

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
WINDSTREAM OHIO, INC. TO ADD
LANGUAGE AND RATES FOR ACCESS TO
POLES, CONDUIT, AND RIGHTS-OF-WAY
BY PUBLIC UTILITIES TO THE ACCESS
TARIFF.

CASE No. 15-950-TP-ATA

IN THE MATTER OF THE APPLICATION OF
WINDSTREAM WESTERN RESERVE, INC.
TO ADD LANGUAGE AND RATES FOR
ACCESS TO POLES, CONDUIT, AND
RIGHTS-OF-WAY BY PUBLIC UTILITIES TO
THE ACCESS TARIFF.

CASE No. 15-951-TP-ATA

FINDING AND ORDER

Entered in the Journal on May 18, 2016

I. SUMMARY

{¶ 1} The Commission finds that Windstream Ohio, Inc. (Windstream Ohio) and Windstream Western Reserve, Inc. (Western Reserve) (collectively, Windstream) should file final pole attachment tariffs consistent with the determinations set forth in this Finding and Order. Additionally, Windstream's motion for a protective order and the Ohio Cable Telecommunications Association's (OCTA) motion for leave to file a reply are denied.

II. 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.

III. PROCEDURAL BACKGROUND

{¶ 3} 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.

{¶ 4} On May 12, 2015, Windstream Ohio filed its tariff amendment application in the above captioned Case No. 15-950-TP-ATA (15-950).

{¶ 5} On May 12, 2015, Western Reserve filed its tariff amendment application in the above captioned Case No. 15-951-TP-ATA (15-951).

{¶ 6} On July 2, 2015, OCTA filed a motion to intervene in these proceedings.

{¶ 7} On August 3, 2015, OCTA filed objections relative to the tariff amendment applications.

{¶ 8} Pursuant to the attorney examiner Entry of August 7, 2015, the tariff amendment applications were suspended and removed from the automatic approval process. Additionally, the motion to intervene filed by OCTA was granted.

{¶ 9} On August 24, 2015, Windstream Ohio and Western Reserve filed a response to OCTA's objections.

{¶ 10} On September 10, 2015, OCTA filed a motion for leave to file a reply and a request for an expedited ruling. OCTA explains that its motion is appropriate in order ensure that the Commission has further information upon which to consider certain

disputed issues in this proceeding. OCTA also offers a proposal for the next procedural steps in this case. Specifically, OCTA proposes that an informal conference be scheduled so that Windstream, OCTA, and the Commission Staff (Staff) can discuss outstanding issues with the intent of avoiding a hearing.

{¶ 11} On September 17, 2015, Windstream filed a memorandum contra OCTA's motion for leave to file a reply.

IV. DISCUSSION

A. *OCTA's Motion for Leave to File a Reply*

{¶ 12} In regard to OCTA's September 10, 2015 motion for leave to file a reply, the Commission finds that the request is denied. The Commission notes that the procedural schedule set forth in the Entries of February 25, 2015, and April 22, 2015, did not contemplate the filing of replies to the responses to objections. Additionally, the Commission finds that OCTA's reply fails to raise additional arguments of significance for the Commission's consideration. Further, the Commission does not believe that an informal conference will be productive at this time.

B. *Attachment and Occupancy Applications*

{¶ 13} OCTA objects to the absence of certain language which it believes, if added, will make the tariffs consistent with the Commission's new rules. For example, OCTA recommends the addition of language in Sheet No. 12, Section S2.2.3(F), "Attachment and Occupancy Applications," in order to be consistent with Ohio Adm.Code 4901:1-3-03 in describing the application process in detail. (Objections at 3-4.)

{¶ 14} Windstream responds that OCTA's objection is a non-issue and should be rejected. Windstream argues that no part of its tariff is inconsistent with the rules and that it fully intends to comply with Ohio Adm.Code 4901:1-3-03. Windstream also argues that OCTA's proposed language is improper as it is either redundant of the actual Commission

language and, therefore, unnecessary or is being used as a platform to create/support ambiguities favorable to OCTA members. Windstream insists that if and when any actual issues arise, Windstream will address them in good faith pursuant to Ohio Adm.Code 4901:1-3-05 and 4901:1-3-06. (Response at 2.)

{¶ 15} In regard to OCTA's request for the inclusion of specific detailed language regarding the application process, the Commission finds that in lieu of OCTA's proposed language, the tariff should clearly state that the attachment and occupancy application process shall be implemented consistent with Ohio Adm.Code Chapter 4901:1-3.

C. *Overlashing*

{¶ 16} OCTA defines overlashing as the practice of an attaching entity lashing its previously permitted strand of cable to the strand of another attachee with that attachee's consent. OCTA submits that while Windstream's tariff proposals do address overlashing, certain revisions are necessary to avoid any future disputes on the handling of overlashing notices. Specifically, in Sheet No. 21, Section S2.2.3(G)(6)(c), OCTA requests that, rather than an attachment application process, Windstream accept lashing of an attachee with 15 days advance notice to Windstream. In support of its position OCTA submits that the Federal Communications Commission (FCC) determined that overlashing does not require an attachment application and that prior notice is up to the parties to negotiate. *See e.g., In re Implementation of Section 703E of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6807, ¶59-69 (rel. Feb. 6, 1998). (Objections at 5-6.)

{¶ 17} Windstream objects to OCTA's claim that Windstream's tariffs should permit notice-only overlashing. Specifically, it considers this request to be an improper attempt at rehearing or new rule-making and, therefore, believes that it should be rejected. Windstream argues that the new rules do not address overlashing and, therefore, the parties' tariffs cannot be inconsistent with the rules on that subject. Windstream further

argues that proposed tariffs have the same language regarding “lashing” that they have always had and no OCTA member has ever filed a complaint against Windstream regarding lashing. (Response at 3-4.)

{¶ 18} In regard to OCTA’s proposed addition of language regarding overlashing, the Commission finds that overlashing is outside the scope of the pole attachment rules and need not be addressed in Windstream’s pole attachment tariff beyond the level that currently exists. The definition of attachee’s communications facilities in conjunction with the definition of pole attachment, should only define those facilities/pole attachments that have associated charges set forth in Windstream’s tariffs. A wire overlashed to an existing facility/pole attachment is not an attachment subject to the attachment fee and, therefore, is not included in the definition of attachee’s communications facilities. The purpose and scope of Ohio Adm.Code Chapter 4901:1-3, as codified in Ohio Adm.Code 4901:1-3-02(B), is to “establish rules for the provision of attachments to a pole, duct, conduit, or right-of-way owned or controlled by a utility under rates, terms, and conditions that are just and reasonable.” This rule amplifies R.C. 4905.71, which states that every telephone, electric company, and incumbent local exchange company “shall permit, upon reasonable terms and conditions and the payment of reasonable charges the attachment of any wire, cable, facility, or apparatus to its poles ***by any person or entity other than a public utility ***.”

{¶ 19} Further, the Commission recognizes that overlashing can affect the loading of a pole and that a 15-day notice requirement to allow for overlashing may not provide adequate time to evaluate whether a pole can accommodate the additional load.

{¶ 20} As, such, Windstream does not have to amend its tariffs to further address overlashing. Therefore, any terms and conditions associated with overlashing not addressed in its tariffs should be established through negotiated agreements subject to the review of the Commission pursuant to Ohio Adm.Code 4901:1-3-06.

D. Pole Attachment Rates

{¶ 21} OCTA represents that, due to the fact that a protective agreement had not been negotiated as of the time of the filing of its objections, it has been unable to verify the accuracy of the calculation used for the pole attachment rate proposed by Windstream.

{¶ 22} OCTA highlights that Windstream Ohio has proposed a pole attachment rate of \$2.46 per pole per year and a conduit rate of \$0.18 per duct foot. OCTA points out that the current Windstream Ohio pole attachment rates are \$1.75 per pole per year for three specific exchanges and \$2.85 per pole per year for twelve other exchanges. Additionally, the current Windstream Ohio conduit rate is \$.75 per duct foot. With respect to Western Reserve, OCTA reports that while the company proposes to decrease its conduit occupancy rate from \$.75 per duct foot to \$.35 per duct foot, it proposes to increase its pole attachment rate from \$2.00 per pole per year to \$3.20 per pole per year, resulting in an increase of 60 percent.

{¶ 23} OCTA objects to the 60 percent increase in pole attachment rates. OCTA contends that Western Reserve owns 65,343 poles which, at the proposed rate, would be an immediate increase costing over \$78,000 to the attachées and their customers. To the extent that the Commission ultimately determines that the correct rate for Western Reserve results in more than a 20 percent rate increase, OCTA requests that the Commission apply the principle of “gradualism” in order to avoid rate shock. Citing *In re The Cincinnati Gas & Electric Company*, Case No. 91-410-EL-AIR, Opinion and Order (May 12, 1992), OCTA argues that, consistent with R.C. 4905.04, the Commission possesses statutory authority to implement “gradualism.” Therefore, OCTA recommends a phase-in plan of 20 percent each year, until the authorized rate level is achieved. (Objections at 6-8.)

{¶ 24} Windstream contends that OCTA’s argument that a member company would be facing a very large cost increase relative to Western Reserve’s pole attachment rates is only a fraction of the picture and is misleading. Specifically, Windstream avers that

the \$78,000 increase referenced by OCTA assumes that a cable company attaches to every single Western Reserve pole and experiences no offsetting cost reductions from the much lower conduit rates. Therefore, Windstream argues that it is impossible to tell what the overall financial impact will be without more information regarding the actual scenario involved. Windstream submits that under many scenarios, a cable company's overall cost would remain the same or decline. (Response at 4-5.)

{¶ 25} Windstream asserts that OCTA has provided no factual justification for its contention that the Western Reserve rate should be phased-in for the purpose of avoiding "rate shock." Windstream further submits that the rate cases cited by OCTA are not applicable in this case as they involve end-user retail rates and not wholesale rates charged to competitive carriers. Additionally, Windstream opines that many of the cable companies are as large as Windstream and can absorb rate increases and pass them along to their customers.

{¶ 26} Windstream also points out that pursuant to R.C. 4927.03(C), R.C. 4905.04 no longer applies to telephone companies such as Windstream. Finally, Windstream represents that the parties agreed on terms of a protective agreement on August 19, 2015, and Windstream provided the confidential information to OCTA on August 20, 2015. According to Windstream, while OCTA reserved the right to supplement its objections after receiving that information, OCTA counsel advised Windstream on August 24, 2015, that OCTA had reviewed the information and did not plan to file supplemental objections. (Response at 4-5.)

{¶ 27} In regard to OCTA's objection specific to Windstream's rates, the Commission finds that a phase-in of Windstream's pole attachment rate is not appropriate in this proceeding. The Supreme Court of Ohio has determined that the Commission lacks authority to phase-in rates that deprive a utility of the annual revenues to which it is entitled. *Cols. Southern Power Co. v. Pub. Util. Comm. of Ohio*, 67 Ohio St.3d 535, 620 N.E.2d

835 (1993). The Commission believes that pole attachment and conduit occupancy rates fall within this directive. The phase-in of a rate increase would also go against one of the main reasons for the Commission adopting its pole attachment formula; specifically, that it is straight-forward, easy to compute and relies on readily available data.

{¶ 28} Consistent with the determination set forth in this Finding and Order, Windstream Ohio and Western Reserve are directed to file a final pole attachment tariffs on or before June 20, 2016.

E. Windstream's Motion for Protective Treatment

{¶ 29} On July 31, 2015, in 15-950, Windstream Ohio filed redacted and unredacted information relative to its annual carrying charge development, cost of debt, cost of equity, and weighted average cost of capital.

{¶ 30} On July 31, 2015, in 15-951, Western Reserve filed redacted and unredacted information relative to its annual carrying charge development, cost of debt, cost of equity, and weighted average cost of capital.

{¶ 31} On July 31, 2015, Windstream filed a motion for protective treatment in 15-950 and 15-951. Pursuant to Ohio Adm.Code 4901-1-24, Windstream requests protective treatment for the redacted information. Windstream asserts that the information constitutes competitively sensitive trade secret information and that public disclosure of this information will impair Windstream's ability to respond to competitive opportunities in the marketplace, and will provide a competitor with an unfair competitive advantage.

{¶ 32} Specifically, Windstream states that the redacted material consists of Windstream's internal accounting information that is kept proprietary and is not published or kept in the public domain. This information includes Windstream's investment, accumulated depreciation, expenses (depreciation, maintenance, and "A&G")

derived from Windstream's books, as well as inputs and calculations for Windstream's cost of debt, equity, and overall cost of capital.

{¶ 33} R.C. 4905.07, provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43 and as consistent with the purposes of R.C. Title 49. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.396, 399, 732 N.E.2d 373 (2000).

{¶ 34} Similarly, Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed *** to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

{¶ 35} Ohio law defines a trade secret as "information *** that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D).

{¶ 36} The Commission has reviewed the information included in the motion for protective order, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well

as the six-factor test set forth by the Ohio Supreme Court,¹ the Commission finds that Windstream has failed to demonstrate that the redacted information filed under seal on July 31, 2015, constitutes trade secret information. Therefore, Windstream's motion for a protective treatment is denied.

{¶ 37} In reaching this determination the Commission determines that, notwithstanding Windstream's trade secret claims, all of the information either is or should be obtainable from Windstream's publicly available annual report information or should be able to be derived from such information or other publicly available information in other Commission dockets. Specific to the cost of debt, cost of equity, and weighted average cost of capital, the Commission notes that this information is not considered as a trade secret for either companies. Therefore, the Commission finds that the criteria set forth in R.C. 1333.61(D) has not been satisfied.

{¶ 38} Accordingly, the docketing division is directed to release the information filed under seal on June 20, 2016.

V. ORDER

{¶ 39} It is, therefore,

{¶ 40} ORDERED, That on or before June 20, 2016, Windstream Ohio and Western Reserve each file its pole attachment tariff consistent with this Finding and Order. It is, further,

{¶ 41} ORDERED, That OCTA's motion for leave to file a reply is denied as set forth above. It is, further,

{¶ 42} ORDERED, That all other arguments not addressed in this Finding and Order are denied. It is, further,

¹ See *State ex-rel. the Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 524-525.

{¶ 43} ORDERED, That the motions for a protective order be denied as set forth above. It is, further,

{¶ 44} ORDERED, That, consistent with Finding (38), the docketing division release all information filed under seal. It is, further,

{¶ 45} ORDERED, That a copy of this Finding and Order be served upon all parties of record.

Commissioners Voting: Andre T. Porter, Chairman; Asim Z. Haque, Vice Chairman; Lynn Slaby; M. Beth Trombold; Thomas W. Johnson.

JSA/dah/vrm