

**BEFORE
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)	Case No. 15-973-TP-ATA
Poles, Conduit, Rights-of-Way by Public)	
Utilities to the Access Tariff.)	

**APPLICATION FOR REHEARING OF
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code, the Ohio Cable Telecommunications Association (“OCTA”) hereby files this Application for Rehearing from the May 18, 2016 Finding and Order issued by the Public Utilities Commission of Ohio (“Commission”) in this matter. The OCTA was an active participant in this proceeding and files this application for rehearing because the Commission’s May 18, 2016 Finding and Order is unreasonable and unlawful in the following respect:

1. It was unjust and unreasonable for the Commission to conclude that Cincinnati Bell Telephone Company LLC’s ten percent mark-up is “attributable to” nonrecurring costs and, as such, appropriate to continue when Cincinnati Bell Telephone Company LLC presented no evidence on the record to justify the ten percent mark-up for all work performed under the tariff, including, but not limited to, surveys and inspections and make-ready work.

The facts and arguments that support this ground for rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

/s/ Gretchen L. Petrucci

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**MEMORANDUM IN SUPPORT OF THE
APPLICATION FOR REHEARING OF
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

I. Introduction

The Ohio Cable Telecommunications Association (“OCTA”) seeks rehearing of the May 18, 2016 conclusion of the Public Utilities Commission of Ohio (“Commission”) that Cincinnati Bell Telephone Company LLC’s (“CBT”) 10% mark-up for all work performed under the tariff is “attributable to” nonrecurring costs. The record in this proceeding does not contain any evidentiary support for the Commission’s conclusion because nothing but unsubstantiated claims about the basis for CBT’s 10% mark-up were presented by the applicant. The record is devoid of any details, data, or analysis to support any charge above the direct and actual costs for conducting work such as surveys and inspections and make-ready work. As a result, there is no justification to continue the mark-up. The record does not demonstrate that it is a just and reasonable charge. The Commission should reverse its May 18 ruling and reject the mark-up.

II. Background

This proceeding will establish the inaugural pole attachment tariff for CBT following the Commission’s adoption of new industry-wide pole attachment rules in Ohio Administrative Code Chapter 4901:1-3.¹ The new pole attachment rules became effective in January 2015. The Commission required all telephone company and electric distribution utility pole owners to file tariff applications to modify their existing pole attachment tariffs to correspond with the new pole attachment rules.² CBT filed the instant tariff application in this docket on May 15, 2015,

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

² *Adoption, supra*, Entry (February 25, 2015), as modified by Entry (April 22, 2015).

and amended it on June 26, 2015. CBT's tariff proposal included new pole attachment and conduit occupancy fees, and a worksheet for the development of those fees. CBT did not include any changes in any other terms and conditions of its pole attachment tariff in light of the Commission's new pole attachment rules. Automatic approval of the amended application was suspended.

CBT has proposed to continue Section 3.2.1, without change. That provision states the following:

Charges for all work performed by the Telephone Company or by its authorized representative in connection with the furnishing of pole, anchor and conduit system accommodations as covered by this tariff shall be based upon the full cost, plus (10%) of such amount, to the Telephone Company for performance of such work. Such charges will apply for, but not be limited to, prelicense survey, make-ready work, inspection and removal of attachee's communications facilities and supervision, at the option of the Telephone Company, of attachee performed work in and around the immediate vicinity of a conduit system.

The OCTA, representing the cable television and telecommunications industry in Ohio, raised targeted objections to select portions of CBT's pole attachment tariff, including the 10% mark-up. The OCTA's members have existing and potential business interests in the state and in CBT's service territory, which will be directly and substantially affected by the outcome of this proceeding. Access to the poles, conduits and rights-of-way of Ohio's public utilities is a vitally important aspect of the OCTA's members' provision of services in Ohio. That access is essential for the OCTA's members to provide a variety of communications services, including video, voice, and Internet access services, in CBT's service territory. OCTA members are and will continue to be subject to the above-noted 10% mark-up.

The Commission rejected the OCTA's argument relative to the 10% mark-up, stating:³

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.** (Emphasis added.)

The Commission's May 18, 2016 decision allows CBT to recover additional costs, amounting to 10% above and beyond the actual expenses for attachment-related expenses that can be directly charged to the attacher.

III. Standard of Review

Ohio Revised Code Sections ("R.C.") 4905.51 and 4905.71 authorize the Commission to determine reasonable terms, conditions, and charges for attaching any wire, cable, facility, or apparatus to poles of public utilities.

Additionally, the Commission, in adopting the new rules in Chapter 4901:1-3 stated that it is "in the public interest to ensure that not only do all attachers have nondiscriminatory access to poles, ducts, conduits, and rights-of-way, but that all attachers are afforded such access on terms and conditions that are just and reasonable."⁴

³ Finding and Order at ¶ 33.

⁴ *Adoption, supra*, Finding and Order at 10 (July 30, 2014).

IV. Argument -- It was unjust and unreasonable for the Commission to conclude that CBT's ten percent mark-up is "attributable to" nonrecurring costs and, as such, appropriate to continue when CBT presented no evidence on the record to justify the additional expense.

CBT charges a pole attachment rate, as well as a nonrecurring charge for "all work performed * * * in connection with the furnishing of the pole."⁵ That nonrecurring charge is intended to recover "the full cost" of the work performed. In this proceeding, the OCTA has not questioned CBT's right to recover the full cost for work necessary to provide pole attachments. The OCTA's concern is with continuation of a 10% mark-up over and above the actual cost CBT incurs from the work that is automatically added for every one-time nonrecurring charge.

The Commission concluded that the 10% mark-up is "attributable to nonrecurring costs" as recovery of overhead expenses, and therefore can continue to be recovered.⁶ The evidence on the record to support this conclusion, however, is completely lacking. CBT's tariff application did not include any data or information to support the 10% mark-up. When the OCTA challenged the 10% mark-up, CBT responded by simply claiming that the 10% mark-up was established in the 1980s to recover "overhead expense."⁷ CBT did not provide any citations or case references to support a blanket mark-up, nor did CBT provide any data or evidence of the amount of these alleged overhead costs to justify imposing an additional 10% on any nonrecurring charge levied upon attachers. The Commission did not investigate CBT's claim for recovery of additional overhead expenses, and did not assess whether that cost recovery decision made more than 20 years ago is still appropriate going forward, given the new pole attachment rules the Commission put into place.

⁵ CBT Pole Attachment Tariff, 13th Revised Page 40.

⁶ Finding and Order at ¶ 33.

⁷ CBT's August 24, 2015 Response at 7.

This Commission has declared, in establishing the new pole attachment rules, that all attachers should have access on terms and conditions that are just and reasonable, but it received no evidence and did no analysis when the justness and reasonableness of a specific term (the 10% mark-up) was challenged. A complete record was not made in this contested case, as required by Ohio Revised Code Section 4903.09. Additionally, it was error for the Commission to conclude that the 10% mark-up remains just and reasonable without evidence in the record in support. The Commission stopped short in its assessment of the FCC precedent. The FCC did define non-recurring costs as costs that could be reimbursed directly by the attacher, but it further explained: “As indicated in the legislative history, pre-construction, survey, engineering, make-ready, and change-out (non-betterment) costs are included in additional costs **but only to the extent they are out-of-pocket expenses specifically attributable** to CATV attachments or facilities.”⁸ “[T]he statute does not permit utilities to recover in excess of fully allocated costs.”⁹ In *Texas Cable Telecommunications Association v. Entergy Services, Inc.*, the FCC struck down a similar administrative surcharge of \$10 imposed on top of the actual costs of any necessary engineering surveys for make-ready work. The FCC determined that attachers only “obligation [was] to reimburse [the pole owner] for the actual cost of necessary engineering survey expenses.”¹⁰ The Commission should follow FCC precedent, its CBT decision should be revised and the 10% mark-up should be rejected.¹¹

⁸ *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 92 FCC 2d 59, ¶ 29 (rel. May 23, 1979) (emphasis added)

⁹ *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387, ¶ 44 (rel. Jul. 23, 1987).

¹⁰ *Texas Cable Telecomm. Assoc. et al. v. Entergy Servs., Inc., et al.*, 14 FCC Rcd. 9138, ¶ 10 (rel. Jun. 9, 1999).

¹¹ See, *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶37, citing *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶24-25 (lack of record support for portion of order justifies reversal).

V. Conclusion

Rehearing should be granted so that CBT's new pole attachment tariff will be not only fully compliant with the Commission's new rules, but also only include just and reasonable fees. There is no record support for the Commission's determinations regarding CBT's proposed 10% mark-up. The OCTA urges the Commission to reverse the ruling related thereto and reject CBT's 10% mark-up.

Respectfully submitted,

/s/ Gretchen L. Petrucci

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CERTIFICATE OF SERVICE

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Douglas E. Hart at dhart@douglasschart.com

/s/ Gretchen L. Petrucci

Gretchen L. Petrucci

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Summary: App for Rehearing Application for Rehearing electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable Telecommunications Association