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Comments:

RE: AT&T Ohio v. The Dayton Power and Light Company, PUCO Case No. 06-1509-EL-CSS

To Whom It May Concern:

Attached for filing are: (1) The Dayton Power and Light Company's Reply to AT&T Ohio's Memorandum Contra The Dayton Power and Light Company's Motion to Strike or in the Alternative, for Leave to File Surreply; and (2) Answer of Respondent The Dayton Power and Light Company. The originals and twelve (12) copies will follow via Federal Express to the attention of Renee Jenkins. If you need any further information for filing, please do not hesitate to contact me.

Teri E. Seabold (937) 227-9917
Secretary to Jeffrey S. Sharkey

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO,	:	CASE NO. 06-1509-EL-CSS
	:	
Complainant,	:	
	:	
v.	:	
	:	
THE DAYTON POWER AND LIGHT	:	
COMPANY,	:	
	:	
Respondent.	:	

**THE DAYTON POWER AND LIGHT COMPANY'S REPLY TO
AT&T OHIO'S MEMORANDUM CONTRA DP&L'S MOTION TO STRIKE
OR IN THE ALTERNATIVE, FOR LEAVE TO FILE SURREPLY**

Pursuant to Ohio Admin. Code § 4901-1-12(B)(2), The Dayton Power and Light Company ("DP&L") submits this Reply to AT&T Ohio's Memorandum Contra DP&L's Motion to Strike, or in the Alternative, Motion for Leave to File Surreply ("Opposition"). In its Opposition, AT&T Ohio blatantly elevates form over substance by denying that its Motion for Emergency Relief ("AT&T Ohio's Motion") constituted a request for expedited consideration. In fact, AT&T Ohio's Motion was a request for expedited consideration, and its Reply was, therefore, an unauthorized pleading that should be struck. If the Commission accepts AT&T Ohio's Reply, then DP&L requests the opportunity to submit a Surreply as outlined in its Motion to Strike.

I. Introduction

On December 28, 2006, AT&T Ohio filed its Complaint and Request for Emergency Relief seeking, among other things, a temporary restraining order and preliminary injunction against DP&L. Complaint, ¶¶ 45 & 46(d). Each is a matter that requests expedited

consideration by the Commission. *See* Ohio Civ. R. 65. Simultaneously, AT&T Ohio filed a Motion for Emergency Relief, asserting that "emergency relief should be issued restraining DP&L . . ." Motion, ¶ 2. AT&T Ohio further asserted, using language common in requests for temporary restraining orders, that it "will suffer immediate and irreparable injury, loss or damage before DP&L can be heard in opposition to AT&T Ohio's Complaint." *Id.*, ¶ 4. Finally, in its Memorandum in Support of the Motion, AT&T Ohio instructed that "[t]his 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." Memorandum in Support of the Motion, p. 5. All of AT&T Ohio's papers were served on DP&L electronically on the day of filing and by overnight delivery the next day.

The next day, DP&L's counsel entered their appearance before the Commission. In so doing, counsel noted that "[t]he Commission's rules do not provide for the filing of an emergency motion. DP&L will treat AT&T Ohio's emergency motion as a request for an expedited ruling under Ohio Admin. Code § 4901-1-12(c), and DP&L will respond within seven days to AT&T Ohio's Motion." Entry of Appearance on Behalf of Respondent The Dayton Power and Light Company, p. 2 n.1. AT&T Ohio made no attempt to "correct" what it now claims to have been a misunderstanding on the part of DP&L.

In conformance with § 4901-1-12(c), DP&L filed its opposition to the Motion for Emergency Relief within seven days. Subsequently, AT&T Ohio filed a Reply to that opposition. DP&L has moved to strike that Reply as contrary to Ohio Administrative Code § 4901-1-12(C).



II. Argument

In opposing DP&L's Motion to Strike, AT&T Ohio claims that it actually did not request an expedited ruling from the Commission. To support its claim, AT&T Ohio engages in semantics and ignores the import of its own pleadings.

There is no statute, rule or regulation empowering the Commission to grant emergency relief.¹ Under the Administrative Code, however, "[a]ny motion may include a specific request for an expedited ruling." AT&T Ohio moved the Commission for "emergency relief" to prevent "immediate and imminent" harm, including relief in the nature of a "temporary restraining order" and a "preliminary injunction."

An emergency is commonly understood as "a serious situation or occurrence that happens unexpectedly and demands immediate action." See Webster's II New Riverside University Dictionary (1988). A motion seeking "emergency" relief, by definition, seeks "immediate action." The only way to grant "immediate action" is through "expedited consideration." Thus, it is beyond debate that AT&T Ohio sought expedited consideration -- cloaked as an "emergency request" -- and is not entitled to file a Reply.² The Motion to Strike should be granted.

¹ AT&T Ohio has previously argued that the Commission does not have the power to grant such a motion. See SBC Ohio's Brief in Opposition to Petition and Motion for Emergency Relief in Emergency Petition of LDM Telecommunications, Inc., Case No. 05-298-TP-UNC <http://dis.puc.state.oh.us/TiffToPDF/YGSDOSILJMI8WST.pdf>

² AT&T Ohio appears to have recognized that a motion for emergency relief falls under § 4901-1-12(c). AT&T Ohio filed its opposition to a motion for emergency relief in a prior matter four days after the motion was filed. See Docket in Case No. 05-298-TP-UNC.

Alternatively, DP&L seeks leave to file a Surreply because, among other reasons, AT&T Ohio has raised new issues. Among the issues to which DP&L should be entitled to respond is AT&T Ohio's claim that it is not required to submit evidence in support of its motion.

In urging the Commission to accept its unsupported arguments in this proceeding, AT&T Ohio ignores its prior inconsistent arguments to this Commission in a separate proceeding. Recently, AT&T argued that this Commission should deny a motion for emergency relief specifically because the movants had "not satisfied key elements of Ohio Civ. R. 65(A), which states that requests for similar relief [a temporary restraining order] must be supported by either an affidavit or a verified complaint." SBC Ohio's Brief in Opposition to Petition and Motion for Emergency Relief in Emergency Petition of LDMI Telecommunications, Inc., Case No. 05-298-TP-UNC, [http://dis.puc.state.oh.us/TiffToPDF/YG5DO\\$ILJMJ18WST.pdf](http://dis.puc.state.oh.us/TiffToPDF/YG5DO$ILJMJ18WST.pdf).

DP&L should be permitted to demonstrate that AT&T Ohio is speaking out of both sides of its mouth before the Commission. If the Commission accepts AT&T Ohio's Reply, then DP&L should be allowed to file a Surreply as outlined in its Motion to Strike.

III. Conclusion

For the reasons set forth above and in its Motion to Dismiss, DP&L respectfully moves that the Commission strike AT&T Ohio's Reply. Alternatively, DP&L should be permitted to file a Surreply.

Respectfully submitted,



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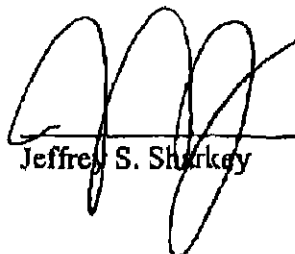
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Reply to AT&T Ohio's Memorandum Contra DP&L's Motion to Strike or in the Alternative, for Leave to File a Surreply has been served via electronic mail and regular U.S. mail, postage prepaid, upon the following counsel of record, this 25th day of January, 2007:

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