

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
OHIO POWER COMPANY TO AMEND ITS
POLE ATTACHMENT TARIFF.

CASE NO. 15-974-EL-ATA

FINDING AND ORDER

Entered in the Journal on September 7, 2016

I. SUMMARY

{¶ 1} The Commission finds that Ohio Power Company should file its final pole attachment tariff 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 utility's 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 (Pole Attachment Rules). The new rules became effective in 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 May 22, 2015, Ohio Power Company (Ohio Power or Company) 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} On August 3, 2015, OCTA filed objections relative to Ohio Power's tariff amendment application.

{¶ 7} 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.

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

{¶ 9} On September 18, 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 Ohio Power, OCTA, and the Commission Staff (Staff) can discuss outstanding issues with the intent of avoiding a hearing.

{¶ 10} On September 25, 2015, Ohio Power filed a memorandum contra the motion for leave.

{¶ 11} In regard to OCTA's September 18, 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. Finally, the Commission does not believe that an informal conference will be productive at this time.

IV. DISCUSSION

A. *Calculation of the Pole Attachment Rate*

{¶ 12} OCTA objects to Ohio Power's proposed pole attachment rate because it believes that the factors reflected in its tax accounts do not match the factors reflected in its investment accounts. Therefore, OCTA questions whether Ohio Power has properly calculated its pole attachment rate according to the accepted pole attachment formula. According to OCTA, Federal Energy Regulatory Commission (FERC) Form 1 report reflects that Ohio Power had a significant step-down in assets between 2012 and 2013. In calculating the tax component of its carrying charge, OCTA contends that it appears that Ohio Power has compared the reduced investment in plant to taxes that are based on the plant investment prior to the step-down. OCTA argues that property taxes are paid in arrears, and by comparing the higher tax burdens of 2012 (paid in arrears in 2013), Ohio Power's tax component is multiplied. OCTA contends that the tax-to-investment mismatch has not been fully corrected in the 2014 FERC Form 1 report. OCTA believes it would be unfair to enter a tariff establishing a pole attachment rate based upon unusually high tax charges. In order to establish a fair rate, OCTA urges the Commission to hold a hearing and allow for further discovery in order to allow interested parties to ensure a rate is not designated based upon an anomaly. (Objections at 3-4.)

{¶ 13} Ohio Power maintains that although it is true that it had a step-down in assets, this step-down did not lead to any error in Ohio Power's pole attachment rates, as OCTA claims. Ohio Power contends that its pole attachment calculation is based on the 2014 FERC Form 1 and does not include any generation-related taxes. Further, Ohio Power avers that, 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 in 2014, there is no generation property tax and no net generation plant included. Ohio Power contends

that in this case, the increase in tax carrying charges is primarily driven by differences in operating taxes and net plant investment. As noted above, Ohio Power claims the net plant investment in 2014 relates only to transmission and distribution, not generation. In sum, Ohio Power argues that 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. Therefore, Ohio Power submits that there is no reason for the Commission to hold a hearing on this matter. (Response at 2-3.)

{¶ 14} The Commission finds that Ohio Power's calculation of the tax component of the carrying charge used in the pole attachment rate formula is correct and should be accepted. Because the step-down in assets occurred prior to 2014 and because property taxes are accrued and expensed in the year they occur rather than when they are paid, there is not mismatch between property tax expenses and net plant investment used in the calculation.

B. Implementation of Rate Gradualism

{¶ 15} OCTA proposes that if the Commission ultimately determines that the correct pole attachment rate for Ohio Power results in more than a 20 percent increase in its rate, the Commission should apply the concept of rate gradualism or rate continuity in this proceeding. OCTA contends that for decades, the Commission has applied the principle of gradualism in order to avoid hardships to suppliers and end users when a sudden, substantial rate increase would otherwise disrupt demand. OCTA maintains that the Ohio General Assembly granted general supervisory powers to the Commission to protect the public. OCTA avers that the Commission has authorized appropriate phase-in plans by using this supervisory authority under R.C. 4905.04 to avoid rate shock. OCTA believes the combination of the following three reasons requires the Commission to apply the equitable concept of gradualism as to the proposed pole attachment rate. First, the amount of the increase in the pole attachment rate proposed by the company is extremely large. Second, the increase in the pole attachment rate is a business expense that is neither

by-passable nor avoidable; thus, OCTA members will pay the rate increase and pass it along to the end users. Third, there is no evidence that the increase is commercially necessary. OCTA believes that the magnitude of the proposed rate increases under these circumstances and the potential disruptive impact on attaching entities and their customers warrant the application of the principle of gradualism and the establishment of a phase-in plan. OCTA further contends that a gradually implemented rate increase will not harm the utility. Accordingly, OCTA urges the Commission to establish a phase-in plan of approximately 20 percent each year until the authorized rate level is achieved. (Objections at 4-5.)

{¶ 16} Ohio Power contends that 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, Ohio Power argues that in this case, OCTA's request to phase-in the increase in the company's pole attachment rates is an attempt to prevent Ohio Power from recovering its cost of providing pole attachment service and results in a financial windfall to OCTA members.

{¶ 17} According to Ohio Power, case law clearly establishes that the Commission has no authority to order any rate phase-in in this case. Specifically, Ohio Power asserts that while the Commission ordered a rate phase-in as part of a rate proceeding for Columbus Southern Power (CSP), the Supreme Court of Ohio 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." 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." See *In re Columbus Southern Power Co. v. Pub. Util. Comm. of Ohio*, 67 Ohio St.3d 535, 620 N.E.2d 835 (Ohio 1993)

{¶ 18} Citing R.C. 4928.144, Ohio Power submits that the General Assembly did provide the Commission rate phase-in authority in Senate Bill (SB) 221, but it expressly limited that phase-in authority to rates established as part of a Standard Service Offering (SSO). By providing such specific and limited statutory authority for a phase-in of SSO rates, Ohio Power argues that the General Assembly confirmed that the Commission lacks any general authority to order a rate phase-in in any other context. Here, Ohio Power avers, 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. (Response at 3-4.)

{¶ 19} The Commission finds that a phase-in of Ohio Power's pole attachment rate is not appropriate in this proceeding. As Ohio Power correctly notes, the Supreme Court of Ohio has determined that the Commission lacks authority to phase-in rates, such as the pole attachment rates in this case, that deprive a utility of the annual revenues to which it is entitled. See *In re Columbus Southern Power Co. v. Pub. Util. Comm. of Ohio*, 67 Ohio St.3d 535, 620 N.E.2d 835 (Ohio 1993). While the Commission notes it now has the limited authority pursuant to R.C. 4928.144 to phase-in SSO rates, this authority is distinguishable from the pole attachment rates being addressed in this case.

C. *Nondiscriminatory Pole Attachment Access*

{¶ 20} OCTA points out that consistent with Ohio Adm.Code 4901:1-3-03(A)(1) and (A)(4), pole attachment access must be provided on a nondiscriminatory basis under rates, terms, and conditions that are just and reasonable, unless there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes. However, OCTA submits that Ohio Power's schedules state that pole attachments are available "so long as those attachments do not interfere, obstruct, or delay the service and operation of the Company or create a hazard to safety." OCTA proposes that this portion of Ohio Power's tariff schedules should be modified to align with the reasons for denial set forth in the Commission's rules in the *Pole Attachment Rules Case*. (Objections at 7.)

{¶ 21} Ohio Power argues that the proposed tariff language mirrors the language set forth in R.C. 4905.71, the enabling statute for the applicable rules. While Ohio Power is not substantively opposed to incorporating the changes requested by OCTA, it believes that such changes are unnecessary given the alignment in the proposed tariff with R.C. 4905.71 and the requirement that Ohio Power must comply with both R.C. 4905.71 and the applicable rules. (Response at 5.)

{¶ 22} The Commission finds that Ohio Power should modify its proposed tariff language to more closely align with the rules set forth in the *Pole Attachment Rules Case*. The Commission notes that while statutory requirements are broad, tariff requirements are more specific but still do not cover all of the details involved with the provision of service. Incorporating language that better reflects the more specific tariff requirements is preferable.

D. *Applicability of Overlashing*

{¶ 23} OCTA interprets Ohio Power's definition of "Attachment" as not prohibiting overlashing an existing pole attachment and also as not requiring overlashing to go through the full Attachment application process. To the extent that OCTA's interpretation is incorrect, then OCTA objects to the proposed tariff provisions. For clarification, OCTA recommends that tariff language be added that clarifies that an attachment does not include a wire overlashed to an existing attachment or riser cable and that a customer may overlash an existing, permitted attachment without a Company-approved application upon at least 15 days advance written notice to the Company. (Objections at 8.)

{¶ 24} Ohio Power contends that 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. Ohio Power argues that overlashing cannot be marginalized as having very little impact on pole engineering, as OCTA would suggest. In some cases, overlashing can be accomplished with very little impact on the pole while in other cases, overlashing on an already stressed

pole can have a significant impact claims Ohio Power. The Company further maintains that 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, Ohio Power avers that pole owners must consider the potential impacts and that details concerning how the parties address overlashing are best left to the parties through mutual agreement subject to the review of the Commission pursuant to Ohio Adm.Code 4901:1-3-06. (Response at 5-6.)

{¶ 25} The Commission finds that overlashing is outside the scope of the rules set forth in the *Pole Attachment Rules Case* and need not be addressed in Ohio Power's pole attachment tariff incorporating charges for attachments to poles or conduit occupancy. 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 Ohio Power's tariff. A wire overlashed to an existing facility/pole attachment is not an attachment subject to an 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 ***."

{¶ 26} Further, the Commission agrees with Ohio Power 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.

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

E. Establishment of a Payment Due Date

{¶ 28} OCTA maintains that Ohio Power's schedules require all of its bills to be paid within 30 days of the date on the bill. OCTA points out that Ohio Adm.Code 4901:1-3-03(B)(2)(b) requires that cost estimates for make-ready work must be paid within 21 days of receipt of the estimate, unless there is a dispute or request for additional information regarding the scope of work or allocation of costs. OCTA argues that receipt of the cost estimate may or may not be within 30 days of the invoice. Additionally, OCTA contends that a dispute or request for additional information can extend the time for payment. Thus, OCTA argues that Ohio Power's proposed tariff should be revised to comply fully with Ohio Adm.Code 4901:1-3-03(B)(2)(b). (Objections at 8.)

{¶ 29} Pursuant to the terms of its pole attachment agreements, Ohio Power generally allows attaching parties 30 days to pay invoices related to engineering and make-ready work. Ohio Power is not opposed to shortening the time to pay such invoices to 21 days, as requested by OCTA. (Response at 6.)

{¶ 30} The Commission finds that OCTA's proposed revisions should be adopted as they are unopposed by Ohio Power and are consistent with the Commission's rules.

F. Tariff Reference to a Separate Agreement

{¶ 31} OCTA contends that Ohio Power's tariff language repeatedly refers to a required separate agreement or contract, the terms and conditions of which are not spelled out Ohio Power's schedules. Thus, OCTA argues that Ohio Power's schedules include some, but not all of the rates, terms, and conditions under which it will provide pole attachments. OCTA contends that R.C. 4905.71 states that every telephone or electric light

company that is a public utility “shall file a tariff with the public utilities commission containing the charges, terms, and conditions” for attachments. OCTA argues that the statutory language does not say that the tariff can contain some, but not all, of the charges, terms, and conditions for the tariff offering. Nor does the statute allow for other unknown rates, terms, and conditions to be applicable without having been reviewed and approved by the Commission. Rather, OCTA contends, the statute envisions that, if a tariff exists, all the applicable rates, terms, and conditions under that tariff will be contained in the tariff itself.

{¶ 32} Additionally, OCTA maintains that Ohio Adm. Code 4901:1-3-04(A) states that the rates, terms, and conditions for nondiscriminatory access to poles, ducts, conduits, and rights-of-way of a telephone or electric light company by an entity that is not a public utility “are established through tariffs.” OCTA believes that this too confirms the expectation that the tariffs would include all of the charges, terms, and conditions for attachments. OCTA argues that Ohio Power should not be allowed to mandate execution of a separate, non-negotiated agreement in order for parties who want the tariff offering to attach to Ohio Power’s facilities. OCTA proposes that the Commission require Ohio Power to either (a) remove all references to the separate agreement and submit a new tariff proposal that adds in the other rates, terms, and conditions; or (b) add the separate agreement to the tariff as a stand-alone attachment. (Objections at 10-11.)

{¶ 33} Ohio Power submits that separate pole attachment agreements are appropriate and need not be approved as a schedule to the tariff. Ohio Power contends that OCTA’s position denies parties the flexibility to negotiate pole attachment agreement terms that can change with time and that are tailored to the needs of the parties. Ohio Power submits that 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 complaint pursuant to Ohio Adm.Code 4901:1-3-05.

{¶ 34} Further, Ohio Power notes that Ohio Adm.Code 4901:1-3-06 provides 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.” Ohio Power submits that such a mechanism would not be necessary if the proscribed form of agreement was incorporated within the tariff. It is not unusual for Ohio Power to have agreements with its customers that contain terms and conditions that reach beyond the basic terms set forth in Ohio Power’s tariff. Ohio Power maintains that such terms and conditions are always subject to review to ensure compliance with applicable provisions of its tariff, the Ohio Revised Code, and the Ohio Administrative Code. Ohio Power asserts that it has many pole attachment agreements that are over 20 years old that have served the parties well. Dismantling such agreements would only create unnecessary business uncertainty. (Response at 7.)

{¶ 35} The Commission finds that OCTA’s proposal to remove all references to the separate agreement and submit a new tariff that adds in the other rates, terms, and conditions, or adds the separate agreement to the tariff as a stand-alone attachment should be denied. In reaching this determination, the Commission notes that the language in question was previously approved by the Commission in Case Nos. 11-346-EL-SSO et al., and 11-351-EL-AIR et al., subsequent to the adoption of R.C. 4905.71. The Commission also recognizes that there have been no formal complaints filed regarding the issue of Ohio Power’s separate agreements referenced in the tariff. Although Ohio Power does not have to include the actual separate agreements as part of the tariff, it should provide copies to an entity upon request. The rates, terms, and conditions incorporated into the separate agreements should be extended to all similarly situated customers purchasing service pursuant to Ohio Power’s tariff. The Commission further notes that the separate agreements referenced in Ohio Power’s pole attachment tariff must be consistent with the newly adopted pole attachment and conduit rules contained in Ohio Adm.Code Chapter 4901:1-3. The rules take precedence to the extent that the agreements conflict with the

rules. Further, the Commission points out that the rules allow an attaching entity to file a complaint or seek arbitration if the parties are unable to reach agreement.

{¶ 36} Based on the foregoing, the following rates and their rate impacts are approved:

Ohio Power

Case No. 15-974-EL-ATA	Current Rate	New Rate	Increase/(Decrease)
Pole Attachment	\$6.26	\$9.59	\$3.33
Conduit Attachment:	Not Applicable	Not Applicable	Not Applicable

{¶ 37} Consistent with the determinations set forth in this Finding and Order, Ohio Power is directed to file a final pole attachment tariff within 30 days of this Finding and Order.

V. ORDER

{¶ 38} It is, therefore,

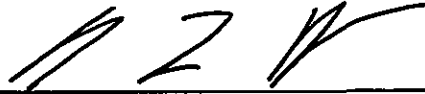
{¶ 39} ORDERED, That within 30 days of this Finding and Order, Ohio Power file its final pole attachment tariff consistent with the determinations set forth in this Finding and Order. It is, further,

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

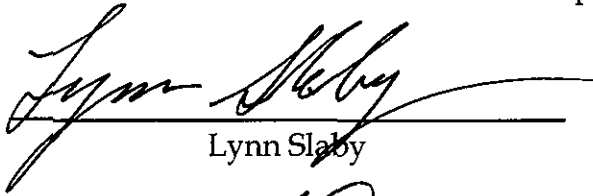
{¶ 41} ORDERED, That OCTA's motion for leave to file a reply is denied consistent with Paragraph (11). It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO



Asim Z. Haque, Chairman



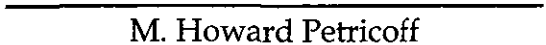
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