

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

ENTRY ON REHEARING

Entered in the Journal on July 26, 2017

I. SUMMARY

{¶ 1} The Commission grants the application for rehearing filed by the Ohio Cable Telecommunications Association, regarding the effective date of Ohio Power Company's pole attachment and conduit tariff amendments.

II. DISCUSSION

A. *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 utilities' poles, pedestals, conduit space, or right-of-way.

{¶ 3} Ohio Power Company (Ohio Power) is an electric light company under R.C. 4905.03 and a public utility under R.C. 4905.02 and is, therefore, subject to the Commission's jurisdiction.

{¶ 4} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

B. Procedural History

{¶ 5} 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. The new rules became effective 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.

{¶ 6} On May 15, 2015, Ohio Power filed its tariff amendment application in this docket.

{¶ 7} On June 26, 2015, the Ohio Cable Telecommunications Association (OCTA) filed a motion to intervene in this proceeding.

{¶ 8} On August 3, 2015, OCTA filed its objections in this proceeding.

{¶ 9} Pursuant to the attorney examiner Entry of August 7, 2015, Ohio Power's tariff amendment application was suspended and removed from the automatic approval process. Additionally, the motion to intervene filed by OCTA was granted.

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

{¶ 11} On September 7, 2016, the Commission issued its Finding and Order establishing the rates, terms, and conditions to be incorporated into Ohio Power's pole attachment tariff.

{¶ 12} On September 19, 2016, Ohio Power filed its final pole attachment tariff.

{¶ 13} Pursuant Commission's Entry of April 12, 2017, the revised pole attachment tariff was approved with an effective date of September 19, 2016.

{¶ 14} On May 12, 2017, OCTA filed an application for rehearing regarding the Commission's Entry of April 12, 2017.

{¶ 15} On May 22, 2017, Ohio Power filed its memorandum contra the application for rehearing.

{¶ 16} On June 7, 2017, the Commission issued an Entry on Rehearing granting rehearing for the limited purpose of further consideration of matters raised in the application for rehearing.

C. *Assignments of Error Raised by OCTA*

{¶ 17} As its first assignment of error, OCTA asserts that it was unjust and unreasonable for the Commission to grant a retroactive rate increase in violation of R.C. 4909.17, which provides that public utility rates and rate changes cannot be effective prior to the Commission finding that the rate or rate change is just and reasonable. Additionally, OCTA submits that R.C. 4905.30 requires that terms, conditions, and charges are required to be on-file with the Commission in schedules.

{¶ 18} OCTA points out that while the Commission reviewed Ohio Power's tariff filings pursuant to its Order of September 7, 2016, it did not implement any part of the revised tariff at that time and did not approve the final tariff until its Entry of April 12, 2017. OCTA notes that Ohio Power proposed additional tariff revisions on September 19, 2016, for the Commission's approval. As a result, OCTA contends that the Commission improperly established an effective date of September 19, 2016, for the rate increase, due to the fact that it is prior to the Commission approval of the revised tariff on April 12, 2017, and prior to the Commission-approved tariff being properly filed in

the TRF docket. Therefore, OCTA asserts that the Commission has violated Ohio's law prohibiting retroactive ratemaking and requests that the Commission require that revised tariffs be effective no earlier than April 19, 2017, the date on which Ohio Power filed the Commission-approved revised tariff in its TRF docket.

{¶ 19} In support of its position, OCTA asserts that the Supreme Court of Ohio in *Lucas Cty. Commrs. V. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347, 348 (1997) has held that:

[W]hile a rate is in effect, a public utility must charge its consumers in accordance with the Commission-approved rate schedule. * * *

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.

{¶ 20} As its second assignment of error, OCTA asserts that 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 effect in the prior period.

{¶ 21} According to OCTA, the Commission in *In re the Establishment of Tariff Filing Dockets and Tariff Filing Procedures*, Case No. 89-500-AU-TRF, Entry (July 6, 1989), established a process for placing final, Commission-approved tariffs on file with the Commission. This process includes that (a) each company file one copy of tariff changes authorized by the Commission in its assigned TRF docket, and (b) only final Commission-approved tariffs are to be filed in the designated TRF docket.

{¶ 22} OCTA submits that 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.

{¶ 23} Further, OCTA states that a tariff's effective date establishes 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.

{¶ 24} Therefore, OCTA contends that, consistent with R.C. 4905.32, the Commission should have determined that its April 12, 2017 approval of the revised pole attachment rate does not render the rate in the prior tariff that was in effect from September 19, 2016 to April 19, 2017 to be unlawful. Rather, OCTA avers that the only lawful rate in effect during these seven months was the rate in the former pole attachment tariff. OCTA submits that this rate remained in effect until the final, Commission-approved tariff in this proceeding was filed in Ohio Power's TRF docket.

{¶ 25} In its third assignment of error, OCTA states that it was unjust and unreasonable for the Commission to not clarify in its April 12, 2017 Entry that Ohio Power 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. Further, OCTA requests that the Commission should direct Ohio Power 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.

{¶ 26} With respect to OCTA's arguments relative to the applicability of R.C. 4909.17, Ohio Power rejects OCTA's contention that the Commission's September 7, 2015, Finding and Order was interlocutory or preliminary in nature as to the pole attachment rate applicable to Ohio Power's poles and that the Commission did not actually approve the pole attachment rate until April 2017. Further, contrary to OCTA's contention that the Commission merely directed Ohio Power to further modify its proposed tariff, Ohio Power submits that the Commission expressly considered whether the company's proposed pole attachment rate was just and reasonable and approved Ohio Power's proposed pole attachment rate at the time of the September 7, 2015 Finding and Order. Further, Ohio Power states that the Commission authorized Ohio Power to file its tariff and begin collecting that rate upon the final tariff filing.

{¶ 27} Ohio Power also argues that the Entry of April 12, 2017, did not constitute an illegal retroactive rate increase because the Commission had already determined in *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*, Case No. 13-579-AU-ORD, Entry at 6 (Apr. 22, 2015), that the changes to pole attachment and conduit occupancy rates being considered here are not subject to the requirements applicable to proposed increases in rates charged to customers for electric services.

{¶ 28} Ohio Power rejects OCTA's argument that the pole attachment tariff became effective upon its filing in Case No. 89-6007-EL-TRF. In support of its position, Ohio Power avers that its pole attachment rate has been on file with the Commission since September 2016. Therefore, consistent with R.C. 4905.32, it contends that it should be allowed to collect a rate for service rendered that is specified in its schedule filed with Commission which was in effect at that time. While acknowledging that it waited to file the updated rate schedule in its TRF docket until the Commission confirmed its approval of the company's specific non-rate-related tariff language, Ohio Power asserts that this did not change the fact that it filed its schedule containing the Commission-approved rate on September 19, 2016, as directed by the Commission. Further, Ohio Power argues that there is no requirement that a utility must file an updated tariff in its tariff docket before a rate increase becomes effective.

{¶ 29} Upon a review of the arguments set forth in OCTA's three assignments of error, the Commission finds that the application for rehearing should be granted.

{¶ 30} The record reflects that pursuant to the Commission Finding and Order of September 7, 2016, the Commission, in the context of approving tariff amendments for Ohio Power, approved revised rates for Ohio Power pole attachments. Additionally, the Commission required the filing of a final pole attachment tariff within 30 days of the Finding and Order. The record also reflects that on September 19, 2016, Ohio Power filed its final pole attachment tariff, including the applicable rates, in response to the Finding

and Order of September 7, 2016. No Commission action was taken with respect to the approval of the final tariff filing until its Entry of April 12, 2017.

{¶ 31} Pursuant to R.C. 4905.32:

No public utility shall charge, demand, exact, receive, or collect a different, 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 * * * .

{¶ 32} Based on an analysis of this statute it is clear that Ohio Power is only permitted to charge a rate that is both specified in its schedule filed with the Commission and that is also in effect at that time. While Ohio Power filed the proposed pole attachment rates on September 19, 2016, the filing was a redline version with no effective or issue date indicated. In order to be effective, the final tariff sheets were required to be approved. As noted above, this did not occur until the Commission's Entry of April 12, 2017, when, upon reviewing all of the pending pole attachment tariff pages, the Commission approved the final tariff sheets and Ohio Power filed its final unredlined revised tariffs on April 19, 2017 in 89-6007. This determination is especially true in light of the fact that the automatic approval process for the filing of electric pole attachment tariff rates was suspended pursuant to the Entry of August 7, 2015. Therefore, the Commission finds that the directive in its Entry of April 12, 2017, regarding the September 19, 2016, effective date resulted in an inappropriate retroactive rate increase. Instead, the effective date should be April 12, 2017, which is the date of the Commission's approval of the revised pole attachment tariff.

{¶ 33} Consistent with the above determination, the company must refile revised tariff sheets reflecting the new effective date.

{¶ 34} Ohio Power is directed 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. ORDER

{¶ 35} It is, therefore,

{¶ 36} ORDERED, That the application for rehearing filed by OCTA be granted as set forth above. It is, further,

{¶ 37} ORDERED, That Ohio Power refile its revised tariff sheets consistent with paragraph (33). It is, further,

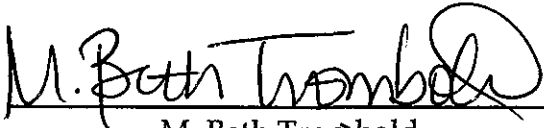
{¶ 38} ORDERED, That, consistent with the above determination, Ohio Power is directed to review and correct any bills using the new rates prior to the tariff being properly on file and cease any improper billing and collection. It is, further,

{¶ 39} ORDERED, That a copy of this Entry on Rehearing be served upon Ohio Power, OCTA, and all other interested persons of record.

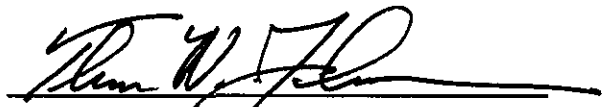
THE PUBLIC UTILITIES COMMISSION OF OHIO



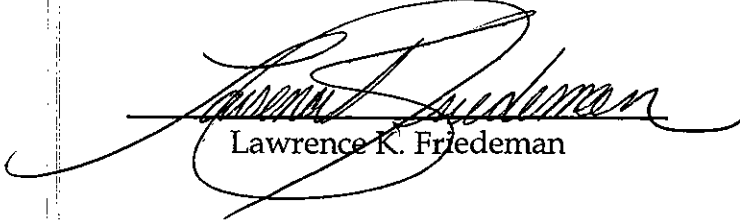
Asim Z. Haque, Chairman



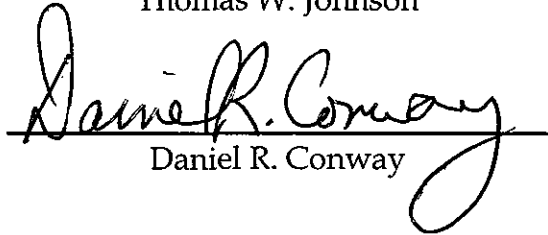
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