



Dayton Power and Light Company
Courthouse Plaza S.W., P.O. Box 1247, Dayton, Ohio 45401

LEGAL DEPARTMENT

April 25, 1986

Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43266-0573

RE: Case No. 86-463-EL-CSS, Adam Group
Investment v. Dayton Power and Light Company

Dear Docketing:

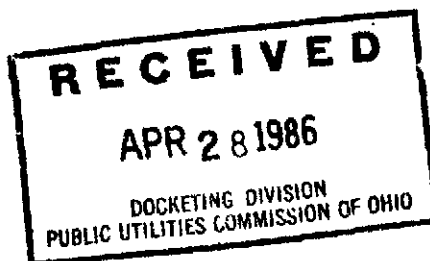
Enclosed is an original and 14 copies of a Reply Memorandum to be filed in the above-captioned case. Please return one time stamped copy in the enclosed envelope.

Sincerely,

Denis E. George

Denis E. George

Enclosure
74411/DEG
cc: Michael Eckhart
2801 Far Hills Avenue
Dayton, OH 45419

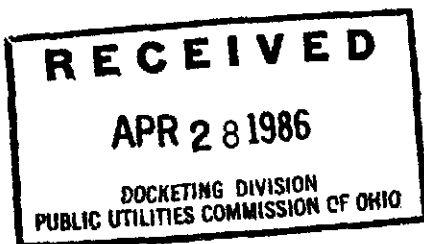


STATE OF OHIO
BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

ADAM GROUP INVESTMENT)	
)	CASE NO. 86-468-EL-CSS
)	
Complainant)	
)	
vs.)	<u>RESPONDENT'S REPLY MEMORANDUM</u>
)	
THE DAYTON POWER AND LIGHT COMPANY)	
)	
)	
Respondent)	

Pursuant to Commission Rule 4901-1-12(B)(2), The Dayton Power and Light Company submits its Reply Memorandum in support of its Motion to Dismiss the Formal Complaint filed by Adam Group Investment on the grounds that: (1) the Commission lacks subject matter jurisdiction over that part of the Complaint relating to events occurring before service was rendered to Adam Group, and (2) the remainder of the Complaint fails to state a claim upon which relief can be granted.

Respectfully submitted,



Denis E. George
Denis E. George
Trial Attorney
The Dayton Power and Light Company
P.O. Box 1247
Dayton, OH 45401
(513) 224-6217

MEMORANDUM

Complainant's alleged damages arose out of two separate and distinct events; 1) the alleged reliance by Complainant, in conducting a non-utility related act, on utility bills rendered by

Respondent to someone other than Complainant, and 2) the misbilling of electric service rendered to Complainant pursuant to tariff. The former is clearly unrelated to service rendered by Respondent to Complainant, while the latter is direct related thereto. Since the former claim constitutes a simple non-service negligence action, the Commission does not have jurisdiction to address the issue in an O.R.C. § 4905.26 proceeding. See Kohli v. PUCO, 18 Ohio St. 3d 12 (1985).

As Complainant properly states, § 4905.26 provides for Commission review of any utility practice which "is or will be" unreasonable, etc. to the party requesting service. Complainant's purchase of a building after examining the utility bills rendered to another person is not related to a request for service or actual service rendered to Complainant. The fact that Complainant's alleged injury arose from the act of rendering utility service to another person does not mean the Commission is the proper forum for addressing the action. Likewise, being a successor in interest to a previous utility customer does not give Complainant standing to contest its pre-service claim since its successor in interest was not injured by Respondent's alleged negligence.¹ Since Complainant's pre-service claim did not arise from activities related to service rendered to Complainant, the claim must be litigated at the Common Pleas Court where Complainant now has an action pending against Respondent.

Complainant's cause of action based on service rendered to it by Respondent is properly before the Commission pursuant to § 4905.26.

1 Were Respondent attempting to backbill Complainant for services rendered to the successor in interest, a different conclusion results.

This is the "certain matter" which Complainant speaks of in its "Reply to Respondent's Motion." This cause of action is separate and distinct from Complainant's non-service negligence claim based on events unrelated to Complainant receipt or attempted receipt of utility service.

This is a simple backbilling case. Since Respondent did not render an accurate bill to Complainant for the services Complainant admits to have consumed, Respondent seeks only to recover the lawful tariff rate for the services rendered in the seven month period during which Complainant was misbilled. Complainant, however, seeks to prevent Respondent from backbilling for uncollected payments and charging the proper rate in the future.

Suffice it to say, without reciting the extensive supporting statutory and case authority, that Complainant is not entitled to the relief he seeks. Respondent must collect the lawful rate for services rendered and is not prevented from backbilling a customer to do so. Misfeasance or nonfeasance by the utility does not alter this conclusion.

It appears from reviewing Complainant's Reply to Respondent's Motion to Dismiss that Complainant cannot refute the authority cited by Respondent. Instead, Complainant's Reply consists of repleading, speculation, and misinterpretation. Respondent agrees that §§4905.26 and 4905.37 authorize the Commission to examine the service rendered to Complainant. When it does so, the Commission will find that:

1. Complainant consumed \$25,595.86 worth of electric service from December 28, 1984 to August 28, 1985;

2. Respondent only billed Complainant \$15,488.82 for the service rendered;

3. Complainant owes Respondent \$10,107.04 for unpaid service rendered between December 28, 1984 and August 28, 1985;

4. Since August 1985, Respondent has accurately billed Complainant for service and Complainant has paid each bill rendered; and

5. At all times, Respondent has provided utility service in accordance with its PUCO tariffs.

See Appendix A of Respondent's Motion to Dismiss, filed April 11, 1986, paragraphs 10, 11, 12, 14 and 16. These facts do not entitle Complainant to any sort of relief from the obligation to pay the lawful tariff rate for service rendered.

Complainant appears to believe that pursuant to §§ 4905.31 and 4905.33, it is entitled to enter into a special arrangement with Complainant for utility service. Complainant's argument is invalid for two reasons. First, Complainant has failed to show that it is a member of a class of customers who have usage patterns different enough to be entitled to special treatment. In fact, the very opposite is true. Second, Complainant seeks to be treated in a way which §§ 4905.31 and 4905.33 are designed to prohibit, namely discrimination of similarly situated customers.

Complainant receives electric service to operate a commercial building. Complainant is billed the correct, lawful rate for such service. The fact that Respondent failed to render accurate monthly bills for seven months does not entitle Complainant to special treatment or a reduced rate. If it did, Chapter 49's safeguards

against discrimination could be easily sidestepped. Complainant's cited authority is clearly inapplicable to the instant case.

WHEREFORE, Respondent requests that the Commission dismiss the Formal Complaint for the reason cited above and in Respondent's Motion to Dismiss.

Respectfully submitted,

Denis E. George
Denis E. George
Trial Attorney
The Dayton Power and Light Company
P.O. Box 1247
Dayton, OH 45401
(513) 224-6217

Certificate of Service

I hereby certify that I have served a copy of the foregoing upon Michael R. Eckhart, Attorney for Plaintiff, at 207 Far Oak Building, 2801 Far Hills Avenue, Dayton, Ohio 45419, by ordinary U. S. mail this 25th day of April, 1986.

Denis E. George
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