**BEFORE THE**
**PUBLIC UTILITIES COMMISSION OF OHIO**

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| **In the Matter of the Application of Ohio Power Company to Amend its Pole Attachment Tariffs.** | **)** **)** **)** | **Case No. 15-974-EL-ATA** |

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# OHIO POWER COMPANY'S RESPONSES TO OBJECTIONS OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

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On February 25, 2015, the Commission issued an entry in Case No. 13-579-AU-ORD directing "electric distribution 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." On April 22, 2015, the Commission issued an entry in Case No. 13-579-AU-ORD extending the filing date for the tariff amendment application to May 15, 2015. On May 15, 2015, the Ohio Power Company (AEP Ohio) filed its Application to Amend its Pole Attachment Tariff in Case No. 15-974-EL-ATA. On August 3, 2015, the Ohio Cable Telecommunications Association (OCTA) filed objections to the AEP Ohio's Application to Amend its Pole Attachment Tariff. On August 7, 2015 the Attorney Examiner in this case issued an Entry granting certain pole owners the opportunity to file responses to objections on or before August 24, 2015. Additionally, this Entry suspended the automatic approval set to take place on September 1, 2015 and instituted approval upon a separate Commission Order. AEP Ohio hereby submits its responses to OCTA objections filed on August 3, 2015 in Case No. 15-974-EL-ATA – all of which lack merit – and requests that the Commission approve the Company's Application.

## I. AEP Ohio did not use an inflated tax carrying charge

OCTA claims that the Company has used an inflated tax carrying charge. In particular, OCTA claims: "In calculating the tax component of its carrying charge, it appears that AEP Ohio has compared the reduced investment in plant to taxes that are based on the plant investment prior to the step-down."[1] That is, OCTA notes that AEP Ohio had a step-down in assets between 2012 and 2013 and that AEP Ohio failed to account for this properly in the tax component of its carrying charge.

Although it is true that AEP Ohio had a step-down in assets, this step-down did not lead to any error in AEP Ohio's pole attachment rates, as OCTA claims. The Company's Pole Attachment calculation is based on the 2014 FERC Form 1 and does not include any generation-related taxes. Further, although property taxes are paid on a one-year lag basis, they are expensed in the current year, so for the Pole Attachment calculation year of 2014 there is no generation property tax and no net generation plant included. Additionally, any differences between the Company's Pole Attachment filings from the FERC Form 1 years of 2011 (the Company's last Pole Attachment Filing) and 2014 are not material to this case because the calculations are independent of each other. In any event, even if it were proper to compare Pole Attachment calculations for FERC years 2011 and 2014, there would be an increase in the tax carrying charge, but this increase is by no means incorrect or artificially inflated, as OCTA implies, when in reality the inclusion of generation property and related taxes in prior filings understated the true tax cost associated with the wires business in Ohio. In fact, one-time differences are not unexpected, as the FCC formula will yield different results before and after

[1] "Step-down" is defined as December 31, 2013, the time at which the company ceased to include its divested generation assets on the FERC form 1.

the Company divested its generation assets. In this case, the increase in tax carrying charges is primarily driven by differences in operating taxes and net plant investment. As noted above, the net plant investment in 2014 relates only to transmission and distribution, not generation.

In sum, despite OCTA's claims to the contrary, the Company has followed the approved FCC formula in calculating its 2014 pole attachment rate, and there are no unexpected rate design anomalies and, therefore, no reason for the Commission to hold a hearing on this matter.

## II. The Commission is not authorized to phase in AEP Ohio's pole attachment rates

OCTA argues that the Commission should apply the "equitable concept of gradualism" so that the proposed increase in AEP Ohio's rates will not "be implemented all at one time." OCTA Objections 4-5. The rate design concept of gradualism typically involves the gradual elimination of cross-subsidies among or within rate classes and is premised on avoiding sudden rate changes while remaining revenue-neutral to the utility. By contrast, OCTA's request is to prevent AEP Ohio from recovering its cost of providing pole attachment service and results in a financial windfall to OCTA members. In any case, OCTA's request is simply another way of asking the Commission to *phase in* the increase in AEP Ohio's rates, and case law clearly establishes that the Commission has no authority to order any rate phase-in here. The Commission's only statutory authority to order a phase-in exists in R.C. 4928.144, which is expressly limited to SSO rates and has no application or relevance here.

In *Columbus Southern Power Company v. Public Utilities Commission of Ohio*, 620 N.E.2d 835 (Ohio 1993), the Commission ordered a rate phase-in as part of a rate proceeding for Columbus Southern Power (CSP). On appeal, the Supreme Court reversed the Commission on the phase-in issue, holding that the "phase-in plan ordered by the PUCO deprives CSP of the annual revenues to which it is entitled . . . and exceeds the PUCO's statutory authority." *Id.* at

841. The Court reasoned that, "considering the detail with which the General Assembly has legislated in this area, . . . if it had intended to grant the PUCO authority to phase in a utility's annual revenue increase, it would have specifically provided such a mechanism." *Id.* at 840. "If the PUCO now seeks such authority," the Court concluded, "its recourse is through the legislature, and not this court." *Id.*[2]

Then, tellingly, the Legislature did provide the Commission rate phase-in authority in SB221, but it expressly limited that phase-in authority to rates established as part of a standard service offer (SSO) under R.C. 4928.141-.143. *See* R.C. 4928.144 ("The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established *under sections 4928.141 to 4928.143 of the Revised Code . . . .*" (emphasis added)). By providing such specific and limited statutory authority for a phase-in of SSO rates, the General Assembly confirmed that the Commission lacks any general authority to order a rate phase-in in any other context.[3]

Here, the Commission obviously is *not* setting rates pursuant to R.C. 4928.141-.143, and thus the Commission has no statutory authority to order a phase-in. Once the Commission

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[2] OCTA fails to note that the only precedent it cites for its phase-in proposal was overturned on appeal, just as the *Columbus Southern* phase-in. OCTA argues (Objections 4) that the "Commission has authorized appropriate phase-in plans by using [its] supervisory authority under R.C. 4905.04 to avoid rate shock." The only example OCTA provides is *In re Cincinnati Gas & Electric Company*, Case No. 91-410-EL-AID. *See* OCTA Objections 4 n.8. Critically, the phase-in ordered by the Commission in that case was reversed by the Supreme Court. *See Cincinnati Gas & Electric Co. v. Pub. Utilities Comm'n*, 67 Ohio St. 3d 517 (1993) (citing *Columbus Southern*, 620 N.E.2d at 841 and holding that the Commission lacks statutory authority to phase in rates).

[3] Importantly, moreover, R.C. 4928.144 provides that, if the Commission orders an SSO rate phase-in, the Commission must "provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount." R.C. 4928.144. Thus, even in the limited circumstances in which the General Assembly authorized a rate phase-in, it ensured that the utility would eventually be made whole.

determines the just and reasonable rate to which AEP Ohio is entitled, it may not reduce that rate even if it represents a "large increase." OCTA Objections 5. Any such phase-in of AEP Ohio's new rate would "deprive[] [AEP Ohio] of the annual revenues to which it is entitled . . . and exceed[] the PUCO's statutory authority." *Columbus Southern*, 620 N.E.2d at 841.

## III. OCTA's objections to AEP Ohio's proposed terms and conditions are meritless

### A. Access to Pole Attachments (Availability of Service Section)

AEP Ohio's proposed tariff language concerning access includes the following language: "so long as those attachments do not interfere, obstruct or delay the service and operation of the Company or create a hazard to safety." The OCTA contends that this language should be modified for consistency with the Rules. But the proposed tariff language is the exact same language set forth in Ohio Revised Code § 4905.71, the enabling statute for the Rules.

AEP Ohio is not substantively opposed to incorporating the changes requested by OCTA in this regrd, but believes that such changes are unnecessary given the alignment in the proposed tariff with R.C. § 4905.71 and the requirement that AEP Ohio must comply with both §4 905.71 and the Rules. Typically, statutory requirements are broad and tariff requirements are more specific but still do not cover all of the details involved with the provision of service; often with large commercial or industrial customers, the Company enters into a service contract that covers the gaps in a way that is consistent with the tariff and any applicable statutes. Thus, regardless of whether all provisions of both are set forth in the tariff, the Company will simultaneously follow the statute, the Rules and the tariff. OCTA's recommendation is unnecessary.

### B. Definition of "Attachment" (Availability of Service Section)

The definition of "Attachment" set forth in the proposed tariff is intended to define an attachment for purposes of billing the attachment fee. The proposed tariff does not set forth

terms concerning permitting. Permitting rules are set forth in OAC 4901:1-03-03 (the "Access Rule") and are implemented pursuant to pole attachment agreements between the parties. The OCTA attempted to have overlashing addressed in the Access Rule in its previous comments. The Commission rightfully chose not to specifically carve out overlashing from the permitting requirements set forth in the Access Rule.

Overlashing cannot be marginalized as having very little impact on pole engineering, as the OCTA would suggest. In some cases, overlashing can be accomplished with very little impact on the pole. In other cases, however, overlashing on an already stressed pole can have a significant impact. Overlashing significantly increases the total weight of the bundled facilities and increases the potential for ice loading due to the increase in surface area of the bundle. As such, pole owners must consider the potential impacts. The details concerning how the parties address overlashing is best left to the parties through mutual agreement subject to the review of the Commission pursuant to OAC 4901:1-3-06. AEP Ohio retains the right to review overlashing in its pole attachment agreements. Such discretion should continue to remain available to pole owners in order to ensure that poles are not overloaded.

**C. Payment (Payments Section)**

Pursuant to the terms of its pole attachment agreements, AEP Ohio generally allows attaching parties thirty days to pay invoices related to engineering and make-ready work. AEP Ohio is not opposed to shortening the time to pay such invoices to twenty-one days, as requested by the OCTA.

**D. Separate Agreement (Throughout Schedules)**

OCTA appears to be arguing that separate pole attachment agreements either are not appropriate or must be approved as a schedule to the tariff. Both propositions are wrong –

separate pole attachment agreements are appropriate and need not be approved as a schedule to the tariff. OCTA's contrary argument seeks to deny parties the flexibility to negotiate pole attachment agreement terms that can change with time and that are tailored to the needs of the parties. Neither the Rules nor the proposed tariff are well positioned to address the minutia of every pole attachment term and condition, as discussed above. Pole attachment agreements serve to fill in the gaps and create mutual obligations that are negotiated between the parties subject to Commission review pursuant to a 4901:1-3-05 complaint.

Moreover, the Rules clearly contemplate separate pole attachment agreements that would not be a part of the tariff, because OAC 4901:1-3-05 permits a party to file a complaint to address denial of access or seek a finding that a "rate, term, or condition for a pole attachment are not just and reasonable." Presumably, any term or condition of an agreement made a part of a tariff would be deemed reasonable when approved and would not need further review. The Rules further provide for arbitration or mediation "[i]f parties are unable to reach an *agreement* on rates, terms, or conditions regarding access to poles, ducts, conduits, and rights-of-way review." OAC 4901:1-3-6 (emphasis added). Such a mechanism would not be necessary if the proscribed form of agreement was incorporated within the tariff.

It is not unusual for AEP Ohio to have agreements with its customers that contain terms and conditions that reach beyond the basic terms set forth in AEP Ohio's tariff. Such terms and conditions are always subject to review to ensure compliance with applicable provisions of AEP Ohio's tariff, the Ohio Revised Code, and the Ohio Administrative Code. AEP Ohio has many pole attachment agreements that are over twenty years old that have served the parties well. Dismantling such agreements would only create unnecessary business uncertainty.

## IV. Conclusion

Based on the foregoing comments, the Commission should reject OCTA's positions and grant AEP Ohio's Application in this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Ohio Power Company's *Responses to Objections of the Ohio Cable Telecommunications Association* have been served upon the below-named counsel and Attorney Examiners by electronic mail to all Parties this 24th day of August, 2015.

/s/ Steven T. Nourse
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Summary: Response to Objections of the Ohio Cable Telecommunications Association electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company