

**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
Pole, Conduit, and Rights-of-Way by)
Public Utilities to the Access Tariff.)**

**OPPOSITION OF CINCINNATI BELL TELEPHONE COMPANY LLC TO THE
APPLICATION FOR REHEARING OF THE OHIO CABLE
TELECOMMUNICATIONS ASSOCIATION**

On June 17, 2016, the Ohio Cable Telecommunications Association's ("OCTA") filed an Application for Rehearing of the Commission's May 18, 2016 Finding and Order in this proceeding. OCTA's sole grievance is that the Commission did not require Cincinnati Bell Telephone Company LLC ("CBT") to change a provision in its pole attachment tariff. The OCTA's objection is unfounded and the Commission should deny rehearing.

I. Introduction and Procedural History.

Through its Finding and Order entered July 30, 2014 in Case 13-579-AU-ORD, as revised in an October 15, 2014 Entry on Rehearing, the Commission adopted Ohio Adm.Code Chapter 4901:1-3, establishing pole attachment rules in Ohio. On February 25, 2015, as revised on April 22, 2015, the Commission issued an Entry directing each telephone company and electric distribution utility pole owner to file appropriate company-specific tariff amendment applications, including the applicable calculations based on 2014 data, to render its filed tariff consistent with Rule 3-04.

On May 15, 2015, CBT filed an application to amend its pole attachment tariff in this docket. The only changes proposed by CBT were to the pole attachment rates in Section 3.1.2 to

have a single pole attachment rate consistent with the formula in Rule 3-04, to establish a new conduit occupancy rate, and to deleted previous verbiage from Note 1 regarding historical conduit occupancy charges. Otherwise, CBT's tariff remained unchanged. As required by the April 22, 2015 Entry, CBT's filing contained calculations supporting the new rates. In response to a Staff inquiry, CBT filed an Amended Application on June 26, 2015, to use a lower rate of return, which resulted in slightly different rates.

On August 3, 2015 OCTA filed objections to CBT's tariff. The OCTA made no objection to CBT's proposed rates for pole attachments or conduit occupancy or of its revisions to Note 1. The OCTA's objections solely addressed "the absence of certain changes to its existing pole attachment tariff terms and conditions." OCTA Objections, p. 1. In its May 18, 2016 Finding and Order, the Commission rejected all of OCTA's objections except that, with respect to OCTA's objection to § 2.5(B) of CBT's tariff, the Commission agreed that that section should be revised to comply with the order volume requirements of Ohio Adm.Code 4901:1-03(B)(6). However, the Commission agreed with CBT that the necessary revisions were not as substantial as those requested by OCTA. CBT has since file revised tariff pages consistent with the May 18, 2016 Finding and Order.

In its Application for Rehearing, the OCTA only challenged the Commission's ruling with respect to § 3.2.1 of CBT's tariff. That provision is within the section addressing non-recurring charges associated with pole attachments (not the pole attachment rate) and states that charges for work performed by CBT would be based upon its full cost, plus 10%.

II. The OCTA's Application for Rehearing Is Baseless and Should Be Denied

1. It Is Inappropriate to Change Section 3.2.1 of CBT's Tariff in This Proceeding.

Section 3.2.1 addresses non-recurring costs for pole attachment work, not pole attachment or conduit occupancy rates. The 10% markup played no part in the calculation of the pole attachment and conduit occupancy rates, so this objection has nothing to do with anything addressed in CBT's Application. The contested tariff provision has been in CBT's pole attachment tariff since January 12, 1983. A copy of Original Page 40, filed on that date, is attached to this filing. It is verbatim to the current version of the tariff and not so much as a word or a punctuation mark has changed in 33 years. The requirement that rates and practices must be just and reasonable is not new and has existed as long as utility regulation, and was certainly around when the tariff first came into being. So, there was no reason for CBT to make any change to § 3.2.1 to come into compliance with a principle that was not new. No attaching party has complained that this tariff provision or a charge imposed pursuant to it was unjust or unreasonable in over 33 years.

It is procedurally improper for OCTA to challenge § 3.2.1 of CBT's tariff in this proceeding. CBT did not propose any change to that tariff provision, so it has not placed the provision at issue. A utility does not have the burden of proving the reasonableness of a tariff provision that it has not placed at issue in its application. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm. of Ohio*, 330 N.E.2d 1, 42 Ohio St.2d 403, 420, paragraph 6 of the syllabus (1975). Because it is challenging a 33 year old provision of CBT's tariff that has never changed, OCTA should have had to file an independent complaint pursuant to Ohio Revised Code § 4927.21 in order to challenge an existing tariff provision. The complainant has the burden of proof that an already approved tariff provision is unjust or unreasonable. *Williams v. Pub. Util.*

Comm., 49 Ohio St.2d 256, 361 N.E.2d 445 (1977). OCTA’s attempt to reverse the burden of proof, by complaining that CBT *did not* change a provision of its tariff or prove that an unchanged provision continues to be reasonable, is totally improper.

2. OCTA Has Not Proven That § 3.2.1 of CBT’s Tariff Is Unjust or Unreasonable.

OCTA has not identified any specific Commission Rule that is offended by § 3.2.1 of CBT’s tariff. At best, it contends that the general rule that a public utility must provide access to poles “under rates, terms and conditions that are just and reasonable.” Ohio Adm.Code § 4901:1-3-03.¹ Even if this case was a proper procedural vehicle under which to challenge CBT’s 33 year old tariff provision, the OCTA has failed to show that § 3.2.1 is unjust or unreasonable. Even if OCTA may challenge an existing tariff provision in this proceeding, it still bears the burden of proof that the provision is unjust or unreasonable. It has offered nothing to support that proposition.

OCTA first challenges the Commission’s conclusion that the 10% markup is “attributable to nonrecurring costs.” But, that conclusion is unshakeable and obvious from its very placement in CBT’s tariff. Section 3 of the tariff addresses “Rates and Charges” and is divided into two sections: § 3.1 “Pole Attachment and Conduit Occupancy”; and § 3.2 “Charges – Nonrecurring.” Section 3.2.1 is clearly in the section on non-recurring charges and played no part in the establishment of the pole attachment and conduit occupancy charges, the specific amounts of which are stated directly in the tariff. CBT provided detailed calculations with its revised pole attachment and conduit occupancy rates showing that the 10% markup played no part in those

¹ OCTA cites certain FCC decisions under federal law, which are inapplicable in Ohio. The Commission has adopted the FCC *formulas* for pole attachments and conduit occupancy (Ohio Admin.Code § 4901:1-3-04(D)(2),(3)), but not other FCC rules or orders addressing non-recurring costs. In any event, the FCC allows recovery of fully allocated costs, which would include common costs such as overhead.

calculations. Therefore, OCTA is wrong in challenging the Commission's conclusion that the 10% markup is only attributable to non-recurring costs.

The OCTA's only other challenge to this tariff provision is that CBT's application did not include any data or information to support the 10% markup. Nor should it have. CBT did not propose any change to § 3.2.1 of the tariff, so there was no reason for it to provide any support for a provision it did not propose to change. Whatever support for the tariff provision was necessary to demonstrate that § 3.2.1 was reasonable was provided in Case No. 81-1338-TP-AIR, the case from which this tariff provision originated, and all parties to that case had an opportunity to challenge it upon its establishment.

OCTA does not contend that overhead costs are not part of the cost of doing business, or that CBT should not be allowed to recover its overhead in its rates. But, the OCTA provided no evidence that CBT's overhead costs are less than 10%, which would be a necessary finding in order to conclude that such a markup is unjust or unreasonable. Since it is the OCTA that proposes now 33 years later to change a provision in CBT's tariff, *OCTA* had the burden of proving that the provision is unreasonable. OCTA has offered nothing. It cannot simply try to flip the burden of proof on this issue citing a lack of evidence for a non-change.

III. Conclusion

The OCTA's application for rehearing is unfounded. It is attempting in this proceeding to challenge a longstanding tariff provision that was not placed at issue in CBT's application for a tariff change. As the proponent of a tariff change, OCTA should have filed a complaint case. And whether it would be permitted to challenge an existing tariff provision in this case or should have filed a separate complaint, in either case OCTA has the burden of establishing that the provision is unjust or unreasonable. It has provided no evidence to that effect and its objections were properly denied and its application for rehearing should also be denied.

Respectfully submitted,

/s/ Douglas E. Hart
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CERTIFICATE OF SERVICE

This is to certify that I served the foregoing upon Gretchen L. Petrucci and Stephen M. Howard, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, Columbus, Ohio 43216-1008, by electronic mail to glpetrucci@vorys.com and smhoward@vorys.com this 27th day of June, 2015.

/s/ Douglas E. Hart

POLE AND ANCHOR ATTACHMENT AND CONDUIT OCCUPANCY
ACCOMMODATIONS
PUCO NO. 1

CINCINNATI BELL INC.

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3. RATES AND CHARGES (Cont'd)

3.1 Pole and Anchor Attachment, Anchor and Associated Guy Strand Utilization and Conduit Occupancy (Cont'd)

3.1.2 Rates

	<u>Annual</u>
(A) Pole and Anchor Attachment	
(1) Per pole attached	\$1.95
(2) Per anchor attached	6.55
(B) Anchor/Guy Strand Utilization	
(1) Per Anchor/Guy Strand Utilized	\$2.70
(C) Conduit Occupancy	
(1) Per foot of duct occupied	\$.60
(2) For the purpose of determining the duct feet chargeable the duct considered occupied shall be measured from the:	
(a) center to center of adjacent manholes, or	
(b) center of a manhole to the end of a duct not terminated in a manhole.	

3.2 Charges - Nonrecurring

3.2.1 Determination

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.

Issued January 12, 1983

By W. W. Victor, Vice President
Cincinnati, Ohio

Effective January 12, 1983
In accordance with Order No.
81-1338-TP-AIR, issued by The
Public Utilities Commission
of Ohio, January 7, 1983

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Case No(s). 15-0973-TP-ATA

Summary: Memorandum Opposition to the Application for Rehearing of the Ohio Cable Telecommunications Association electronically filed by Mr. Douglas E. Hart on behalf of Cincinnati Bell Telephone Company LLC