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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Complaint of )  
McLeodUSA Telecommunications )  
Services, Inc. d/b/a PAETEC Business )  
Services, Complainant )

Case No. 11-3407-TP-CSS

v. )

AT&T Ohio, Respondent, )  
)

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**MOTION FOR LEAVE TO FILE SURREPLY INSTANTER**

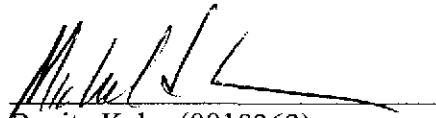
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Pursuant to Rule 4901:1-38(B) of the Ohio Administrative Code, McLeodUSA Telecommunications Services, L.L.C. d/b/a PAETEC Business Services and LDMI Telecommunications, Inc. (collectively "PAETEC") respectfully request that PAETEC's surreply to AT&T-Ohio's reply brief be accepted for filing. In its reply brief, AT&T-Ohio pointed to facts outside of PAETEC's complaint to support its motion to dismiss. In addition, AT&T-Ohio cited to new authority in its reply brief and arguments regarding the parties' ICA amendments, both of which could and should have been raised in its motion to dismiss and memorandum in support.

These portions of AT&T-Ohio's reply brief go beyond the scope of a reply brief, warranting PAETEC's attached surreply. Accordingly, to ensure fairness and due process in this proceeding, PAETEC respectfully requests that the Attorney Examiner accept PAETEC's surreply for filing. The reasons underlying this motion are detailed in the attached Memorandum in Support.

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Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF  
MOTION FOR LEAVE TO FILE SURREPLY INSTANTER**

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In its reply brief, AT&T-Ohio relies on facts from other proceedings to refute the factual allegations in the complaint regarding PAETEC's recent discovery of AT&T-Ohio's discriminatory conduct.<sup>1</sup> As well, AT&T-Ohio presents new authority that it claims support its motion to dismiss and relies on the 2003/2004 PAETEC amendments to claim that PAETEC has waived any right to a different rate application absent a cost proceeding.<sup>2</sup> These arguments and authority should have been raised in AT&T-Ohio's initial memorandum in support of its motion to dismiss. Instead, AT&T-Ohio elected to wait until after PAETEC filed its memorandum contra to raise these issues in its reply brief.

AT&T-Ohio's use of the reply brief to refute factual allegations and submit new authority warrants a surreply. Commission Rule 4901-1-38(B) states that "[t]he commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth above in this chapter or prescribe different practices or procedures to be followed in a case." Under that rule, a surreply may be filed upon a showing of good cause.<sup>3</sup>

Good causes exists for PAETEC's surreply. AT&T-Ohio relies on facts from other proceedings in an attempt to rebut PAETEC's allegations in the complaint(¶¶27, 29) that new evidence recently came to light regarding AT&T-Ohio's discriminatory conduct.<sup>4</sup> AT&T-Ohio's submission of facts from other proceedings is impermissible in the context of a motion to dismiss

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<sup>1</sup> AT&T-Ohio Reply, pp. 10-11.

<sup>2</sup> *Id.*, pp. 11-13, 18-20.

<sup>3</sup> See e.g. *in re Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case Nos. 10-176-EL-ATA, Entry dated November 17, 2010 at ¶15, 2010 Ohio PUC LEXIS 1219 (granting surreply based on a showing of good cause).

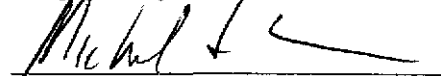
<sup>4</sup> AT&T-Ohio Reply at pp. 10-11.

or reply brief. AT&T-Ohio also relies on new authority in its reply brief, one federal court decision and three state commission decisions, and goes so far as to claim that the Commission "...should follow the lead of these ..." commissions and court.<sup>5</sup> However, because AT&T-Ohio used these authorities to refute the discrimination claim in PAETEC's complaint, supported by the Iowa Utilities Board remand, AT&T-Ohio should have raised these authorities in its motions to dismiss. This would have allowed PAETEC the opportunity to respond in its memorandum contra. AT&T-Ohio's inclusion of new factual allegations and authorities in its reply brief provide sufficient reason for PAETEC's surreply.

AT&T-Ohio also devoted several pages in its reply brief to arguments related to the 2003/2004 PAETEC amendments, arguments that were clearly available to AT&T-Ohio at the time it filed its motion to dismiss. However, in its motion to dismiss, AT&T-Ohio only briefly referenced the amendments to point out that the rate application methodology was provided for in the amendments. As a matter of fairness and due process, PAETEC should be allowed to address AT&T-Ohio's arguments on the amendments through the attached surreply.

Thus, as good cause exists, PAETEC respectfully requests that the Attorney Examiner accept PAETEC's surreply, attached hereto, for filing.

Respectfully submitted,



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<sup>5</sup> *Id.*, pp. 18-20.

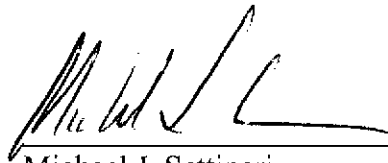
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### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document was served upon the following persons  
via electronic mail this 3rd day of August, 2011:

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Mary Ryan Fenlon (mfl842@att.com)  
AT&T Services, Inc.  
150 E. Gay St., Room 4-A  
Columbus, Ohio 43215



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Michael J. Settineri

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of	)	
McLeodUSA Telecommunications	)	
Services, Inc. d/b/a PAETEC Business	)	
Services, Complainant	)	
	)	Case No. 11-3407-TP-CSS
v.	)	
	)	
AT&T Ohio, Respondent	)	
	)	

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**SURREPLY TO AT&T OHIO'S REPLY**

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AT&T-Ohio continues to ignore the basic maxim that when ruling on the motion to dismiss the Commission must accept as true the facts alleged in PAETEC's complaint. Rather, through its reply brief, AT&T-Ohio attempts to counter PAETEC's factual allegations with its own, contrary version of the facts.<sup>1</sup> But, AT&T-Ohio's factual assertions have no bearing on whether PAETEC has adequately pled its claims. What is important is that the determination of whether conduct is discriminatory and when that conduct was disclosed is a factual determination and appropriately, a matter for hearing.<sup>2</sup>

The new authority cited by AT&T-Ohio in its reply brief actually supports PAETEC's point of moving forward with a hearing. Specifically, AT&T-Ohio cited to one federal court decision and three state commission decisions in its reply brief, claiming that the Commission "...should follow the lead of these commissions and the Arizona federal court."<sup>3</sup> Significant to this matter, and ignored by AT&T-Ohio, each of those decisions was based on an administrative record fully developed through hearing.<sup>4</sup> The parties presented evidence on the issue of

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<sup>1</sup> AT&T-Ohio Reply at pp. 10-11.

<sup>2</sup> See ¶¶ 25-27 and 29 of the complaint.

<sup>3</sup> AT&T-Ohio Reply, pp. 18-20.

<sup>4</sup> See *McLeodUSA Telecommunications Services, Inc. v. Arizona Corporation Commission*, 655 F. Supp. 2d 1003, 1009 (D.C. Ariz. 2009) (rejected binding agreement argument and evidentiary hearing held); *McLeodUSA*

discrimination and only after reviewing the evidence, did the state commissions determine whether McLeodUSA met its burden of proof. There is the appearance that AT&T-Ohio is attempting to circumvent fact discovery, but consistent with the commissions cited by AT&T-Ohio, the Commission should move forward with discovery, hold a hearing in this proceeding and allow the parties to present evidence to support and/or refute the allegations in the complaint. Only then, should the Commission rule on the substance of the allegations in the complaint.

In essence, AT&T-Ohio is asking this Commission to allow it to argue the facts through a motion to dismiss. That is not the proper vehicle to resolve PAETEC's factual allegations of AT&T-Ohio's discriminatory actions or that such actions were not apparent at the time the 2003/2004 amendments were executed due to AT&T-Ohio's failure to disclose the manner in which it "assesses" collocation power charges to itself. A Commission hearing is the proper vehicle to resolve PAETEC's allegations. For these simple reasons, AT&T-Ohio's attempt to litigate the facts through a motion to dismiss should be rejected and a hearing date should be set for this matter.

Further, the arguments made over several pages by AT&T-Ohio in its reply brief related to the 2003/2004 PAETEC amendments were clearly available to AT&T-Ohio at the time it filed its motion to dismiss. However, in its motion to dismiss, AT&T-Ohio only briefly referenced the amendments to point out that the rate application methodology was provided for in the amendments. AT&T-Ohio did recognize in its reply brief that the amendments allow for revisions in the power rate application through a cost proceeding.<sup>5</sup> There is no definition of a cost proceeding in the amendments and no basis to determine that a complaint proceeding like

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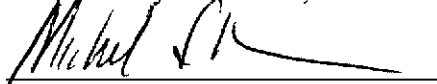
*Telecommunications Services, Inc. v. Qwest Corporation*, 2007 Wash. UTC LEXIS 82, \*\*11-12, Docket UT-063013, Order dated February 15, 2007 (the section quoted by AT&T-Ohio is based on factual evidence presented at hearing; as noted, the Commission must accept PAETEC's facts in the complaint as true and may not go beyond the four corners of the complaint when considering the motion); *In re. McLeodUSA Telecommunications Services, Inc. v. Qwest Corp. for Enforcement of Commission-Approved Interconnection Agreement*, Docket No. 062249-01, Report and Order dated September 28, 2006 available <http://www.psc.utah.gov/utilities/telecom/telecomindx/2006-2009/06224901indx.html> (discrimination claims not precluded by Act and relied on facts presented at hearing); and *McLeodUSA Telecommunications Services, Inc. v. Qwest Corporation*, Docket No. 06F-124T, Commission Decision Denying Exception Adopted Date July 25, 2007, copy attached to AT&T-Ohio Reply (relying on evidence presented at hearing).

<sup>5</sup> AT&T-Ohio Reply, p. 12.

this one is not a “cost proceeding” within the meaning of the amendment. PAETEC’s complaint already pled that the rate application violated cost causation principles and was not consistent with TELRIC, thereby raising cost issues.<sup>6</sup> Raising yet another question of fact to be determined after evidence is received.

To put AT&T-Ohio’s motion in the proper context, the Commission’s rule regarding complaints requires a statement which clearly explains the facts that constitute the basis of the complaint (and with respect to claims of discrimination, the particular facts that constitute the discrimination) and a statement of the relief sought.<sup>7</sup> There can be no question that PAETEC has met these requirements and adequately pled all of its claims. AT&T-Ohio’s Motion must be denied.

Respectfully submitted,



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<sup>6</sup> See ¶ 28 of the complaint.

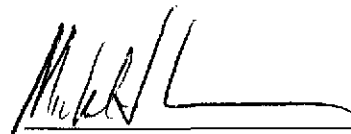
<sup>7</sup> See O.A.C. 4901-9-01(B).



## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document was served upon the following persons  
via electronic mail this 3rd day of August, 2011:

Jon F. Kelly  
Mary Ryan Fenlon  
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