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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

AT&T OHIO'S MEMORANDUM CONTRA THE RESPONDENT'S APPLICATION FOR REHEARING

COMES NOW AT&T Ohio, by its undersigned attorneys, and files this Memorandum Contra the Respondent's Application for Rehearing of the Commission's March 28, 2007 Entry Finding Reasonable Grounds for the Complaint. As explained herein, the application for rehearing filed by Respondent The Dayton Power & Light Company ("DP&L") should be denied.

INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") correctly concluded that it has jurisdiction over AT&T Ohio's Complaint pursuant to several sections of the Ohio Revised Code. DP&L's application for rehearing raises no arguments that the Commission has not already considered and properly rejected. The substance of the parties' dispute is not – as DP&L contends – purely contractual; rather, it involves matters that fall within the Commission's exclusive jurisdiction and require the Commission's expertise to resolve. Indeed, the parties are both public utilities and their dispute involves terms and conditions by which each party can use

space on the other party's poles to attach equipment used to provide electric and telecommunications service to customers – including the rate that DP&L and AT&T Ohio charge each other for such joint use. DP&L is also wrong when it contends that AT&T Ohio's complaint seeks damages that the Commission lacks authority to grant. Assuming AT&T Ohio prevails on all of its claims, the Commission will be ordering a true-up and refund of *overpayments – not damages*. For all of the reasons stated herein and in AT&T Ohio's Memorandum Contra DP&L's Motion to Dismiss, jurisdiction clearly and exclusively rests with the Commission.

ARGUMENT

A. The Commission Has Jurisdiction Under Sections 4905.06 and 4905.22

DP&L argues that the Commission is "a creature of statute and may only exercise such jurisdiction as is specifically conferred upon it by statute." DP&L App. at 3. While that may be true, DP&L's ultimate conclusion – that sections 4905.06 and 4905.22 confer only the power to "perform critical regulatory duties" and not "specific jurisdiction over the instant dispute" – is not.

To begin with, neither section 4905.06 nor 4905.22 limits the Commission's supervisory authority to performing so-called "critical" regulatory duties. For example, section 4905.06 clearly gives the Commission jurisdiction over "all public utilities" and broadly permits the Commission to "keep informed as to [all public utilities'] general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted" with respect to the adequacy of service, safety and security, and compliance with the law. Of course, this case squarely falls within these parameters as it involves two public utilities

and their agreement to lease their property (*i.e.*, poles used to provide regulated services) to one another.

Moreover, even if the Commission's supervisory authority were limited to performing so-called "critical regulatory duties," the duties the Commission must perform to resolve this dispute qualify. AT&T Ohio's Complaint concerns: (1) the applicable rate for pole attachments, including whether DP&L's unilateral 1185% increase in the pole rental rate is lawful; (2) whether DP&L can lawfully refuse to allow AT&T Ohio to attach equipment to its poles pending resolution of the parties' dispute;[1] (3) whether AT&T Ohio overpaid (and DP&L overcharged) for pole rental; and (4) whether DP&L unlawfully subleased AT&T Ohio's pole space. In addition, DP&L seeks to include the related issue of whether the number of poles owned by each party should be adjusted. Resolving these critical matters is something the Ohio Supreme Court has held lies exclusively within the Commission's jurisdiction.[2]

DP&L argues that section 4905.22 does not confer jurisdiction because it relates to charges assessed by public utilities for "services," and neither DP&L's nor AT&T's "service" is pole rental. DP&L App. at 3-4. Section 4905.22 is not so narrow. It gives the Commission broad authority over a public utility's "service and facilities" and requires such "service and

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[1] DP&L's termination of service – *i.e.*, its refusal to process AT&T Ohio's requests to attach to DP&L poles – probably will not be an issue going forward. As explained later in the text, pursuant to a recent ruling by the Commission, AT&T Ohio is processing payments to DP&L for the entire rental amount requested by DP&L – $45.00 – in exchange for DP&L processing AT&T Ohio's applications to attach to poles. AT&T Ohio's payments will be subject to true-up at the conclusion of the case.

[2] *Illuminating Co. v. Cuyahoga County Court of Common Pleas,* 776 N.E.2d 92, 96 (Ohio 2002) (the "Commission has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications and service"); *id.* at 97 ("[a]llegations of violations of R.C. Chapter 4905 and commission regulations are within the exclusive initial jurisdiction of the commission."); *Columbia Gas of Ohio, Inc. v. Henson*, 810 N.E.2d 953, 956 (Ohio 2004) ("the commission's exclusive jurisdiction includes complaints regarding the termination of service by public utilities."); *Higgins v. Columbia Gas of Ohio, Inc.*, 736 N.E.2d 92, 95 (2000) ("refusal or termination of service by a public utility is a matter which is in the exclusive jurisdiction of the PUCO, subject to an appeal to the Ohio Supreme Court"); *Milligan v. Ohio Bell Telephone Co.*, 383 N.E.2d 575 (Ohio 1978), paragraph two of the syllabus ("A Court of Common Pleas is without jurisdiction to hear a claim alleging that a utility has violated 4905.22 by charging an unjust and unreasonable rate and wrongfully terminating service, since such matters are within the exclusive jurisdiction of the Public Utilities Commission").

facilities" to be "adequate and in all respects just and reasonable." It does not limit jurisdiction to a utility's primary regulated service.

DP&L argues that jurisdiction is not proper under section 4905.06 because that section does not give the Commission authority to award damages in contract disputes. Even assuming that is true, AT&T Ohio's Complaint does not seek damages. The Joint Agreement provides for a rental rate of $3.50 per pole per year. DP&L unilaterally raised that rate to $45.00 per year per pole and sent AT&T Ohio invoices for 2005 and 2006 reflecting that amount. AT&T Ohio paid DP&L the contractual rate ($3.50), and eventually DP&L suspended AT&T's right to attach equipment to DP&L poles for failure to pay. The Commission recently ruled that, if AT&T Ohio pays the full amount of the 2005 and 2006 invoices (the amount DP&L was asking and AT&T Ohio is challenging), DP&L must lift the suspension. The Commission also made clear that AT&T Ohio's payments would be subject to true-up. AT&T Ohio is processing those payments to DP&L and assumes DP&L will begin processing AT&T Ohio's applications to attach to poles once the payments are received. Thus, when the Commission sets the correct rental amount, if that amount is below $45.00, the Commission will be ordering a true-up – not awarding damages. As for AT&T Ohio's claim that it has overpaid (and DP&L overcharged) for pole rental, again, the Commission will not be awarding damages if AT&T Ohio prevails – rather, it will be ordering a refund of the amounts overcharged.

B. The Commission Has Jurisdiction Under Section 4905.51

DP&L argues that "the Commission's jurisdiction is *delimited* by Section 4905.51," and those limits cannot be expanded by resort to general provisions such as sections 4905.06 and 4905.22. While it may be true that specific statutory provisions are supposed to govern over more general provisions, DP&L's reading of section 4905.51 is plainly wrong.

DP&L begins by complaining that the Commission relied on AT&T Ohio's purported "mischaracterization of DP&L's position" with respect to the scope of the Commission's jurisdiction under section 4905.51. DP&L App. at 5. But, as it turns out, DP&L's position is actually "narrower than" what everyone thought (*id.*) – which, of course, means there is all the more reason to reject it. DP&L explains that it "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;" rather, its "more precise and narrower" position 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." *Id.* AT&T Ohio fails to see the distinction DP&L is trying to make, but the notion that the Commission's expertise is not needed to resolve this dispute is plainly wrong. Indeed, the Ohio legislature obviously believes that the Commission has special expertise in the area of joint use of poles or it would not have given the Commission the role it did in enacting sections 4905.51 and 4905.71 of the Ohio Revised Code.

DP&L posits that the Commission's expertise is not needed to establish the joint pole rental rate going forward because "the [Joint Agreement] is very explicit . . . and specifies the default pricing mechanism that will be used." DP&L App. at 6. DP&L is incorrect. At best, the contract is extremely vague. It provides that the pole rental rate will be set at "one-half of the then average total annual cost per pole of providing and maintaining the standard joint poles covered by" the Joint Agreement. It does not, however, provide any clue as to how the annual cost per pole will be calculated. The threshold issue, then, is what formula should be used to calculate pole costs. Of course, the Commission – not a state court – has the expertise to

determine the proper methodology for calculating pole costs and to apply that methodology. Other issues include: (1) what inputs should be used in the calculation and, in particular, whether DP&L's cost calculation improperly includes costs for items unrelated to bare pole costs (such as conductors, transformers, racks, brackets, platforms, cross arms, and insulators); (2) how the cost calculation should account for third party attachers; and (3) how pole height should be factored into the cost calculation. Resolution of all these issues will be well served by the Commission's expertise.[3]

DP&L is also wrong when it claims "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." DP&L App. at 7. Section 4905.51 of the Ohio Revised Code provides that if two public utilities "fail[] to agree upon such use or joint use, or upon the conditions or compensation for such use or joint use," either utility "may apply to the [C]ommission" to direct joint use and prescribe reasonable conditions and compensation for such joint use. Here DP&L has sought to raise the rate it charges AT&T Ohio for the use of its poles from $3.50 to $45.00; AT&T Ohio disagrees with that increase (because, among other reasons, it violates the agreement and section 4905.51's requirement that joint use be permitted for "reasonable compensation") and has sought resolution of the dispute by the Commission. In addition, DP&L and AT&T Ohio have "fail[ed] to agree" on several other matters relating to the joint use of their equipment, including: (1) whether AT&T Ohio has overpaid (and DP&L overcharged) for the use of DP&L's poles; (2) whether

[3] The dispute over whether pole ownership should be reallocated requires the Commission's expertise in determining what is a "reasonable balance" in ownership given the characteristics of and changes in both the electric and telecommunications industries over the years. In addition, although DP&L's termination of service is unlikely to be an issue going forward given the Commission's recent ruling, if it were to remain an issue, it would raise questions that the Commission is uniquely equipped to address, including: whether that refusal is permissible under section 4905.51 of the Ohio Revised Code (which requires *every* public utility to permit the joint use of specified equipment by another public utility for reasonable compensation); and whether that refusal will (1) increase consumer rates, (2) reduce consumer service quality, and/or (3) result in the inefficient use of utility equipment.

DP&L unlawfully subleased AT&T Ohio's exclusive pole space; and (3) whether the number of poles owned by each party should be adjusted. To read section 4905.51 as DP&L does – giving the Commission jurisdiction over disputes arising during the parties' initial attempt to negotiate a joint use agreement, but no continuing jurisdiction over disputes arising after an agreement is entered – is illogical, counterproductive, and unsupported by the text.

Finally, DP&L provides a string of cites standing for the proposition that state courts – not the Commission – have jurisdiction over contract disputes. But the law is that state courts have jurisdiction to determine "*purely* contractual claims that are *independent* of any claim that [defendant] violated any provision of R.C. Title 49 or the [C]ommission regulations." *Illuminating Co.*, 776 N.E.2d at 99) (emphasis added). And the Ohio Supreme Court has explained that a "pure contract case is one having *nothing to do* with the utility's service or rates – such as perhaps a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier." *Hull v. Columbia Gas of Ohio,* 850 N.E.2d 1190, 1195 (Ohio 2006) (emphasis added). The dispute here has everything to do with rates and service – including the termination of service – and implicates several provisions of Title 49 of the Ohio Revised Code. See AT&T Ohio's Memorandum Contra DP&L's Motion to Dismiss the Complaint and Request for Emergency Relief, filed January 11, 2007 (incorporated herein by reference) at 9-14. Moreover, the dispute is not between DP&L and one of its employees or its uniform supplier; rather, it involves another public utility – AT&T Ohio. And the dispute involves services and facilities over which the Commission has unquestionable authority. It therefore is not a "pure contract claim" having nothing to do with a utility's services or rates, and the Commission (not a state court) has subject matter jurisdiction over it.

C. The Commission Has Jurisdiction Under Section 4905.26

DP&L argues that section 4905.26 does not confer jurisdiction on the Commission because it supposedly "is meant to apply to disputes regarding 'publicly available rates'" (*i.e.*, tariffed rates). *DP&L App. at 9. DP&L puts quotes around the phrase "publicly available rates,"* suggesting that it appears somewhere in section 4905.26. It does not. Nothing in the text of section 4905.26 or the case cited by DP&L supports DP&L's claim.

Section 4905.26 allows the Commission to consider any complaint filed by a person, firm, or corporation alleging (1) "that *any* rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law;" (2) "that *any* regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential;" or (3) "that *any* service is, or will be, inadequate or cannot be obtained." Emphasis added. Section 4905.26 also allows the Commission to consider the "complaint of a public utility as to *any matter* affecting its own product or service." Emphasis added. Plainly, jurisdiction is not limited to disputes about *tariffed* services and rates.

If the Legislature intended section 4905.26 to limit the Commission's jurisdiction in that manner, it could have easily – and in just a few words – said so. It did not. Instead, a "schedule" (*i.e.*, tariff) is just one of many things that a person, firm or corporation can complain about under section 4905.26 – others include rates, fares, charges, tolls, rentals, classifications, or services. And public utilities are explicitly allowed to file complaints regarding matters affecting their products or services. The fact that the majority of complaints heard by the Commission

under section 4905.26 may involve disputes over *tariffed* rates and services is neither here nor there, and certainly does not change the plain language of the statute.

Consistent with the plain language of the statute, the Ohio Supreme Court has held that section 4905.26 "confers exclusive jurisdiction on the [C]ommission to determine whether *any* charge by a public utility 'is in *any* respect unjust, unreasonable, * * * or in violation of law.'" *Illuminating Co.*, 776 N.E.2d at 96 (emphasis added). *See also Higgins*, 736 N.E.2d at 94 ("The Ohio Supreme Court has interpreted [section 4905.26] to confer jurisdiction upon the [Commission] to hear all complaints pertaining to rates and/or service provided by a public utility").[4]

CONCLUSION

For these reasons and the reasons set forth in AT&T Ohio's Memorandum Contra DP&L's Motion to Dismiss, the Commission should deny DP&L's application for rehearing and affirm the jurisdictional determination made in its March 28, 2007 Entry.

Dated: May 7, 2007

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[4] DP&L also challenges the Commission's determination that, under sections 4905.31 and 4905.48 of the Ohio Revised Code, it "has jurisdiction over contracts between public utilities and all such transactions are subject to approval by the Commission." Entry at p. 7. Contrary to DP&L's claim, the reach of section 4905.48 is not limited to the "sharing of lines or plant by two public utilities furnishing a like service or product." DP&L App. at 8. That section also applies to "any two or more public utilities whose lines intersect or parallel each other." And DP&L offers no case law to support its claim that section 4905.31 "does not apply to a private joint use agreement between two parties" (App. at 8).

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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 7th day of May, 2007, by e-mail, as indicated, and by first class mail, postage prepaid, on the parties listed below.

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