

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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AT&T OHIO,

Complainant,

v.

**THE DAYTON POWER & LIGHT
COMPANY,**

Respondent,

Case No. 06-1509-EL-CSS

**AT&T OHIO'S MEMORANDUM CONTRA DP&L'S
MOTION TO DISMISS THE AMENDED COMPLAINT**

COMES NOW AT&T Ohio,¹ by its undersigned attorneys, and files this Memorandum Contra to Dayton Power & Light Company's ("DP&L's") Motion to Dismiss the Amended Complaint.² The relevant facts are set forth fully in AT&T Ohio's Amended Complaint and will not be repeated here.

INTRODUCTION

On June 7, 2007, DP&L moved to dismiss the Amended Complaint, incorporating by reference DP&L's Motion to Dismiss filed on January 4, 2007 and its Reply filed on January 19, 2007, which argued that the Commission did not have jurisdiction over the parties' dispute. AT&T Ohio's January 11, 2007 Memorandum Contra DP&L's Motion to Dismiss ("January Memorandum") and its May 7, 2007 Memorandum Contra DP&L's Application for Rehearing ("May Memorandum") respond to the arguments raised in DP&L's motion, and both are hereby incorporated by reference. As explained therein, the Commission has jurisdiction over the

¹ The Ohio Bell Telephone Company uses the name AT&T Ohio.

² Pursuant to the Attorney Examiner's May 27, 2007 Entry, a memorandum contra is to be filed within five business days after service of a motion and a reply to a memorandum contra is to be filed within four business days after service of the memorandum contra.

parties' dispute pursuant to sections 4905.06, 4905.22, 4905.26, 4905.31 and 4905.51 of the Ohio Revised Code. The Public Utilities Commission of Ohio ("Commission") so found in its March 28, 2007 Entry denying DP&L's motion to dismiss the initial Complaint and its May 16, 2007 Entry denying DP&L's Application for Rehearing. For the reasons set forth in the Commission's Entries, AT&T Ohio's Memoranda, and herein, DP&L's Motion to Dismiss should be denied again.

ARGUMENT

The Amended Complaint involves the joint use of equipment (poles) owned by DP&L and AT&T Ohio. Specifically, the Amended Complaint asks the Commission to resolve issues concerning: (1) the applicable rate for pole attachments, including whether DP&L's massive, unilateral increase in the pole rental rate is unlawful, unjust and unreasonable, against the public interest, and inconsistent with the parties' Joint Pole Line Agreement ("Joint Agreement"); (2) whether DP&L can lawfully refuse to allow AT&T Ohio to attach equipment to its poles pending resolution of a dispute between the parties; (3) whether DP&L overcharged (and AT&T Ohio overpaid) for pole rental; (4) whether DP&L unlawfully subleased AT&T Ohio's pole space; (5) whether certain provisions in the Joint Agreement are unlawful, unjust and unreasonable, against the public interest, and therefore unenforceable; (6) whether certain provisions of the Joint Agreement should be modified.

The Commission has jurisdiction over these matters pursuant to sections 4905.06, 4905.22, 4905.26, and 4905.51 of the Ohio Revised Code. See January Memorandum at pp. 2-9; May Memorandum at pp. 2-9. The Commission also has jurisdiction pursuant to section 4905.31 of the Ohio Revised Code. That section provides in relevant part that two public utilities can enter into "any reasonable arrangement," including any "financial device that may be practicable

or advantageous to the parties interested.” Section 4905.31 further provides that any such “device shall be under the supervision and regulation of the [C]ommission, and is subject to change, alteration, or modification by the [C]ommission.” The Joint Agreement between DP&L and AT&T Ohio plainly falls within the parameters of section 4905.31. The Commission therefore has authority to change, alter or modify the Joint Agreement as it sees fit – which is precisely what AT&T Ohio requests in several counts of its Amended Complaint.

DP&L asserts several new grounds for dismissing the Amended Complaint that were not raised in its initial Motion to Dismiss, but DP&L provides no memorandum or case law to support its assertions.³ For example, DP&L argues (at ¶ 88) that the Commission lacks jurisdiction to rewrite portions of the parties’ agreement and is prohibited by the United States Constitution from impairing the parties’ obligations under contracts, and that rewriting the agreement would constitute a taking prohibited by the Ohio and United States Constitutions. DP&L is wrong. Sections 4905.06, 4905.22, 4905.26, 4905.31, and 4905.51 give the Commission jurisdiction over the Joint Agreement and the parties’ dispute, including the authority to rewrite provisions of the agreement that are unlawful, unjust and unreasonable, and/or against the public interest. Indeed, section 4905.31 is clear: if two public utilities enter into a financial agreement, that agreement is “subject to change, alteration, or modification by the [C]ommission.” Moreover DP&L offers no facts or case law to support its novel assertions, and the Commission should summarily reject them.

DP&L also argues (at ¶ 88) that the Commission does not have authority to issue declaratory judgments. To begin with, AT&T Ohio’s initial Complaint included counts seeking declaratory judgment and the Commission correctly found that it had jurisdiction over those

³ To the extent DP&L has failed to raise arguments in its motion to dismiss, it is prohibited from raising them in any reply to AT&T Ohio’s Memorandum Contra.

counts, notwithstanding DP&L's objections now repeated here. AT&T Ohio's Amended Complaint seeks declarations that: 1) DP&L's unilateral increase in the pole attachment rental rates violates the Joint Agreement (Count V); (2) the termination clause of Article XVIII and the default provision of Article XIV are unlawful, unjust and unreasonable, and against the public interest (Counts VIII and X); and (3) a "reasonable balance" in joint pole ownership is not 50/50, but should be based on the parties' actual use of joint poles (Count IX). Making such declarations is plainly within the Commission's jurisdiction under sections 4905.06, 4905.22, 4905.26, 4905.31 and 4905.51 of the Ohio Revised Code, as the Commission has already found.

For example, under section 4905.51, the Commission has jurisdiction to prescribe reasonable conditions and compensation for joint use – which is precisely what AT&T Ohio's declaratory judgment counts request that the Commission do. The Commission has jurisdiction under section 4901.31 to change, alter, or modify any agreement between two public utilities. Of course, in order to determine whether the terms of the Joint Agreement should be modified, the Commission must consider whether those terms are unlawful, unjust and unreasonable, and/or against the public interest, as AT&T Ohio asks the Commission to do in its requests for declaratory judgment. In addition, under section 4905.26, the Commission has jurisdiction over complaints "as to any matter affecting [a public utility's] own product or service," including complaints that "any rate, fare, charge, toll rental, schedule, classification, or service . . . rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or extracted, is in any respect unjust, unreasonable . . . or in violation of law" and that "any . . . 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 [or] unjust." Again, such matters are at the heart of AT&T Ohio's requests for declaratory judgment.

Finally, DP&L complains (at ¶ 88) that AT&T Ohio's Amended Complaint goes beyond the original Complaint by adding new counts. There is nothing improper about AT&T Ohio's Amended Complaint. The Attorney Examiner gave AT&T Ohio permission to file the Amended Complaint pursuant to her authority under section 4901-1-06 of the Ohio Administrative Code. Moreover, it is appropriate for an Amended Complaint to include additional causes of action. *See, e.g., McGuire v. Corn*, 110 N.E.2d 809, 812-13 (Ohio App. 1952) (a right of action may be changed by timely amendment, provided the action proceeds on the same set of facts or on the same transaction). The Amended Complaint clearly proceeds on the same set of facts and the same transaction as the original Complaint.

CONCLUSION

For these reasons, the Commission should find that it has subject matter jurisdiction over the Amended Complaint and deny DP&L's motion to dismiss.

Dated: June 14, 2007

Respectfully submitted,

AT&T Ohio

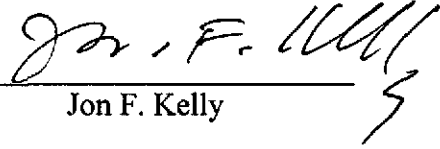
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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 14th day of June, 2007, by e-mail, as indicated, and by first class mail, postage prepaid, on the parties listed below.


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