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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO,	)	
Complainant,	)	**Case No. 06-1509-EL-CSS**
v.	)	
THE DAYTON POWER & LIGHT COMPANY,	)	
Respondent.	)	

MOTION FOR EMERGENCY RELIEF

COMES NOW AT&T Ohio, by its undersigned attorneys, and files this Motion for Emergency Relief against The Dayton Power & Light Company ("DP&L"), its affiliates, subsidiaries, employees, officers, directors, servants, attorneys and agents, and those persons in active concert with them who receive actual notice. AT&T Ohio brings this action pursuant to R.C. §§ 4905.26, 4905.51, and 4905.71. In support thereof, AT&T Ohio states as follows:

1. On December 28, 2006, AT&T Ohio filed a Complaint and Request for Emergency Relief against the Defendant, DP&L, in this Commission and served the same on opposing counsel via overnight and electronic mail. AT&T Ohio now submits this Motion for Emergency Relief, along with a supporting memorandum, both of which are being filed with this Commission and served on opposing counsel in the manner indicated on the Certificate of Service.

2. AT&T Ohio hereby incorporates by reference, as if set forth in full herein, the supporting memorandum. As fully explained therein, emergency relief should be issued restraining DP&L, its affiliates, subsidiaries, employees, officers, directors, servants, attorneys and agents, and those persons in active concert with them who receive actual notice from

suspending AT&T Ohio's contractual rights to use DP&L's poles to attach equipment used to provide telecommunications services to customers.

3. As fully explained in the supporting memorandum, the evidence supports AT&T Ohio's request for emergency relief.

4. AT&T Ohio will suffer immediate and irreparable injury, loss or damage before DP&L can be heard in opposition to AT&T Ohio's Complaint. AT&T Ohio has given notice to DP&L and its counsel of the filing of AT&T Ohio's Complaint and motion for emergency relief.

5. AT&T Ohio has a substantial likelihood of success on the merits of its claim that DP&L has no legal right to suspend AT&T Ohio's rights under their contract, or to unilaterally increase the pole attachment rate from $3.50 (as agreed to by the parties) to $45.00 per pole.

6. AT&T Ohio would be irreparably harmed if emergency relief is not granted. If DP&L refuses to allow AT&T Ohio to use space on DP&L's poles, AT&T Ohio will be unable to serve customers in a timely manner, thus irreparably harming its business relationship with end users and other carriers to whom AT&T Ohio provides service.

7. DP&L will suffer no harm if emergency relief is granted, and no third party will be harmed by issuance of emergency relief. Emergency relief will preserve the status quo – *i.e.*, the parties will continue to operate under the terms of their existing contract, with AT&T Ohio paying $3.50 annually for pole attachments. If DP&L ultimately prevails on the merits, and the Commission finds that it is justified in raising the annual rate for pole attachments, DP&L can be made whole by AT&T Ohio paying the disputed invoices and paying the new rate going forward.

8. The public interest would be served by issuance of emergency relief. In the absence of emergency relief, end user customers will be unable to have timely access to vital telecommunications services. Moreover, absent temporary relief, the public interest purposes of

R.C. §§ 4905.51 and 4905.71, efficient sharing of wireline support structures and the concomitant avoidance of added burden on the public rights of way caused by duplicative poles lines, will be frustrated.

9. Emergency relief is appropriate under Ohio Admin. Code § 4901-9-01(D) because of the threatened suspension by DP&L of AT&T Ohio's rights under the Joint Agreement. AT&T Ohio agrees to pay all amounts that are not in dispute pursuant to that provision.

10. Emergency relief is also appropriate under R.C. § 4909.16, under which the Commission may temporarily alter the rates charged by DP&L to prevent injury to the interests of the public and the interests of AT&T Ohio.

WHEREFORE AT&T Ohio respectfully requests that this Commission grant emergency relief enjoining DP&L, its affiliates, subsidiaries, employees, officers, directors, servants, attorneys and agents, and those persons in active concert with them who receive actual notice of the injunction order from suspending AT&T Ohio's contractual rights to use DP&L's poles. The emergency relief should remain in effect until the Commission decides AT&T Ohio's Complaint.

Dated: December 28, 2006

Respectfully submitted,

AT&T Ohio

By: _____

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BEFORE

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Complainant,	)	**Case No.**
v.	)	
THE DAYTON POWER & LIGHT COMPANY,	)	
Respondent,	)	

MEMORANDUM IN SUPPORT OF MOTION FOR EMERGENCY RELIEF

Defendant The Dayton Power & Light Company ("DP&L"), its affiliates, subsidiaries, employees, officers, directors, servants, attorneys and agents, and those persons in active concert with them who receive actual notice should be enjoined from suspending AT&T Ohio's contractual right to use DP&L's poles to attach telecommunications equipment used to provide service to customers.

STATEMENT OF FACTS

On March 17, 1930, AT&T Ohio and DP&L entered into a Joint Pole Line Agreement ("Joint Agreement") (Complaint, Ex. A), providing terms and conditions by which each party can use space on the other party's poles to attach equipment used to provide service to customers. For example, where DP&L owns poles for the purpose of providing electric service to customers, the Joint Agreement sets forth terms and conditions allowing AT&T Ohio to use space on those poles to attach equipment used to provide telecommunications services to customers. Conversely, the agreement allows DP&L to use space on poles owned by AT&T

Ohio. In this way, the Joint Agreement seeks to obviate the need for duplicative poles. The Joint Agreement has been amended from time to time.

Article 11.10 of the Joint Agreement established a rate of $2.00 per pole payable by each party: "The Licensee shall pay to the Owner as rental for the use of each and every pole any portion of which is occupied by or reserved for the attachments of the Licensee, Two Dollars ($2.00) per pole per annum." This provision was revised in a 1947 Supplemental Agreement ("1947 Supplemental Agreement") (Complaint, Ex. C) to restructure the formulation for calculating the number of poles to which the rate applied – the $2.00 rate, however, remained unchanged.

Article 13.10 of the Joint Agreement provides procedures for adjusting the pole attachment annual rental. It states:

> At the expiration of five (5) years from the date of this agreement, and at the end of every five (5) year period thereafter, the rental per pole per annum thereafter payable hereunder shall be subject to readjustment at the request of either party made in writing to the other not later than sixty (60) days before the end of any such five (5) year period. If within sixty (60) days after the receipt of such a request by either party from the other, the parties hereto shall fail to agree upon a readjustment of such rental, then the rental per pole per annum so to be paid shall be an amount equal to one-half of the then average total annual cost per pole of providing and maintaining the standard joint poles covered by this agreement. In case of a readjustment of rentals as herein provided, the new rentals shall be payable until again readjusted.

Historically, the parties rarely have adjusted the rental rate under this provision. In fact, the rate under the agreement remained unchanged at $2.00 until it was revised in November 1995 to increase the rent to $3.50. Complaint, ¶ 11.

On or around November 12, 2004, DP&L notified AT&T Ohio of its desire to adjust the pole attachment rental amount pursuant to Article 13.10. Complaint, ¶ 12. Though the rental rate has always been low ($2.00 from 1930 until 1995, and $3.50 from 1995 to the present),

DP&L sought to increase the rate by 1185%, from $3.50 to $45.00 per year, effective March 17, 2005. Over the course of the next year, AT&T and DP&L engaged in a series of informal and formal communications in the hopes of reaching agreement on an adjusted rate as well as other issues that are not the subject of this motion. The parties' attempts were unsuccessful. As noted above, Article 13.10 states that, if the parties are unable to agree on a readjustment of the rent, the rent will be "one-half of the then average total annual cost per pole of providing and maintaining the standard joint poles covered by this agreement." Article 13.10 does not explain specifically how to calculate the total annual cost per pole. It is clear, however, that the calculation must include the cost of all poles covered by the agreement – both DP&L's poles and AT&T Ohio's poles covered by the agreement – and should not include the cost of either party's poles that are not covered by the agreement.

DP&L's proposed $45.00 rate indisputably does not include the cost of AT&T Ohio's poles. And it includes DP&L poles that are not covered by the agreement. Its calculation therefore does not conform to the agreement and cannot be used as the rate under the Joint Agreement.

DP&L purports to have calculated its proposed $45.00 rate by using a cost methodology approved by the Federal Communications Commission ("FCC") for pole attachments by cable and certain telecommunications carriers. The FCC's methodology was set forth in its May 25, 2001 Consolidated Partial Order on Reconsideration,[1] and codified at 47 C.F.R. § 1.1409. The Joint Agreement, however, does not specify that the parties use the FCC's methodology; in fact, the FCC's methodology did not even exist when the parties entered this contract in 1930.

[1] *Consolidated Partial Order on Reconsideration,* In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket Nos. 97-98, 97-151, FCC 01-170 (rel. May 25, 2001).

Although its proposed $45.00 rate does not comply with the Joint Agreement, and AT&T Ohio did not agree to pay that rate, DP&L unilaterally applied it effective March 17, 2005. Complaint, ¶ 15. DP&L submitted bills to AT&T Ohio in the amount of $396,665.78[2] for the period October 2, 2004 through September 30, 2005 ("2005 Invoice"), and in the amount of $690,660.00 for the period October 1, 2005 through September 30, 2006 ("2006 Invoice") (Complaint, Exs. D and E). AT&T Ohio paid DP&L $53,459.00 for the 2005 Invoice and $26,859.00 for the 2006 Invoice, the amounts not in dispute at the time of the payments.

On December 6, 2006, DP&L notified AT&T Ohio of its intent to suspend AT&T Ohio's rights under the Joint Agreement because of its purported default of the Agreement for its failure to pay the 2005 and 2006 invoices in full. Article 14.10 of the Joint Agreement, relating to procedures in the event of default by either party, provides:

> If either party shall make default in any of its obligations under this contract and such default continue thirty (30) days after notice thereof in writing from the other party, all rights to the party in default hereunder shall be suspended including its right to occupy jointly used poles, until such default has been made good, and in addition and without affecting such suspensions, if the Owner shall fail to perform its obligations hereunder to properly maintain and to promptly renew joint poles after thirty days notice from the Licensee, the Licensee shall have the right to maintain such poles or to renew the same at the expense of the Owner and it shall be the duty of the Owner to immediately reimburse the Licensee for such expense upon the rendition of bills therefore.

Contrary to DP&L's claim, AT&T Ohio is not in default of the Joint Agreement because it has paid the applicable contractual rate. AT&T Ohio has performed all of its obligations under its contract with DP&L.

[2] This amount was the result of a blended rate. DP&L claims that the $45.00 rate became effective March 17, 2005. Therefore, it charged AT&T Ohio the $3.50 rate for 5.5 months of this billing cycle and the $45.00 rate for the remaining 6.5 months.

EMERGENCY RELIEF IS WARRANTED HERE.

AT&T Ohio has provided notice to DP&L and its counsel of the Complaint and motion for emergency relief that AT&T Ohio filed. The purpose of the requested emergency relief is to preserve the status quo of the parties pending final adjudication of the case on the merits. *Yudin v. Knight Industries Corp.*, 672 N.E.2d 265, 266 (Ohio App. 1996). In deciding whether to grant a preliminary injunction, a court would typically look at (1) whether there is a substantial likelihood that AT&T Ohio will prevail on the merits, (2) whether AT&T Ohio will suffer irreparable injury if the injunction is not granted, (3) whether third parties will be unjustifiably harmed if the injunction is granted, and (4) whether the public interest will be served by the injunction. *Procter & Gamble Co., v. Stoneham,* 747 N.E.2d 268, 273 (Ohio App. 2000). Some courts describe the third factor as requiring consideration of whether "the potential injury that may be suffered by [defendant] will not outweigh the potential injury suffered by [plaintiff] if the injunction is not granted." *City of Cleveland v. Cleveland Electric Illuminating Co.,* 684 N.E.2d 343, 350 (Ohio App. 1996). No one factor is determinative; rather, the four factors must be balanced. *Id.* at 351. For example, "[w]hen there is a strong likelihood of success on the merits, the preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak." *Id.* Stated another way, "what plaintiff must show as to the degree of irreparable harm varies inversely with what plaintiff demonstrates as to its likelihood of success on the merits." *Id.*

This Commission should analyze this request in the same manner as an Ohio court would analyze a request for a temporary restraining order or motion for preliminary injunction.

ARGUMENT

I. AT&T Ohio Is Likely To Succeed On The Merits Of Its Claim.

A. DP&L's Unilateral Increase Of The Pole Attachment Rental from $3.50 To $45.00 Annually Violates The Joint Agreement.

Article 13.10 of the Joint Agreement provides the procedures for adjusting the pole attachment annual rental. It provides that either party may request an adjustment to the annual per pole rate at the expiration of five years from the date of the agreement, and at the end of every five year period thereafter. Here, DP&L proposed to adjust the rate to $45.00 effective March 17, 2005. AT&T did not agree with that drastic increase in rate and, although the parties attempted to agree upon a readjustment to the rate, they were unable to do so. In those circumstances, Article 13.10 provides:

> If within sixty (60) days after the receipt of such a request by either party from the other, the parties hereto shall fail to agree upon a readjustment of such rental, then the rental per pole per annum so to be paid shall be an amount equal to *one-half of the then average total annual cost per pole of providing and maintaining the standard joint poles covered by this agreement.* In case of a readjustment of rentals as herein provided, the new rentals shall be payable until again readjusted. [Emphasis added].

Article 13.10 was written in 1930 and, as is apparent from the text, does not provide specific instruction on how to calculate the "then average total annual cost per pole of providing and maintaining" the poles covered by the agreement. Nevertheless, DP&L's $45.00 rate is clearly inconsistent with the plain terms of the Joint Agreement. The language of Article 13.10 makes clear that, where the parties are unable to agree on a readjustment of rental, the amount will be set at one-half the "then average total annual cost per pole of providing and maintaining the standard joint poles *covered by this agreement*," which includes *all* poles covered by the agreement, both DP&L's *and* AT&T's. DP&L, however, excluded from its calculation the cost of providing and maintaining AT&T Ohio's poles covered by the agreement. Thus, even assuming $45.00 is an accurate calculation of the average cost of providing and maintaining DP&L's poles covered by the agreement (which there is no evidence to support), it is not

necessarily the average cost of *all* poles – including those of AT&T Ohio – covered by this agreement. In addition to excluding AT&T Ohio's poles, DP&L's calculation included the cost of *all* DP&L poles, even those *not* covered by the agreement. It is clear, then, that DP&L's proposed $45.00 rate does not meet the terms of the Joint Agreement and cannot be used as the rental rate for purposes of the Joint Agreement.

DP&L claims to have calculated the total annual cost per pole in accordance with the cost methodology developed by the FCC. The FCC's regulations and implementing order are irrelevant here for several reasons. The Joint Agreement did not specify that the parties would calculate "*the then average total annual cost per pole of providing and maintaining the standard joint poles covered by this agreement*" pursuant to FCC regulations. In fact, the regulations at issue did not even exist when the parties entered the Joint Agreement.

Though DP&L tries to lend credibility to its calculation by claiming it "is in accordance with the cost methodology specified in the" FCC's regulations (Complaint, ¶ 14), it does not mirror the FCC's formula; rather it makes dramatic adjustments to it. These adjustments clearly have DP&L's own self interest in mind. DP&L's calculation artificially increases DP&L's purported costs and, hence, the price AT&T Ohio would have to pay for pole attachments, in several respects.

Finally, DP&L's unilateral increase in the pole attachment rental does not pass the straight face test. The rate has historically been a couple of dollars: it was $2.00 per pole per year from 1930 until 1995, at which time the rate was increased to $3.50. It defies logic to think that the cost of providing and maintaining poles has increased so much in the last eleven years to justify an increase to $45.00 per pole per year – an 1185% increase. This is particularly true

given the parties agreed that only a slight increase of $1.50 was necessary in the 65 years between 1930 and 1995.

B. DP&L's Suspension of AT&T Ohio's Rights, While a Bona Fide Dispute is Pending, Is not Permitted By the Joint Agreement.

Given that there is no basis for the $45.00 rate unilaterally imposed by DP&L, it follows that the 2004 and 2005 invoices that it sent to AT&T Ohio were incorrect or, at the very least, disputed. Under these circumstances, AT&T Ohio's failure to pay those bills in full (AT&T paid only the amount not subject to a bona fide dispute with DP&L) cannot be viewed as a "default" of its obligations under the Agreement. Though it is true that "*one-half of the then average total annual cost per pole of providing and maintaining the standard joint poles covered by this* agreement" may or may not be $3.50, that determination has yet to be made and thus $3.50 continues to be the governing rental rate. If the amount ends up being more than $3.50, AT&T Ohio can reimburse that amount to DP&L with interest. The important fact is that AT&T Ohio has not refused to pay for pole attachments (which would be a default); rather AT&T Ohio has withheld payment only of the amounts subject to a bona fide dispute. The provisions of the contract relating to default and the suspension of rights under the contract cannot be reasonably interpreted as allowing DP&L to unilaterally suspend AT&T Ohio's rights where there is a bona fide dispute over the amount to be charged for pole attachments. Unilateral suspension of AT&T Ohio's rights under the contract is a drastic remedy that should be narrowly construed to apply only where one party does not object to the billed amount, but rather is just stiffing the other party. Cf. *Spence v. Emerine* (1889), 46 Ohio St. 433, 437 (narrowly construing warrant of attorney confessing judgment); *Jackson v. Nelsonville Fdry. & Co.* (1916), 6 Ohio App. 171 (same). The appropriate mechanism by which DP&L should seek to resolve the parties' dispute

is by bringing the matter to an appropriate authority for resolution, which is what AT&T Ohio has done by filing its complaint and request for emergency relief.

* * *

For these reasons, AT&T Ohio is likely to succeed on the merits of its claim that DP&L had no right to suspend AT&T Ohio's rights under the Joint Agreement or to charge AT&T Ohio an annual fee of $45.00 per pole for attachments.

II. AT&T Ohio Will Suffer Irreparable Injury Without Emergency Relief.

If emergency relief is not granted and DP&L is permitted to suspend AT&T Ohio's rights under the contract to use of DP&L's poles, AT&T Ohio will suffer irreparable injury. AT&T Ohio will be unable to serve customers in a timely manner, thus harming its business relationship with end users and other carriers to whom AT&T Ohio provides service. If AT&T Ohio were not permitted to use DP&L's poles, it would have to either: (1) set its own poles, which is costly, inefficient (in that it results in two sets of poles, DP&L and AT&T Ohio's, at the same location) and time-consuming, insofar as it requires approval from local governmental entities; or (2) bury cable, which suffers from the same problems, and is even more costly. Either way, AT&T Ohio will have to tell customers that it is not able to fulfill their service requests in a timely manner, if at all, thereby irreparably harming its business relationships with them.

III. The Defendant Will Suffer No Harm If Emergency Relief is Granted.

DP&L will suffer no harm if emergency relief is granted. AT&T seeks only to preserve the status quo – that the parties continue to operate under the terms of the existing agreement, with AT&T Ohio being charged $3.50 annually for pole attachments. If DP&L ultimately prevails on the merits, and the Commission finds that it was justified in raising the annual rate for pole attachments to $45.00, DP&L can be made whole by AT&T paying the disputed

invoices and paying the new rate going forward. There is no suggestion that AT&T will not be able to pay. And harm that can be cured with money damages is not irreparable harm.

IV. The Public Will Not Be Harmed If Emergency Relief Is Granted, But Will Be Significantly Harmed If One Is Not Issued

The interest of the public weighs strongly in favor of granting emergency relief. In the absence of emergency relief, end user customers will be unable to have timely access to vital telecommunications services. Moreover, absent temporary relief, the public interest purposes of R.C. §§ 4905.51 and 4905.71, efficient sharing of wireline support structures and the concomitant avoidance of added burden on the public rights of way caused by duplicative poles lines, will be frustrated.

CONCLUSION

For the foregoing reasons, emergency relief should be granted enjoining DP&L, its affiliates, subsidiaries, employees, officers, directors, servants, attorneys and agents, and those persons in active concert with them who receive actual notice from suspending AT&T Ohio's contractual rights to use DP&L's poles to attach equipment used to provide telecommunications services. The emergency relief should remain in effect until the Commission decides AT&T Ohio's complaint.

Dated: December 28, 2006

Respectfully submitted,

AT&T Ohio

By: _____

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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 28th day of December, 2006, by UPS overnight courier and e-mail, where noted, on the parties listed below.

Jon F. Kelly

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