakeholders to challenge the justness and reasonableness of the pole owners' tariffs. OCTA has a process to challenge the reasonableness of any tariffs filed in response to the February 25, 2015 Entry by seeking to intervene in an individual pole owners' tariff proceeding or, thereafter, to file a complaint proceeding as contemplated by R.C. 4905.71(B).

With respect to ORBA's request for additional time to file the requisite tariff amendment, the Commission finds that the motion should be granted in part and denied in part.

Specifically, all public utility pole owners shall have until May 15, 2015, to file their requisite tariff applications.

With respect to OCTA's contention that the July 1, 2015 effective date does not provide sufficient time for interested entities to review and comment on the filings, the motion is granted in part and denied in part, consistent with the ruling regarding ORBA's motion *supra*. While the Commission agrees that additional time may be appropriate for the review and comment on the tariff amendment filings, the deadline for the filing of comments must also provide an adequate amount of time for Commission review of such filings. Therefore, the Commission finds that the automatic approval date for the pole attachment amendments shall be extended to September 1, 2015. All motions to intervene and corresponding objections shall be filed on or before August 1, 2015.

It is, therefore,

ORDERED, That OCTA's motion for clarification, or in the alternative application for rehearing, be granted, in part, and denied, in part, consistent with Finding (13). It is, further,

ORDERED, That ORBA's motion for an extension of time be granted, in part, and denied, in part, in accordance with Finding (13). It is, further,

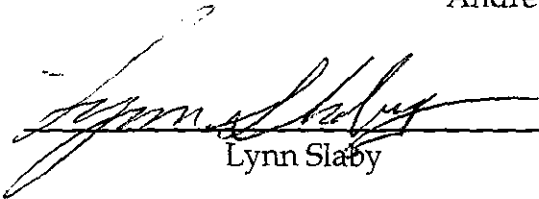
ORDERED, That notice of this Entry be served via the Electric-Energy, Gas-Pipeline, Telephone, and Water industry listserves. It is, further,

ORDERED, That a copy of this Entry be served upon all investor-owned electric utilities in the state of Ohio, all incumbent local exchange telephone companies in the state of Ohio, the Ohio Telecom Association, and the Ohio Cable Telecommunications Association.

## THE PUBLIC UTILITIES COMMISSION OF OHIO



Andre T. Porter, Chairman




Lynn Slaby



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**APR 22 2015**Barcy F. McNeal  
Secretary