

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY, AND
THE TOLEDO EDISON COMPANY TO
CHANGE THEIR POLE ATTACHMENT
TARIFFS.

CASE NO. 15-975-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 the pole attachment tariff amendments for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

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} The Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company (collectively, "FirstEnergy Companies") are electric light companies under R.C. 4905.03 and public utilities under R.C. 4905.02 and are, 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, as amended on August 3, 2015, FirstEnergy Companies each 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, FirstEnergy Companies' tariff amendment applications were suspended and removed from the automatic approval process. Additionally, the motion to intervene filed by OCTA was granted.

{¶ 10} On August 24, 2015, FirstEnergy Companies 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 FirstEnergy Companies' pole attachment tariffs.

{¶ 12} On September 29, 2016, FirstEnergy Companies each filed its revised pole attachment tariff.

{¶ 13} Pursuant Commission's Entry of April 12, 2017, the revised pole attachment tariffs were each approved with an effective date of September 29, 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, FirstEnergy Companies filed a 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 FirstEnergy Companies' tariff filings pursuant to its Order of September 7, 2016, it did not implement any part of the revised tariffs at that time and did not approve the final tariffs until its Entry of April 12, 2017. As a result, OCTA contends that the Commission improperly

established an effective date of September 29, 2016, for the rate increase that 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 the date on which FirstEnergy Companies properly file the Commission-approved revised tariffs in their TRF dockets.

{¶ 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 effect on September 29, 2016 to April 12, 2017 to be unlawful. Rather, OCTA avers that the only lawful rate in effect during the six months from September 29, 2016 to April 12, 2017 was the rate in the former pole attachment tariff.

{¶ 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 FirstEnergy Companies are 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 FirstEnergy Companies 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} In its May 22, 2017 memorandum contra in response to OCTA's application for rehearing, FirstEnergy Companies assert that OCTA's application for rehearing is actually an "untimely collateral attack on prior Commission orders." In support of its position, FirstEnergy Companies note that the Commission approved the use of formula rates in *In re 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 (13-579), July 30, 2014. FirstEnergy Companies also reference the Commission's February 2015 Entry in 13-579, in which the Commission ordered pole owners to file updated tariffs including rates based on 2014 reported data.

{¶ 27} FirstEnergy Companies note that OCTA did not issue a timely challenge on rehearing to any of these decisions. FirstEnergy Companies consider OCTA's current application for rehearing to be a last-ditch effort by OCTA to delay the effect of nearly three years of rulings by the Commission designed to implement updated formula rates.

{¶ 28} Further, citing 13-579, Entry, Apr. 22, 2015, at 6, FirstEnergy Companies note that the Commission has already ruled that statutorily mandated processes (i.e., R.C. 4909.18) do not apply to changes in pole attachment tariff rates. Given this prior determination, FirstEnergy Companies assert that 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.

{¶ 29} In response to OCTA's contention that the Commission has not separately issued an order specifically approving the updated tariff sheets, FirstEnergy Companies assert that the Commission in its Entry of September 7, 2016, specifically approved the Companies' proposed pole attachment tariff rates and the associated impacts. Additionally, FirstEnergy Companies also contend that the Commission in its Entry of September 7, 2016, also rejected OCTA's request for a phase-in of the updated rates. FirstEnergy Companies submit that the April 12, 2017 effective date tends to have the same result as OCTA's previously requested phase-in of the approved increase.

{¶ 30} Finally, FirstEnergy Companies submit that OCTA's argument that preexisting tariffs were lawful contradicts the history of OCTA's arguments in this proceeding. Specifically, FirstEnergy Companies reference OCTA's prior contention that the proposed tariffs filed on May 15, 2015, were unlawful because they did not incorporate certain elements of the new rules.

{¶ 31} 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.

{¶ 32} The record reflects that pursuant to the Commission Finding and Order of September 7, 2016, the Commission, in the context of approving FirstEnergy Companies'

tariff amendments, approved revised rates related to 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 29, 2016, FirstEnergy Companies filed their proposed final pole attachment tariffs, 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.

{¶ 33} 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 * * * .

{¶ 34} Based on an analysis of this statute, it is clear that FirstEnergy Companies are 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 FirstEnergy Companies filed the proposed pole attachment rates on September 29, 2016, with the same stated effective date, these rates were not in effect at that time. 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.

{¶ 35} Additionally, the Commission notes that the automatic approval process for the filing of electric pole attachment tariff rates was suspended pursuant to the Entry of August 7, 2015. As a result, the final tariff rate sheets must be approved. Therefore, the Commission finds that the directive in its Entry of April 12, 2017, regarding the September 29, 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 tariff provisions.

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

{¶ 37} FirstEnergy Companies are 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

{¶ 38} It is, therefore,

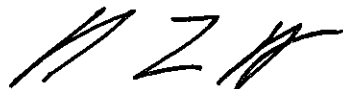
{¶ 39} ORDERED, That the application for rehearing filed by OCTA be granted as set forth above. It is, further,

{¶ 40} ORDERED, That FirstEnergy Companies refile their revised tariff sheets consistent with paragraph (36). It is, further,

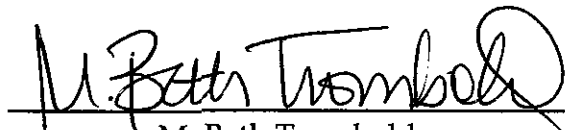
{¶ 41} ORDERED, That, consistent with the above determination, FirstEnergy Companies are directed to review and correct any bills using the new rates prior to the tariff being properly on file and cease any improper billing and collection. It is, further,

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

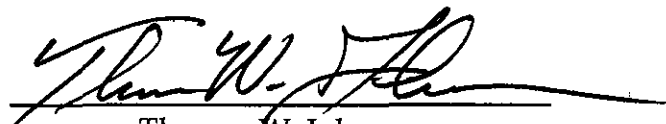
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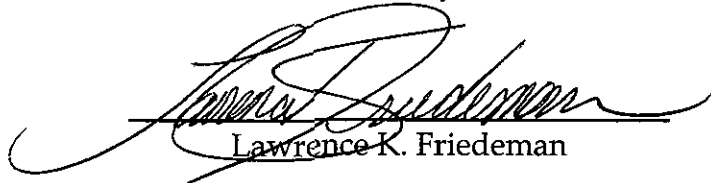
Asim Z. Haque, Chairman



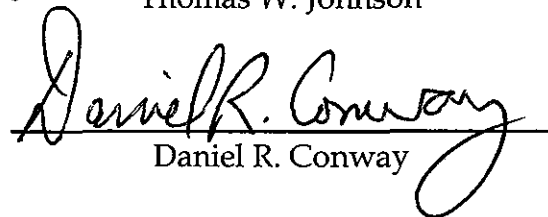
M. Beth Trombold



Thomas W. Johnson



Lawrence R. Friedeman

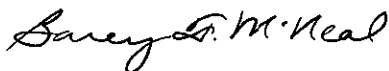


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Secretary