THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF CINCINNATI BELL TELEPHONE COMPANY LLC TO ADD LANGUAGE AND RATES FOR ACCESS TO POLES, CONDUIT, AND RIGHTS-OF-WAY BY PUBLIC UTILITIES TO THE ACCESS TARIFF.	CASE NO. 15-973-TP-ATA

FINDING AND ORDER

Entered in the Journal on May 18, 2016

I. SUMMARY

{¶ 1} The Commission finds that Cincinnati Bell Telephone Company LLC (Cincinnati Bell) should file final tariffs consistent with the determinations set forth in this Finding and Order.

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 15, 2015, as amended on June 26, 2015, Cincinnati Bell filed its tariff amendment application in this docket.

{¶ 5} On June 26, 2015, the Ohio Cable Telecommunications Association (OCTA) filed a motion to intervene in this proceeding.

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

{¶ 7} On August 3, 2015, OCTA filed its objections in this proceeding.

{¶ 8} On August 24, 2015, Cincinnati Bell filed a response to OCTA's objections.

{¶ 9} On September 10, 2015, OCTA filed a motion for leave to file reply comments.

IV. DISCUSSION

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

{¶ 10} In regard to OCTA's motion to file reply comments, the Commission finds that the comments will not be considered. 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.

B. *Overlashing*

{¶ 11} OCTA recommends the addition of language to the Cincinnati Bell tariff to clarify that the "attachee's communications facilities" do not include "a wire overlashed

onto an existing attachment." OCTA also recommends the addition of language to make clear that a wired overlashed to previously permitted facilities only requires 15 days notice to Cincinnati Bell. In support of its position, OCTA states that the Federal Communications Commission (FCC) in *In re Implementation of Section 703(E) 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 (rel. Feb. 6, 1998) et al., found that overlashing does not require an attachment application and that prior notice is up to the parties to negotiate. OCTA submits that these additions are just, reasonable, necessary, and appropriate. OCTA further submits that these additions will make Cincinnati Bell's tariff clearer and help avoid future disputes. (Objections at 3-4.)

{¶ 12} Cincinnati Bell states that OCTA's objections are beyond the scope of this proceeding and should be denied. Specifically, Cincinnati Bell believes that the Commission order only required the amendment of rates and, therefore, the scope of this tariff amendment proceeding does not include any rule other than Ohio Adm.Code 4901:1-3-04. Cincinnati Bell further states that even if the Commission was inclined to consider parts of its tariff that are not governed by Ohio Adm.Code 4901:1-03-04, the objections raised by OCTA should be denied. Cincinnati Bell states that §2.3.1(B) of its tariff provides that it and attaching parties are subject at all times to all laws, ordinances, and regulation which in any manner affect their rights and objections. (Response at 3-4.)

{¶ 13} In addition, Cincinnati Bell states that the Commission rules do not address overlashing; as such, there is no basis for OCTA to contend that Cincinnati Bell should have amended its tariff to be consistent with subject matter that is not addressed in the Commission's pole attachment rules. Cincinnati Bell further states that even if OCTA's objections were relevant, OCTA's proposed amendments are unreasonable inasmuch as they would remove overlashed wires as attachments without taking vital information about the integrity of the pole and other factors into consideration. (Response at 4-5.)

{¶ 14} The Commission first clarifies that the intent of the Entries of February 25, 2015, and April 22, 2015, in the *Pole Attachment Rules Case* was to require that the pole owners file tariffs that were consistent with all of the rules adopted in that case. Therefore, OCTA's objections are not automatically beyond the scope of this proceeding.

{¶ 15} However, the Commission agrees with Cincinnati Bell that the issue of overlashing is not addressed in the Commission's rules. 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 Cincinnati Bell's tariff. 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 or electric light company that is a public utility "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 ***."

{¶ 16} As such, overlashing is outside the scope of the rule and need not be further addressed in the tariff for charges for attachment to poles or conduit use of equipment. Therefore, any terms and conditions associated with overlashing not addressed in the tariff should be established through negotiated agreements subject to the review of the Commission pursuant to Ohio Adm.Code 4901:1-3-06.

C. *§2.2.4(B) - Notice Periods*

{¶ 17} OCTA recommends that the phrase "thirty days" referenced in §2.2.4(B) of Cincinnati Bell's tariff be changed to "sixty days" in order to comply with Ohio Adm.Code 4901:1-3-03(A)(5) (Comments at 4).

{¶ 18} Cincinnati Bell states that OCTA's proposal to change the notice periods in §2.2.4(B) of its tariff is not required to be consistent with the Commission rules. Cincinnati Bell states that the thirty-day provision referenced in §2.2.4(B) of its tariff addresses the time within which an attaching party must respond to a notice of deficiency described in §2.2.4(A) of its tariff, and is not the same time period addressed in Ohio Adm.Code 4901:1-3-03(A)(5). Cincinnati Bell states that the cited rule addresses the amount of notice that a utility must give before actually removing pole attachments. It further states that this issue is addressed in §2.3.3(G) of its tariff, which is consistent with the cited rule. (Response at 5.)

{¶ 19} The Commission agrees with Cincinnati Bell that the time period addressed in §2.2.4(B) of its tariff is different from the time period addressed in Ohio Adm.Code 4901:1-3-03(A)(5). Specifically, §2.2.4(B) of Cincinnati Bell's tariff addresses the thirty-day time period within which an attaching party has to correct a condition and give notice of that correction to Cincinnati Bell, before the public utility may terminate the attachment or occupancy authorization. As pointed out by Cincinnati Bell, §2.3.3(G) of its tariff addresses the sixty-day notice that it will give an attaching party before it will remove the attaching party's facilities.

{¶ 20} The Commission notes that Ohio Adm.Code 4901:1-3-03(A)(5) states:

> A public utility shall provide all attaching entities no less than sixty days written notice prior to:
>
> (a) Removal of facilities or termination of any service to those facilities:

{¶ 21} In essence, based on these two sections of Cincinnati Bell's tariff, an attaching party is given a total of ninety days before the company will remove the attaching party's facilities. Inasmuch as the Commission's rule requires a minimum of a sixty-day notice prior to the removal of the attaching party's facilities, Cincinnati Bell does not have to amend it tariff to comply with Ohio Adm.Code 4901:1-3-03(A)(5).

D. §2.5(B) - Number of Poles

{¶ 22} OCTA requests that §2.5(B) of Cincinnati Bell's tariff be rewritten to address the issue of the number of poles in multiple applications as provided in Ohio Adm.Code 4901:1-03(B)(6) (Objection at 4).

{¶ 23} Cincinnati Bell states that OCTA's proposed amendment to this tariff section is unnecessary and actually goes too far. The company states there in no reason to insert OCTA's proposed language as it is already subject to the Commission's rules when addressing attachment requests. Cincinnati Bell does recognize that it may be appropriate to change the number of poles that correspond to "normal orders," "large orders," and "sizeable orders" in order to be consistent with the new rules. (Response at 6.)

{¶ 24} The Commission agrees with Cincinnati Bell that there is no need to amend its tariff to include the entirety of language from the Commission's rules. The Commission notes that §2.3.1(B) of Cincinnati Bell's tariff states that the company will comply with all laws, ordinances, and regulations which in any manner affect the rights and obligations of the attaching party. However, to the extent that Cincinnati Bell's tariff does not comply with the Commission's rules, the company must amend its tariff regarding the number of poles referenced in §2.5(B) specific to the different volumes for "normal," "large," and "sizable orders" to comply with Commission rules.

E. §2.6.1 Acceptance of a Make-Ready Estimate

{¶ 25} OCTA proposes that §§2.6.1(A) and (D) of Cincinnati Bell's tariff be revised to address the twenty-one day acceptance for estimated make-ready charges consistent with Ohio Adm.Code 4901:1-03(B)(2)(b) (Objections at 5).

{¶ 26} With respect to §2.6.1(A), Cincinnati Bell states that the time frames for acceptance of a make-ready estimate are specified in the Commission rules and nothing in its tariff is inconsistent or contradictory to the rule. In regards to §2.6.1(D), Cincinnati Bell asserts that its tariff actually provides an attaching party more time to accept and pay for a

make-ready request than is required by the rules. In addition, Cincinnati Bell believes that OCTA's revisions would strike the portion of its tariff that addresses the situation where a second request for attachment is made during the time when a make-ready estimate is outstanding. Cincinnati Bell states that the Commission rules do not address how to handle this scenario, and, therefore, there is no reason to delete language from the tariff. (Response at 6.)

{¶ 27} The Commission agrees with Cincinnati Bell that there is no need to amend its tariff to include the entirety of language from the Commission's rules inasmuch as §§2.6.1(A) and (D) are not inconsistent with the Commission's rules. The Commission notes that pursuant to §2.3.1(B) of Cincinnati Bell's tariff, the company will comply with all laws, ordinances, and regulations which in any manner affect the rights and obligations of the attaching party. Since §2.6.1(A) of Cincinnati Bell's tariff does not specify a time period and §2.6.1(D) allows for more time than required in the Commission rules, the Commission finds no amendments are necessary.

{¶ 28} OCTA recommends the addition of language to §2.6.1(E) of Cincinnati Bell's tariff to address the time periods for completion of make-ready work as set forth in Ohio Adm.Code 4901:1-03(B)(3) (Objections at 5-6.)

{¶ 29} Cincinnati Bell states that OCTA's proposed language "paraphrases and conflates various parts of different rule sections and potentially changes its meaning." As such, Cincinnati Bell states that this addition to its tariff is unnecessary since all of these issues are addressed in the Commission rules and all parties are subject to these time frames. (Response at 7.)

{¶ 30} The Commission agrees with Cincinnati Bell that there is no need to amend its tariff to include language from the Commission's rules. The Commission notes that pursuant to §2.3.1(B), of Cincinnati Bell's tariff, the company will comply with all laws, ordinances, and regulations which in any manner affect the rights and obligations of the

attaching party. The Commission finds that no amendments are necessary inasmuch as §2.6.1(E) of Cincinnati Bell's tariff does not include any terms that are contrary to the Commission rules.

F. §3.2.1 - Cost Plus Ten Percent

{¶ 31} OCTA states that Cincinnati Bell's tariff at §3.2.1 allows the company to impose the full cost of furnishing poles, anchors, and conduit system accommodations plus ten percent of such amount for the performance of such work. OCTA asserts that the Commission rules do not authorize such a mark-up and that a ten-percent mark-up is unjust and unreasonable. (Objections at 6.)

{¶ 32} Cincinnati Bell states that this provision addresses nonrecurring costs, not pole attachment or conduit occupancy rates, and has nothing to do with its current filing. Cincinnati Bell states that the ten-percent markup was stipulated as a part of a prior rate case and has been part of Cincinnati Bell's tariff since the 1980's. Specifically, Cincinnati Bell states that the parties in that case stipulated that ten percent was the recoverable amount of Cincinnati Bell's common costs that it was authorized to add to its direct costs in order to represent the overhead expense. As such, Cincinnati Bell alleges that it should still be entitled to recover its full cost of doing work necessary to provide pole attachments, which would include overhead charges. (Response at 7.)

{¶ 33} The Commission agrees with Cincinnati Bell that it is entitled to recover the full cost for the work necessary to provide pole attachments. The FCC states in 47 C.F.R. 1.1409(c), that a just and reasonable rate assures a utility the recovery of not less than the additional costs of providing pole attachments. The FCC, in *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, para. 29, defines nonrecurring costs as those costs that are expended by the utility to prepare utility poles for cable television attachments. The FCC further states that these nonrecurring costs, which are of a one-time nature, are directly reimbursable by the cable television operator and should not constitute any component of additional costs for the purpose of 47 C.F.R.

1.1409(c). Since the ten-percent mark-up is not attributable to the pole attachment or conduit occupancy rates; but is attributable to nonrecurring costs not included as additional costs when calculating the pole attachment or conduit occupancy rates, the Commission finds that Cincinnati Bell may continue to recover its overhead expense via the ten percent mark-up.

{¶ 34} Consistent with the determinations set forth in this Finding and Order, Cincinnati Bell is directed to file a final pole attachment tariff on or before June 20, 2016.

V. ORDER

{¶ 35} It is, therefore,

{¶ 36} ORDERED, That on or before June 20, 2016, Cincinnati Bell file its final pole attachment tariff consistent with the determinations set forth in this Finding and Order. It is, further,

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

{¶ 38} 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