

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio	)	
Power Company to Amend Its Pole	)	Case No. 15-974-EL-ATA
Attachment Tariffs.	)	

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

Pursuant to Ohio Revised Code Section 4903.10, and Ohio Administrative Code Rule 4901-1-35, the Ohio Cable Telecommunications Association (“OCTA”) files this Application for Rehearing of the April 12, 2017 Entry issued by the Public Utilities Commission of Ohio (“Commission”) in this matter. The OCTA was granted intervention in this proceeding and files this application for rehearing because the Commission’s April 12, 2017 Entry is unreasonable and unlawful in the following respects:

1. It was unjust and unreasonable for the Commission to grant a retroactive rate increase.
2. It was unjust and unreasonable for the Commission to substitute the newly approved tariff (terms, conditions and charges) for the lawful terms, conditions and charges specified in the tariff on-file and in effect in the prior period.
3. It was unjust and unreasonable for the Commission to not clarify in its April 12, 2017 Entry that Ohio Power Company is not authorized to charge the new pole attachment rate for attachments prior to the date on which the newly approved tariff was on-file with the Commission.

The facts and arguments supporting this Application for Rehearing are set forth in the attached memorandum in support. The OCTA respectfully requests that the Commission grant rehearing and modify its April 12, 2017 Entry accordingly.

Respectfully submitted,

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

**I. INTRODUCTION**

The Commission's April 12, 2017 decision in this proceeding violates Ohio's law prohibiting retroactive ratemaking. The Commission approved the revised pole attachment tariff of Ohio Power Company ("AEP Ohio") on April 12, 2017, and set the revised tariff's effective date for a date nearly seven months before the tariff's approval and before the tariff was on-file. The revised pole attachment tariff included a rate increase. Rate increases, however, can only be implemented on a prospective basis. The Commission's April 2017 ruling contradicts this fundamental tenet of ratemaking in Ohio. The Commission should correct this error and require AEP Ohio's revised tariff to be effective no earlier than April 19, 2017, which is when AEP Ohio filed the Commission-approved tariff in Case No. 89-6007-EL-TRF – its tariff docket ("TRF docket").

Also, the Commission erred in not clearly stating in its April 12 Entry that AEP Ohio is not authorized to charge the new pole attachment rate for attachments in 2016 or for any period prior to the date on which the newly approved tariff was on-file with the Commission. The OCTA is aware that AEP Ohio has billed, and either collected or attempted to collect the new pole attachment rate before that date. The Commission should direct AEP Ohio to correct bills using the unapproved rate and cease the retroactive billing and collection.

**II. FACTUAL BACKGROUND**

On February 25, 2015, the Commission ordered all public utility pole and conduit owners in Ohio to propose amended pole attachment tariffs to correspond with administrative rules that

became effective in January 2015.<sup>1</sup> AEP Ohio filed its application on May 15, 2015, proposing a revised pole attachment tariff including a new rate.<sup>2</sup> The OCTA intervened and objected to certain aspects of AEP Ohio’s proposal. To further evaluate the objections, the Attorney Examiner suspended automatic approval of the proposal. AEP Ohio filed a response to the OCTA’s objections, disagreeing with them.

On September 7, 2016, the Commission issued a Finding and Order, agreeing in part with the OCTA’s objections. The Commission directed AEP Ohio to further modify its proposed tariff consistent with the determinations made by the Commission. On September 19, 2016, AEP Ohio filed new redlined tariff sheets for Commission review and approval. AEP Ohio even requested “timely approval of the tariffs.”<sup>3</sup>

On April 12, 2017, the Commission issued an Entry stating “[t]he Commission finds that the revised pole attachment tariff is approved.”<sup>4</sup> The Commission also stated that the revised pole attachment tariff is “effective as of the date of filing on September 19, 2016.”<sup>5</sup>

### **III. ARGUMENT**

#### **A. It was unjust and unreasonable for the Commission to grant a retroactive rate increase.**

R.C. 4909.17 states that public utility rates and rate changes cannot be effective before the Commission finds the rate or rate change to be just and reasonable.<sup>6</sup> Case law also establishes

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<sup>1</sup> *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, Entry (February 25, 2015).

<sup>2</sup> AEP Ohio proposed to increase in its pole attachment rate by nearly 53%.

<sup>3</sup> *See*, AEP Ohio’s Correspondence filed September 19, 2016, in this docket.

<sup>4</sup> Entry at ¶8.

<sup>5</sup> *Id.*

that utility ratemaking must be prospective. The Commission's decision in this matter does not comport with Ohio law.

**1. The Commission approved AEP Ohio's revised tariff on April 12, 2017.**

On September 7, 2016, the Commission reviewed AEP Ohio's tariff proposal. The Commission accepted some of the proposal, but determined that further revisions were needed. **The Commission did not implement any part of the revised pole attachment tariff at that time.**

AEP Ohio proposed additional tariff revisions on September 19, 2016, for Commission approval. On April 12, 2017, the Commission reviewed the additional revisions and stated "[t]he Commission finds that the revised pole attachment tariff is approved."<sup>7</sup> The Commission's April 12, 2017 decision was the final approval of the revised pole attachment tariff presented in this proceeding. AEP Ohio filed its Commission-approved tariff in its TRF docket on April 19, 2017.<sup>8</sup>

**2. The Commission set an effective date for the rate increase that is before the Commission approved the revised tariff on April 12, 2017.**

A tariff's effective date sets the date upon which the new rate can be charged to customers as well as when the new terms and conditions can be applied to customers. In this case, the Commission set the effective date for the approved, revised tariff to be nearly seven months

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<sup>6</sup> R.C. 4909.17 states in full: "**No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable**, except as provided in this section and sections 4909.18, 4909.19, and 4909.191 of the Revised Code. Such sections do not apply to any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of railroads, street and electric railways, for-hire motor carriers, and pipe line companies." (Emphasis added.)

<sup>7</sup> Entry at ¶8.

<sup>8</sup> See, Case No. 89-6007-EL-TRF, Correspondence and Tariff Sheets (April 19, 2017).

earlier than its journalized decision approving the revised tariffs. Specifically, this effective date is (a) before the Commission had made its compliance review and determination that the revised tariff complied with the revisions required by its September 7, 2016 Finding and Order, and (b) before the Commission-approved tariffs were filed in the TRF docket.

While the Commission's April 2017 Entry did not expressly authorize AEP Ohio to rebill its pole attachment customers, setting the effective date seven months earlier has the same impact as if the Commission had implemented the new rate and ruled on AEP Ohio's tariff revisions the same day they were filed in September 2016.

### **3. The rate increase constitutes retroactive ratemaking.**

By setting a September 2016 effective date for the revised tariff approved in April 2017, the Commission has violated Ohio's law prohibiting retroactive ratemaking. Utility ratemaking is prospective only in Ohio.<sup>9</sup> The Supreme Court of Ohio has explained:<sup>10</sup>

The General Assembly has attempted to balance the equities by prohibiting utilities from charging increased rates during the pendency of commission proceedings and appeal, while also prohibiting customers from obtaining refunds of excess rates that may be reversed on appeal. In short, retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme.

The Supreme Court of Ohio has rejected attempts to implement a rate increase in order to make up for revenues lost due to regulatory delay as well. The Court struck down the Commission's attempt to permit two utilities to recover 12 months of revenue over a nine-month period because it issued its ruling three months later than requested.<sup>11</sup> As the Court explained, a

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<sup>9</sup> *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997); *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 458 (2014).

<sup>10</sup> *Lucas Cty.*, *supra*, at 348 (citation and footnote omitted).

<sup>11</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 514-515 (2011).

“‘utility may not charge increased rates during proceedings before the commission seeking same[,] and losses sustained thereby’ – that is, while the case is pending – ‘may not be recouped.’”<sup>12</sup> The Commission’s attempt in *Columbus S. Power* to make up that difference was found by the Court to constitute impermissible retroactive ratemaking because the same financial result was reached.<sup>13</sup> The Court reversed the Commission’s ruling.

The Commission has impermissibly and retroactively set AEP Ohio’s pole attachment rate. The Commission did not rule on the tariff revisions for months after they were filed, yet when that approval of the revised tariff was issued, the Commission set an effective date that erased the delay. The Commission is legally mandated to correct this error and to require the revised tariff (terms, conditions and charges) to be effective no earlier than April 19, 2017, the date on which AEP Ohio filed the Commission-approved revised tariff in its TRF docket.

**B. It was unjust and unreasonable for the Commission to substitute the newly approved tariff (terms, conditions and charges) for the lawful terms, conditions and charges specified in the tariff on-file and in effect in the prior period.**

The terms, conditions and charges of service are required to be on-file with the Commission in schedules (“tariffs”). *See*, R.C. 4905.30. The Commission has a long-standing

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<sup>12</sup> *Id.* at 515, quoting *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254.

<sup>13</sup> *Columbus S. Power, supra.*

process for placing final, Commission-approved tariffs on-file.<sup>14</sup> That process requires, in pertinent part:<sup>15</sup>

- Each company to file one copy of tariff changes authorized by the Commission in its assigned TRF docket.
- Only final Commission-approved tariffs are to be filed in the designated TRF docket.

Importantly, R.C. 4905.32 mandates that public utilities can charge only in accordance with the approved tariff on-file and in effect at the time. R.C. 4905.32 states:

**No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.** No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service. (Emphasis added.)

The Supreme Court of Ohio has reinforced R.C. 4905.32, acknowledging “while a rate is in effect, a public utility must charge its consumers in accordance with the commission-approved rate schedule.”<sup>16</sup> Even when a rate in effect is invalidated on appeal, the rate is not rendered unlawful during the period it is in effect, nor does the invalidation allow a rate adjustment/refund

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<sup>14</sup> On July 6, 1989, the Commission established procedures for the final, Commission-approved tariffs of numerous public utilities, including AEP Ohio, to be filed and maintained per R.C. 4905.30. *In the Matter of the Establishment of Tariff Filing Dockets and Tariff Filing Procedures*, Case No. 89-500-AU-TRF, Entry (July 6, 1989).

<sup>15</sup> *Tariff Filing Dockets*, *supra*, Entry (May 31, 1989) and Entry (July 6, 1989).

<sup>16</sup> *Lucas Cty, supra*, at 347. Accord, *In re Complaint of Pilkington N. Am., Inc.*, 145 Ohio St.3d 125, 131 (2015); *Suburban Power Co. v. Public Util. Comm.*, 123 Ohio St 275 (1931); *Erie R.R. v. Steinberg*, 94 Ohio St. 189 (1916).



to be ordered for that prior period.<sup>17</sup> The invalidated rate, instead, remains in effect until later Commission action is taken prospectively.

The Commission should have similarly determined that its April 2017 approval of a revised pole attachment rate does not render the prior rate unlawful or allow the Commission to substitute the revised rate for the lawful rate in the prior period. AEP Ohio had a pole attachment tariff on-file and in effect before and during this proceeding. That former tariff was on-file and in effect on September 19, 2016, through April 19, 2017, until the final, Commission-approved tariff in this proceeding was put on-file in AEP Ohio's TRF docket. The only lawful pole attachment rate in effect during those seven months was the rate in the former tariff. AEP Ohio was required to charge its pole attachment customers in accordance with that former pole attachment tariff.

The Commission's April 2017 decision, however, contradicts R.C. 4905.32 by requiring that AEP Ohio supplant the former pole attachment tariff. In other words, the Commission is requiring AEP Ohio to substitute different terms and conditions for pole attachments for the prior seven months. The Commission's decision to implement AEP Ohio's newly approved tariff did not invalidate the rate charged in the prior seven months. The Commission's decision violates R.C. 4905.32 and should be revised on rehearing.

**C. It was unjust and unreasonable for the Commission to not clarify in its April 12, 2017 Entry that AEP Ohio is not authorized to charge the new pole attachment rate for attachments prior to the date on which the newly approved tariff was on-file with the Commission.**

While this proceeding has been pending, OCTA members have been billed by AEP Ohio for their pole attachments. In some instances, the bills were based on the proposed rate – even before the Commission had ruled. Because this has occurred and it is not clear how many

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<sup>17</sup> *Keco, Lucas Cty., and Columbus Southern, supra.*

incorrect bills were issued to pole attachment customers, the Commission should make clear on rehearing that AEP Ohio is not authorized to charge the new pole attachment rate for attachments prior to the date on which AEP Ohio filed the newly approved tariff in its TRF docket. The Commission, further, should direct AEP Ohio to review and correct its bills and cease the improper billing and collection.

#### **IV. CONCLUSION**

Ohio law does not permit the Commission to implement tariffs or new rates retroactively. The Commission's April 12 ruling in this proceeding, however, requires the pole attachment tariff, including the new rate, to be effective before the Commission approved the tariff and before it was properly on-file. The Commission should grant rehearing to revise its Entry to state that the new tariff is to be effective no earlier than April 19, 2017, which is the date on which AEP Ohio filed the newly approved tariff in its TRF docket. Additionally, the Commission should clarify that AEP Ohio cannot impose the new pole attachment rate on its pole attachment customers prior to April 19, 2017, and should correct any prior billings using the unapproved rate.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

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