

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 15-975-EL-ATA
Illuminating Company, and The Toledo)	
Edison Company to Change Their Pole)	
Attachment Tariffs)	

**MEMORANDUM CONTRA OHIO CABLE TELECOMMUNICATIONS
ASSOCIATION APPLICATION FOR REHEARING**

Pursuant to Ohio Admin. Code 4901-1-35, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (“Companies”) respectfully submit this Memorandum Contra Ohio Cable Telecommunications Association (“OCTA”) Application for Rehearing (“AFR”) filed in this proceeding on May 12, 2017. OCTA has come before the Commission once again in its effort to frustrate the lawful implementation of the Commission’s orders in this proceeding. OCTA continues to collaterally and belatedly attack prior Commission orders in its efforts to delay the natural consequence of rules for which the OCTA itself advocated—formula rates. The Companies oppose each of the grounds upon which OCTA asserts that the Commission’s April 12, 2017 Entry (the “Entry”) is unlawful and unreasonable. For the reasons set forth below, the Companies oppose OCTA’s latest attempt to delay the regulatory process in this case.

I. BACKGROUND

On February 25, 2015, the Commission ordered all pole owning public utilities to file updated tariffs consistent with the newly-promulgated rules issued in Case No. 13-579-AU-ORD, with the tariffs to become automatically effective 60 days after filing absent a Commission-ordered

suspension (“February 2015 Entry”)¹. On April 22, 2015, the Commission issued an Entry rejecting the OCTA’s Application for Rehearing as to whether statutorily mandated procedures for rate increases must be followed to effectuate an increase in pole attachment rates (“April 2015 Entry”). On May 15, 2015, the Companies filed updated pole attachment tariffs in this proceeding pursuant to these orders. On August 3, 2015 OCTA filed Objections to the Companies’ tariffs and on August 7, 2015 the Attorney Examiner issued an Entry suspending the automatic effectiveness of the filed tariffs and also established a procedural schedule for the Companies’ Responses. On September 7, 2016, the Commission issued a Finding and Order (“September 2016 Order”) specifically approving the Companies’ proposed rates and rate impacts, ordering modifications to several non-rate provisions, and ordering the Companies to file final tariffs within 30 days consistent with the findings made therein. On September 29, 2016, the Companies filed their final tariffs consistent with the September 7, 2016 Finding and Order.

On April 12, 2017, the Commission issued an Entry approving the Companies’ pole attachment tariffs (“April 2017 Entry”) effective as of the date of filing on September 29, 2016.. On May 12, 2017, OCTA filed an Application for Rehearing challenging what it asserts to be retroactive ratemaking.

II. LAW AND ARGUMENT

In response to the Commission’s April 2017 Entry approving the Companies’ revisions to the non-rate provisions in its tariff, and more than eight months *after* the Commission explicitly approved the Companies’ pole attachment rates, OCTA now challenges the effective date for the Companies to collect that lawfully approved rate. OCTA’s Application for Rehearing raises

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*, 13-579-AU-ORD, Entry (February 25, 2015).

several related arguments that are each premised upon a fundamental misapprehension of the Commission's September Order. Specifically, contrary to the express language of the September 2016 Order, OCTA argues that the Commission did not actually approve the Companies' pole attachment rates until the Commission's April 2017 Entry. (*See* OCTA AFR at 5.) But that September 2016 Order did not, as OCTA represents, fail to approve the proposed rates. Rather, in no uncertain terms, the Commission expressly approved the Companies' proposed pole attachment rates and the rate impacts, and authorized the Companies to file their tariffs and begin collecting those rates. September Order at 20-21. The April 2017 Entry affirmed this by approving the tariffs effective September 29, 2016.

A. THE OCTA'S APPLICATION FOR REHEARING IS AN OUT-OF-TIME COLLATERAL ATTACK ON THE COMMISSION'S SEPTEMBER 2016 ORDER.

In its efforts to delay the formula rate outcome it advocated, OCTA's Application for Rehearing amounts to an untimely collateral attack on prior Commission orders. In fighting to prevent every major pole-owning public utility from implementing the Commission's orders to update tariffs using formula rates, OCTA simply failed to pursue its challenges in the proper time and manner. As will be explained more fully below, the Commission has already ruled long ago on the matters underpinning OCTA's latest challenge.

With respect to timing, the Commission found the use of formula rates to be appropriate in its July 30, 2014 Order, at p. 40-42². The OCTA did not issue a timely challenge to this finding. In its February 2015 Entry, the Commission ordered pole owners to file updated tariffs including

² *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*, 13-579-AU-ORD, Finding and Order, July 30, 2014.

rates based on 2014 reported data. The OCTA did not issue a timely challenge to this finding. In its April 2015 Entry, the Commission ordered that pole attachment tariff rate increases do not have to follow statutorily mandated rules required for electric rate increases found in R.C. 4909. The OCTA did not issue a timely appeal of this finding on rehearing. And in its September 2016 Order, the Commission fully approved the Companies' proposed tariff rates for pole attachment rentals and the associated rate impacts, and specifically ruled that the concept of rate gradualism or phase-in of rates is inapplicable to pole attachment tariffs. The OCTA did not issue a timely challenge to this finding.

With its current Application for Rehearing, the OCTA belatedly challenges each of these lawful Commission orders individually and collectively. The Commission should reject this last-ditch effort by OCTA to delay the effect of nearly three years of consistent rulings by the Commission designed to implement updated formula rates.

B. THE COMMISSION HAS ALREADY RULED THAT STATUTORILY MANDATED PROCESSES DO NOT APPLY TO POLE ATTACHMENT TARIFF RATE INCREASES.

The main premise of OCTA's Application for Rehearing is that the Commission's April 2017 Order violated the requirements of R.C. 4909.17 by allowing the Companies to charge pole attachment rates that had not yet been approved. However, the OCTA previously challenged the Commission with the argument that statutorily mandated processes should be applied to pole rental rate increases, specifically those found in R.C. 4909.18, and the Commission found that pole attachment tariffs warrant different treatment than rate increases for public utility services:

Upon considering the arguments raised by OCTA and all memorandum contra, the Commission finds that OCTA's motion for clarification, or, in the alternative, application for rehearing should be denied with regard to the issue of an electric distribution utility or telephone company being required to follow the statutorily

mandated procedures for a rate increase or a self-complaint process in order to increase its pole attachment or conduit rate.³

Thus, given this finding that statutorily mandated processes do not apply to changes in pole attachment tariff rates, there is no indication that a separate order with an explicit approval of the form of the tariff sheets is required to effectuate approved rates under R.C. 4905.71.

C. THE COMMISSION HAS ALREADY ISSUED AN ORDER APPROVING THE COMPANIES' POLE ATTACHMENT RATES.

OCTA argues that the Companies should not be permitted to implement updated tariff rates because the Commission had not separately issued an order specifically approving the updated tariff sheets. However, in its September 2016 Order the Commission not only specifically approved the Companies' proposed pole attachment tariff rates, but also the associated rate impacts.⁴ Moreover, the Commission at the same time rejected OCTA's request for gradualism or that the Companies' updated rates be phased in. September 2016 Order at p. 8-9. OCTA's argument that the Companies' updated rates can only be billed with an effective date of April 12, 2017 tends to have the same result as OCTA's previously requested phased-in or delayed increase which the Commission rejected. It is counterintuitive at best to suggest the Commission effectively countermanded its own Order by waiting seven months to approve the final filed tariffs.

D. OCTA's ARGUMENT THAT PRE-EXISTING TARIFFS WERE LAWFUL CONTRADICTS THE HISTORY OF ITS ARGUMENTS IN THIS PROCEEDING.

³ *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*, 13-579-AU-ORD, Entry, April 22, 2015, at p.6.

⁴ Finding and Order, September 7, 2016, at p. 20-21.

On page 9 of its Application for Rehearing, OCTA argues that that the Companies' new tariffs were unlawful until the April 2017 Commission order approving the form of tariff sheets. OCTA further argues that the Commission should order the Companies to apply their previous "lawful" pole attachment tariffs for the period prior to the April 2017 Order. However, OCTA ignores the whole reason why the Companies filed updated tariffs in the first place—to incorporate the Commission's new rules. Indeed, OCTA argued strenuously in its Objections that the Companies' proposed tariffs filed May 15, 2015, were unlawful because they did not incorporate certain elements of the new rules. Now, in a desperate bid to achieve an additional seven-month delay of the updated rates, OCTA argues that the Companies' decades-old tariffs pre-dating the new rules were lawful, while the tariffs filed September 29, 2016 in compliance with the Commission's explicit directives were not lawful until April 12, 2017. The Commission should reject OCTA's assertion that the Companies' compliance filing tariffs were unlawful until April 12, 2017.

CONCLUSION

For the reasons set forth herein, the Companies respectfully request that the Commission deny OCTA's Application for Rehearing.

Respectfully submitted this 22nd of May, 2017

On Behalf of Ohio Edison Company, The Cleveland
Electric Illuminating Company and The Toledo Edison
Company,

/s/ Robert M. Endris

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Certificate of Service

I certify that Notice of Substitution of Counsel was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 22nd day of May, 2017. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Robert M. Endris

Robert M. Endris

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Summary: Memorandum Memorandum Contra OCTA's Application for Rehearing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Mr. Robert M. Endris on behalf of Endris, Robert Mr.