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April 26, 2007

Docketing Division  
The Public Utilities Commission of Ohio  
180 East Broad Street  
10th Floor  
Columbus, Ohio 43215

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

Dear Docketing Clerk:

On behalf of The Dayton Power and Light Company, enclosed for filing in the above-captioned matter are an original and twelve copies of Respondent's Application for Rehearing of the Commission's March 28, 2007 Entry Finding Reasonable Grounds for the Complaint and accompanying Memorandum in Support thereof. Please return one file-stamped copy of the document to me in the enclosed self-addressed, stamped envelope.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jack Richards', written over the printed name 'Jack Richards'.

Enclosures

Cc: Michael T. Sullivan, Esq. (w/enclosure; via electronic mail and U.S. mail)  
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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

AT&T OHIO,

Complainant,

v.

THE DAYTON POWER AND  
LIGHT COMPANY,

Respondent.

CASE NO. 06-1509-EL-CSS

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**RESPONDENT'S APPLICATION FOR REHEARING  
OF THE COMMISSION'S MARCH 28, 2007 ENTRY  
FINDING REASONABLE GROUNDS FOR THE COMPLAINT**

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Pursuant to Ohio Admin. Code § 4901-1-35, The Dayton Power and Light Company ("DP&L") hereby applies for Rehearing of the Commission's March 28, 2007 Entry finding reasonable grounds for the complaint in the above-captioned proceeding. The grounds for this Application are set forth fully in DP&L's supporting memorandum that is attached hereto.

Respectfully submitted,



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April 26, 2007

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO,

Complainant,

v.

THE DAYTON POWER AND  
LIGHT COMPANY,

Respondent.

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CASE NO. 06-1509-EL-CSS

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**MEMORANDUM IN SUPPORT OF RESPONDENT'S APPLICATION FOR  
REHEARING OF THE COMMISSION'S MARCH 28, 2007 ENTRY  
FINDING REASONABLE GROUNDS FOR THE COMPLAINT**

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The Dayton Power and Light Company ("DP&L") submits this memorandum in support of its Application for Rehearing of the Commission's March 28, 2007 Entry finding reasonable grounds for the complaint in the above-captioned proceeding ("March 28 Entry").

In the March 28 Entry, the Commission erroneously found jurisdiction where none exists. Ohio Revised Code Sections 4905.06, 4905.22, 4905.51, 4905.31, 4905.48 and 4905.26, cited by the Commission, provide no basis for Commission review of a dispute between two parties regarding a 75-year-old contract designated as a Joint Pole Line Agreement ("Agreement"). Furthermore, the Commission is unable to award the damages resulting from AT&T Ohio's failure to make the deficiency payments required under the Agreement, or even to award AT&T Ohio the damages it seeks if AT&T Ohio were to prevail. Accordingly, the Commission should rehear this matter and AT&T Ohio's Complaint should be dismissed with prejudice.

## **I. INTRODUCTION AND BACKGROUND**

On December 28, 2006, AT&T Ohio filed its Complaint against DP&L, asking the Commission to resolve a contractual dispute between the parties. AT&T Ohio's Complaint alleges that DP&L's actions constituted a breach of the Joint Pole Line Agreement and asks that the Commission award it damages for the breach. *See* Complaint at ¶¶ 11-23. In addition, AT&T Ohio asks that the Commission award it damages for unjust enrichment and further asks the Commission to grant injunctive relief and to construe the terms of the Joint Pole Line Agreement through a Declaratory Ruling. *Id.*

In its January 4, 2007, Motion to Dismiss, which is incorporated herein by reference, DP&L demonstrated that the Commission lacked subject matter jurisdiction over AT&T Ohio's Complaint and requested that this case be dismissed with prejudice. AT&T Ohio filed a memorandum contra to DP&L's Motion to Dismiss on January 11, 2007, to which DP&L replied on January 18, 2007.

In the March 28 Entry, the Commission concluded that several provisions of the Ohio Revised Code enabled the Commission to exercise jurisdiction over AT&T Ohio's Complaint. March 28 Entry at 7-8. The Commission stated first, that the rates, terms, and conditions associated with the operation and maintenance of poles by AT&T Ohio and DP&L fall within Commission's general supervisory powers over public utilities contained in Sections 4905.06 and 4905.22. *Id.* at 7. Second, the Commission explained that Section 4905.51 empowers it to resolve pole attachment disputes between public utilities. *Id.* Finally, the Commission asserted that Sections 4905.31 and 4905.48 grant it jurisdiction over contracts between public utilities. *Id.* Therefore, the Commission Ordered that reasonable grounds for the complaint had been stated.

As demonstrated below, the Commission erred in its determination that it is the proper body to resolve this dispute.

## **II. The Commission's General Jurisdiction Under Sections 4905.06 and 4905.22, Revised Code, Does Not Apply in This Instance**

The Supreme Court of Ohio has repeatedly held that the Commission is a creature of statute and may only exercise such jurisdiction as is specifically conferred upon it by statute. *See e.g., Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 88 ("The commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly."); *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 5 ("The commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute."); *Consumers' Counsel v. Pub. Util. Comm.* (1983), 6 Ohio St.3d 377, 378 ("Public Utilities Commission is a creature of the General Assembly and [it] may exercise no jurisdiction beyond that conferred by statute."). Ohio Revised Code Sections 4905.06 and 4905.22 confer only the general supervisory powers and general authority necessary for the Commission to perform critical regulatory duties, but they do not confer specific jurisdiction over the instant dispute.

Section 4905.22 relates to charges assessed by public utilities for "service."<sup>1</sup> The "service" offered by DP&L is electricity, and electricity is not the subject of this dispute. *See* Ohio Rev. Code 4905.03(4) ("An electric light company [is a public utility], when engaged in the

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<sup>1</sup> R.C. § 4905.22 states: "Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission. "

business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission.”). AT&T’s service is telephone and related services. *See Id.* at (2). Neither DP&L’s nor AT&T’s “service” is pole rental. Since this dispute involves negotiated, contractual rates associated with the joint use of poles by AT&T and DP&L, jurisdiction does not arise under Section 4905.22.

Section 4905.06 provides that “[t]he public utilities commission has general supervision over all public utilities within its jurisdiction ....” This supervisory authority is not without limits, however. The Commission, for example, does not have jurisdictional power to award damages in contract disputes involving a public utility, *see e.g., Dayton Power & Light Co. v. Riley*, 53 Ohio St.2d 168, 373 N.E.2d 385 (1978), or for torts allegedly caused by utility employees, *see e.g., Bailey v. The Toledo Edison Co.*, Pub Util. Comm’n. of Ohio, No. 87-765-EL-CSS (August 4, 1987). Thus, simply because DP&L and AT&T Ohio are both public utilities does not mean that “the rates, terms, and conditions associated with the operation and maintenance of utility facilities and services, including poles, by AT&T Ohio and DP&L fall within the regulatory authority of the Commission” as the Commission asserted. March 28 Entry at 7. More analysis is required to determine which aspects of DP&L’s and AT&T Ohio’s operations are subject to the Commission’s jurisdiction.

In the case of joint use agreements, the Commission’s jurisdiction is delimited by Section 4905.51. In contrast to the general provisions of Section 4905.06 and 4905.22, Section 4905.51 confers specific jurisdiction on the Commission with regard to joint use agreements. In fact, Section 4905.51 is the sole statute section specifically relating to joint use agreements between

public utilities. As Ohio courts have held, "it is an elementary rule of statutory construction that, in the absence of language to the contrary, a specific statute controls over a general provision." See e.g., *Quality Ready Mix, Inc. v. Mamone*, 35 Ohio St.3d 224, 520 N.E.2d 193 (1988). As Section 4905.51 contains the specific limits of the Commission's jurisdiction with respect to joint use agreements, the Commission may not expand such limits by resorting to the general provisions of Sections 4905.06 and 4905.22.

### **III. Section 4905.51, Revised Code, Does Not Provide the Commission with Jurisdiction Over This Matter**

In the March 28 Entry, the Commission concluded correctly that "[i]n the event parties can not agree on the terms for joint use, [Section 4905.51] vests the Commission with the authority to prescribe conditions and compensation." In this case, the parties have agreed to the terms for joint use. As a result jurisdiction under Section 4905.51 does not arise. The disagreements presented here are of contract interpretation; the terms and conditions themselves are not in dispute.

The Commission appears to have relied on AT&T Ohio's mischaracterization of DP&L's position with respect to this section of the Ohio Revised Code and cites that as DP&L's position. March 28 Entry at 7. DP&L is not asserting that the Commission only has the power to intervene in disagreements between the parties during their negotiations over the initial agreement and not thereafter. DP&L's position is more precise and narrower than that.

DP&L's position, supported by the statute, is that where the dispute involves the interpretation of terms and conditions to which parties have voluntarily agreed, the Commission has no special expertise to resolve the dispute and the Ohio legislature has assigned jurisdiction over such disputes to the courts. This is not a case where the contract uses regulatory terms of art such as would be implicated if the contract tied back to a tariff or stated that a "just and



reasonable” rate will be periodically established. Instead, the contract is very explicit in providing precisely when each party has the right to propose a change in the pole deficiency payment rental and specifies the default pricing mechanism that will be used in the event that the parties do not reach an agreement on the new pole deficiency payment rental. The power to interpret how that contract term operates to set a price is appropriately lodged with the Courts and is not susceptible to analysis under a public convenience and necessity or just and reasonable rate standard. The parties freely and voluntarily agreed to the terms and conditions of this contract and now one party has asked the Commission to ignore the first sentence of Section 4905.51 and find that the Commission can rewrite terms and conditions freely entered into.

Section 4905.51 reads:

In case of failure to agree upon such use or joint use, or upon the conditions or compensation for such use or joint use, any public utility may apply to the commission, and if after investigation the commission ascertains that the public convenience, welfare, and necessity require such use or joint use and that it would not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to the service to be rendered by such owner or other users, the commission shall direct that such use or joint use be permitted and prescribe reasonable conditions and compensation for such joint use.

The March 28 Entry states that “[t]o find that the Commission which is the regulatory body that has the expertise and authority to determine what would be an appropriate joint use rate, does not have jurisdiction over disputes between public utilities that arise out of a contract involving a pole attachment service or rate, is contrary to the public interest, as well as the public policy underlying Section 4905.51, Revised Code.” March 28 Entry at 7.

However, this case does not invoke the expertise of the Commission. This case does not require a Commission determination of reasonable conditions and compensation for joint use. Likewise, it does not require a finding by the Commission that the “public convenience, welfare, and necessity require such use or joint use and that it would not result in irreparable injury to the

owner or other users of such property or equipment or in any substantial detriment to the service to be rendered by such owner or other users.”

Instead, this case solely requires a ruling on whether the terms of an Agreement that has governed the joint use relationship between DP&L and AT&T Ohio for 75 years have been breached. As previously shown by DP&L, a long line of precedent holds that the courts have jurisdiction over this type of contract dispute. *See Marketing Research Services, Inc. v. Public Utilities Commission of Ohio*, 34 Ohio St.3d 52, 56, 517 N.E.2d 540, 544 (Ohio 1997); *see also Hull v. Columbia Gas*, 110 Ohio St. 3d 96, 101, 850 N.E.2d 1190, 1195 (Ohio 2006); *Ohio Edison Co. v. Shaker*, 68 Ohio St. 3d 209, 211, 625 N.E.2d 608, 610 (Ohio 1994); *Milligan v. Ohio Bell Tel.*, 56 Ohio st.2d 191, 195 383 N.E.2d 575, 578 (Ohio 1978); *Dayton Power & Light Co. v. Riley*, 53 Ohio St.2d 168, 170, 373 N.E.2d 385, 386 (Ohio 1978); *Village of New Bremen v. Public Utilities Commission*, 103 Ohio St. 23, 31, 132 N.E. 162, 164 (Ohio 1921); *Coss v. Public Utilities Commission*, 101 Ohio St. 528, 529 (Ohio 1920); *Terry Hoellrich v. The Toledo Edison Company*, 89-1211-EL-CSS, Pub. Utilities Comm. of Ohio (October 3, 1989).

The Commission appears to be improperly asserting authority to reform the existing contract between DP&L and AT&T; this authority is not granted by Section 4905.51 or any other provision. An Agreement between the parties exists; there has been no failure by the parties to reach an agreement on the terms of joint use such that Section 4905.51 is implicated. Instead, the case involves a request by one of the parties for an interpretation of the meaning of existing contractual terms. Under Ohio law, such an interpretation is properly made by the judiciary.

To find that the Commission does not have jurisdiction over this dispute is *not* contrary to the public interest, as the Commission maintains. The reverse is true. A finding that the Commission has the ability to “determine what would be an appropriate joint use rate” with

respect to past performance under an existing Agreement, and thereby reforming that Agreement after the parties have operated in reliance on it, will inhibit future joint use negotiations and result in significant negative consequences to the public convenience, welfare, and necessity.

**IV. Sections 4905.31 and 4905.48, Revised Code, Do Not Apply in This Instance**

The Commission asserts that it has jurisdiction over contracts between public utilities and all such transactions are subject to approval by the Commission pursuant to Sections 4905.31 and 4905.48, Revised Code. March 28 Entry at 7. The Commission, however, does not directly assert jurisdiction over this dispute based on these Sections, and AT&T Ohio did not rely on these Sections to justify the Commission's jurisdiction.<sup>2</sup>

Both sections are clearly inapplicable here. Section 4905.48 governs the sharing of lines or plant by two public utilities furnishing a like service or product, facts which are not present here. Section 4905.31 likewise does not apply to a private joint use agreement between two parties.

To hold that Sections 4905.31 and 4905.48 require the Commission's prior approval with respect to every contract between public utilities directly contradicts Section 4905.51, which contemplates that the Commission will be involved in joint use transactions only to the extent that parties cannot come to an agreement regarding joint use. Such a result cannot have been intended under the statute.

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<sup>2</sup> AT&T Ohio did cite Section 4905.48, Revised Code, in its Memorandum Contra DP&L's Motion To Dismiss the Complaint and Request For Emergency Relief. However, it provided no discussion of the applicability of the Section to the instant dispute.

**V. Section 4905.26, Revised Code, Does Not Provide the Commission with Jurisdiction to Resolve Disputes Between Two Public Utilities**

The Commission also determined that “AT&T Ohio is a proper party to bring [...] a complaint under Section 4905.26, Revised Code” and that “AT&T Ohio has stated reasonable grounds for complaint.” The March 28 Entry does not assert that Section 4905.26 serves as a separate source of jurisdiction. Section 4905.26 does provide the framework for the complaint process, but Section 4905.26 is meant to apply to disputes regarding “publicly available rates,” and not the terms and conditions contained in a private contract.<sup>3</sup> As DP&L demonstrated, Section 4905.26 does not provide the Commission jurisdiction to review disputes between public utilities in a complaint proceeding. *See Dayton Communications Corp. v. Pub. Util. Comm’n*, 64 Ohio St.2d 302 (1980) (“The General Assembly has not, to date, enacted legislation by which the Commission may balance the interests of a public utility ... vis-à-vis its competitors in a complaint proceeding”).<sup>4</sup>

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<sup>3</sup> Section 4905.26, Revised Code, provides for the adjudication of complaints *against* a public utility by any “person, firm or corporation” but does contemplate complaints *by* public utilities.

<sup>4</sup> By contrast, the Commission has authority to hear complaints by public utilities in the highly regulated area of intrastate access charges, a much different case than the private contractual matter presented here. *See Allnet Communications Services v. Pub. Util. Comm’n of Ohio*, 38 Ohio St.3d 195 (1988).

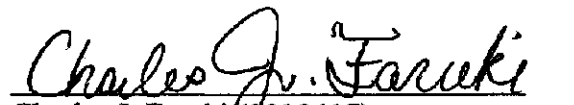
## VI. CONCLUSION

For the reasons set forth above, DP&L requests rehearing of the Commission's March 28, 2007 Entry finding that reasonable grounds for complaint have been stated and requests that the Commission dismiss AT&T Ohio's Complaint in its entirety with prejudice.

Respectfully submitted,

  
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April 26, 2007

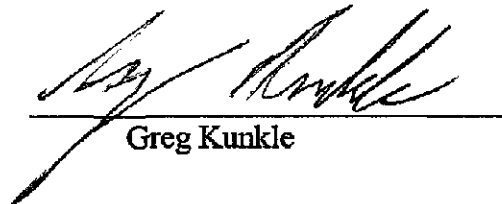
**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Respondent's Application for Rehearing of the Commission's March 28, 2007 Entry Finding Reasonable Grounds for the Complaint and accompanying Memorandum in Support thereof has been served via electronic mail and regular U.S. mail, postage prepaid, upon the following counsel of record, this 26th day of April, 2007:

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