

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Dayton Power and Light Company to)	Case No. 15-971-EL-ATA
Amend Its Pole 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 from 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 The Dayton Power and Light Company is not authorized to charge the new rates prior to the date on which the newly approved tariff is properly 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 tariff for pole attachment and conduit occupancy of The Dayton Power and Light Company ("DP&L") on April 12, 2017, and set the revised tariff's effective date for a date three months before the tariff's approval and before the tariff was properly on-file. The revised 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 DP&L's revised tariff to be effective no earlier than the date when DP&L files the Commission-approved tariff in Case No. 89-6004-EL-TRF – its tariff docket ("TRF docket").

Also, the Commission erred in not clearly stating in its April 12 Entry that DP&L is not authorized to charge the new rates for attachments and conduit occupancy in 2016 or for any period prior to the date on which the newly approved tariff was properly on-file with the Commission. The Commission should direct DP&L to correct any bills using the unapproved rates and cease any 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 tariffs to correspond with administrative rules that became effective

in January 2015.¹ DP&L filed its application on May 15, 2015, proposing a revised tariff including new rates. DP&L amended its application thereafter.² The OCTA intervened and objected to certain aspects of DP&L's proposal. To further evaluate the objections, the Attorney Examiner suspended automatic approval of the proposal. DP&L 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 DP&L to further modify its proposed tariff consistent with the determinations made by the Commission. On September 30, 2016, DP&L filed revised tariff sheets in this docket and in its TRF docket.³ On October 5, 2017, the OCTA objected to certain language contained in DP&L's September 30 revised tariff sheets. On October 5, 2016, DP&L filed an application for rehearing regarding certain Commission rulings in its September 7, 2016 Finding and Order.

On November 30, 2016, the Commission denied DP&L's application for rehearing and granted the OCTA's motion. The Commission directed DP&L to again revise its revised pole attachment tariff. DP&L filed revised tariff sheets in this docket and in its TRF docket on January 3, 2017.⁴

¹ *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).

² DP&L proposed to increase in its pole attachment rate by 130% and to establish a conduit occupancy rate.

³ DP&L stated in that filing that the tariff sheets were final tariff sheets, intended to supersede all preceding sheets, and be effective October 1, 2016. *See*, DP&L's Correspondence filed September 30, 2016, in this docket.

⁴ DP&L stated in that filing that the tariff sheets were final tariff sheets, intended to supersede all preceding sheets. They contained an effective date of January 3, 2017. *See*, DP&L's Correspondence filed January 3, 2017, in this docket.

On April 12, 2017, the Commission issued an Entry stating “[t]he Commission finds that the revised pole attachment and conduit occupancy tariff is approved.”⁵ The Commission also stated that the revised tariff is “effective as of the date of filing on January 3, 2017.”⁶

II. 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.⁷ Case law also establishes that utility ratemaking must be prospective. The Commission’s decision in this matter does not comport with Ohio law.

1. The Commission approved DP&L’s revised tariff on April 12, 2017.

On September 7, 2016, the Commission reviewed DP&L’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 tariff at that time.**

DP&L filed additional revisions to the pole attachment tariff on September 30, 2016. The Commission reviewed the revisions on November 30, 2016, and again accepted some of the revisions, but determined that further revisions were needed. **The Commission again did not implement any part of the revised tariff at that time.**

⁵ Entry at ¶14.

⁶ *Id.*

⁷ 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.)

DP&L filed further revisions on January 3, 2017. On April 12, 2017, the Commission reviewed the additional revisions and stated “[t]he Commission finds that the revised pole attachment tariff is approved.”⁸ The Commission’s April 12, 2017 decision was the final approval of the revised tariff presented in this proceeding.

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 approximately three months 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 Finding and Order and its November 30, 2016 Entry, and (b) before the Commission-approved tariff was properly filed in the TRF docket.

While the Commission’s April 2017 Entry did not expressly authorize DP&L to rebill its pole attachment customers, setting the effective date three months earlier has the same impact as if the Commission had implemented the new rate and ruled on DP&L’s tariff revisions the same day they were filed in January 2017.

⁸ Entry at ¶14.

3. The rate increase constitutes retroactive ratemaking.

By setting a January 2017 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.⁹ The Supreme Court of Ohio has explained:¹⁰

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.¹¹ As the Court explained, a "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.'"¹² 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.¹³ The Court reversed the Commission's ruling.

The Commission has impermissibly and retroactively set DP&L's pole attachment rate. The Commission did not rule on the tariff revisions for months after they were filed, yet when

⁹ *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).

¹⁰ *Lucas Cty.*, *supra*, at 348 (citation and footnote omitted).

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

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

¹³ *Columbus S. Power*, *supra*.

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 the date on which DP&L properly files 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 process for placing final, Commission-approved tariffs on-file.¹⁴ That process requires, in pertinent part:¹⁵

- 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.)

¹⁴ On July 6, 1989, the Commission established procedures for the final, Commission-approved tariffs of numerous public utilities, including DP&L, 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).

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

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.”¹⁶ 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 to be ordered for that prior period.¹⁷ 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 the 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. DP&L 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 7, 2016, through April 12, 2017, when the Commission approved the revised tariff in this proceeding. The only lawful rate in effect during those seven months was the rate in the former pole attachment tariff. DP&L was required to charge its pole attachment customers in accordance with that former tariff.

The Commission’s April 2017 decision, however, contradicts R.C. 4905.32 by requiring that DP&L supplant the former tariff. In other words, the Commission is requiring DP&L to substitute different terms and conditions for the prior three months. The Commission’s decision to implement DP&L’s newly approved tariff did not invalidate the rates charged in the prior three months. The Commission’s decision violates R.C. 4905.32 and should be revised on rehearing.

¹⁶ *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).

¹⁷ *Keco, Lucas Cty.*, and *Columbus Southern, supra*.

- C. It was unjust and unreasonable for the Commission to not clarify in its April 12, 2017 Entry that DP&L is not authorized to charge the new rates prior to the date on which the newly approved tariff is properly on-file with the Commission.**

On September 30, 2016, and January 3, 2017, DP&L filed revised tariff sheets in its TRF docket even though they had not been approved by the Commission.¹⁸ It is not clear whether DP&L has issued bills under those tariff sheets, but the Commission should make clear on rehearing that DP&L is not authorized to charge the new rates prior to the date on which DP&L properly files the Commission-approved tariff in its TRF docket. The Commission, further, should direct DP&L to review and correct any bills using the new rates prior to the tariff being properly on-file and cease any improper billing and collection.

III. 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 revised tariff, including the new rates, 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 the date on which DP&L properly files the newly approved tariff in its TRF docket. Additionally, the Commission should clarify that DP&L cannot impose the new rates prior to filing the newly approved tariff in its TRF docket, and should correct any prior billings using the unapproved rates.

¹⁸ Also, these revised tariffs contain different effective dates. *See*, DP&L's September 30, 2016 and January 3, 2017 tariff sheets.

Respectfully submitted,

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