

# Confidential Release

**Case Number: 06-1509-EL-CSS**

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**Stipulation and Recommendation**

PUCO

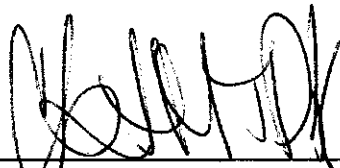
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RECEIVED-SOCKETING DIV

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# CONFIDENTIAL

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Case # 06-1509-EL-CSS

- Page Count 6
- Date Filed 9/21/2007
- Filed by Dayton Power & Light on behalf of \_\_\_\_\_

❖ Summary of document:

Stipulation and Recommendation

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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV  
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PUCO

AT&T OHIO,

Complainant,

v.

THE DAYTON POWER AND  
LIGHT COMPANY,

Respondent.

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CASE NO. 06-1509-EL-CSS

**STIPULATION AND RECOMMENDATION  
CONFIDENTIAL VERSION**

Rule 4901-1-30, Ohio Administrative Code ("OAC"), provides that any two or more parties to a proceeding may enter into a written or oral stipulation covering the issues presented in such proceeding. This document sets forth the understanding of AT&T Ohio and The Dayton Power and Light Company ("DP&L") (together, the "Signatory Parties") and their recommendation that the Public Utilities Commission of Ohio ("Commission" or "PUCO") approve and adopt, as part of its Opinion and Order, this Stipulation and Recommendation ("Stipulation") resolving all the issues in the above-captioned proceeding.

This Stipulation is a product of lengthy, serious, arm's-length bargaining among the Signatory Parties (which are capable, knowledgeable parties) which negotiations were undertaken by the Signatory Parties to settle this proceeding. This Stipulation is supported by adequate data and information; as a package, the Stipulation benefits the public interest and represents a just and reasonable resolution of all issues in this proceeding; and violates no regulatory principle or practice.

This Stipulation includes amendments (attached as Attachment 1) to certain agreements previously entered into by the Signatory Parties (attached as Attachments 2 – 4), which except as amended, remain in full force and in effect. Pursuant to Ohio Rev. Code §§ 4905.31, 4905.48 and 4905.51, the Signatory Parties request that the Commission approve the amendments and the previous agreements.

WHEREAS, the Signatory Parties, or their predecessors in interest, have previously entered into a "Joint Pole Line Agreement and Pole Rental Contract" dated March 17, 1930 (the "1930 Agreement"); a "Supplemental Agreement" dated September 30, 1942 (the "1942 Supplement"); an "Operating Routine" dated December 1952 (the "Operating Routine"), and a Letter Agreement in 1995 (the latter of which relates solely to an adjustment in the rental rate)(together the "Agreements"); and

WHEREAS, disputes arose between the Signatory Parties as to the interpretation and reasonableness of certain provisions within the Agreements; and

WHEREAS, a Complaint against DP&L and a Motion for Emergency Relief was filed by AT&T Ohio before the Commission on December 28, 2006 with respect to certain disputes; and

WHEREAS, a Civil Action was filed by DP&L against AT&T Ohio in Common Pleas Court, Montgomery County, Ohio on December 29, 2006, with respect to certain disputes; and

WHEREAS, both AT&T Ohio and DP&L are desirous of resolving their disputes through this Stipulation;

NOW THEREFORE, for the purpose of resolving all issues raised in this proceeding, the Signatory Parties and each of them stipulate, agree, and recommend as follows:

## I. PARTIES

This Stipulation is entered into by and among DP&L, its successors and assigns, and AT&T Ohio and its successors and assigns. The Signatory Parties urge the Commission to accept and approve it, including the attached Agreements, as amended. The Signatory Parties have been authorized to represent that the Staff of the Public Utilities Commission of Ohio has thoroughly reviewed this Stipulation and supporting documents and has no objection to the Stipulation.

## II. THE PROVISIONS OF THE STIPULATION

A. Amended Agreements. The Agreements are to be amended as set forth in Attachment 1, which amendments are as summarized herein:

1. Beginning as of October 1, 2006, 37.7% of the joint use poles should be owned by AT&T Ohio (AT&T Ohio Target Ownership Percentage) and 62.3% should be owned by DP&L (DP&L Target Ownership Percentage). To the extent one party's ownership share of joint use poles falls below its Target Ownership Percentage, that party shall be deemed deficient and shall be considered "the deficient party" as it relates to the remainder of this Stipulation. The other party shall be considered "the excess party" as it relates to the remainder of this Stipulation.

2. The number of poles against which the deficiency rental is to be applied shall be the sum of: a) the difference between the number of joint poles that should be owned by the deficient party according to the party's Target Ownership Percentage and the number of joint poles actually owned by the deficient party and b) the difference between the number of joint poles owned by the excess party and the number of joint poles that should be owned by the excess party according to the party's Target Ownership Percentage.

3. The deficiency rental will be set at \$30 per pole deficient for each year of the 5-year period beginning with 10/1/06-9/30/07 through 10/1/10-9/30/11.

4. For each 5-year period beginning with October 1, 2011, the deficiency rate will be reset based on the formula set forth in paragraph 5 using the prior year data from DP&L's annual Form 1 filing before the Federal Energy Regulatory Commission ("FERC") and AT&T Ohio's annual ARMIS filing before the Federal Communications Commission ("FCC") made in the year the rate is to be reset, e.g., FERC Form 1 data for calendar year 2011 would be filed in 2012 and would be applied as part of the formula to compute the deficiency rate to be invoiced in late 2012 for the period 10/1/11-9/30/12.

5. For each five-year period beginning with October 1, 2011, the deficiency rate shall be reset according to the following formula:

i) For purposes of computing total bare pole costs for each party, the state-wide cost data of each party for each of the accounts specified in the then-applicable FCC formulae shall be used and shall be deemed determinative and conclusive. A 15% reduction shall be used with respect to the per pole cost computed under FERC Form 1 and a 5% reduction shall be used with respect to the per pole cost computed under ARMIS, which shall be deemed to eliminate the costs of cross-arms and other appurtenances and the effects of non-standard poles whose costs are included in the FERC Form 1 data and ARMIS data, and which reductions may be rebutted to the extent provided for by the FCC.

ii) For purposes of computing the carrying costs for each party, the state-wide cost data as filed with FERC (Form 1) and the FCC (ARMIS) for each of the accounts specified in the then-applicable FCC formulae shall be used and shall be deemed determinative and conclusive. For an entity whose rates are subject to a regulatory authority that has the power to establish a rate of return for such entity, the rate of return shall be the most-recently approved rate of return; otherwise, the then-applicable FCC default rate of return shall be used.

iii) The product of the bare pole costs for a party and the carrying costs for that party shall constitute the "Annual Pole Cost" for that party.

iv) A Per Pole Cost for each party shall be computed by dividing the Annual Pole Cost by the total number of distribution poles owned by such party within the State of Ohio (excluding any poles the costs of which are not included in the net bare pole costs calculated under 5 i) above).

v) The Per Pole Cost shall be reduced by an amount calculated as follows: a value equal to total revenue collected in the prior year from attachers who are not incumbent local exchange carriers (in the case of DP&L) or are not electric utilities (in the case of AT&T Ohio) divided by total distribution poles owned by such party within the State of Ohio (excluding any poles the costs of which are not included in the net bare pole costs calculated under 5 i) above). The result is each party's Net Annual Per Pole Cost.

vi) The deficiency rental shall be one-half of the simple average of each party's Net Annual Per Pole Cost.

vii) It is recognized that certain adjustments to or substitutes for the cost data described above that were proposed in the course of this proceeding are not reflected and are not intended to be reflected in the methodology used to reset the deficiency rate in future periods.

6. Pole balances shall be maintained in line with the Target Ownership Percentages. On June 1 of each year, the parties shall determine which party's ownership is less than its Target Ownership Percentage and that party shall be responsible for installing (or accepting a "set-and-sell" from the other party) all new and replacement poles until the Target Ownership Percentage balances are restored. Alternatively, and at the deficient party's sole discretion, the deficient party may purchase poles from the other party at the prices set forth in the then-applicable Schedule A to the Operating Routine. Under this option, identification of poles to be sold will be jointly determined by the joint use personnel within the two companies and, if they cannot agree, the matter will be resolved by good faith negotiations of more senior management.

7. The initial term of the revised agreement will be 5 years, automatically renewing for additional two-year terms unless two year's written notice of termination is given. The parties will be able to maintain then-existing attachments after any such termination, but, to the extent that the Target Ownership Shares differ from the percentages set forth in paragraph 1, the party with the deficiency will continue to make annual payments based on the formula rate as provided in paragraphs 2, 4 and 5.

8. Licensing, contractual arrangements, and other matters relating to attachments by third parties will be the responsibility of the party owning the pole, regardless of the nature of the attachment. The revenue derived from third party attachments are payable to the owner of the pole, regardless of the nature of the attachment. The pole owner, as the entity that licenses third party attachers, is responsible for managing the third party relationship, including as the third party initially becomes attached to a pole, third party attacher obligations and rights while it is attached to a pole, and as the third party abandons an attachment or otherwise is no longer attached to a pole.

9. The default provision is modified so that the party that is allegedly in default does not have to immediately remove existing attachments. Upon notice of an alleged material breach and a failure to cure within 60 days, the non-breaching party may suspend the right of the allegedly breaching party to place new attachments; provided, however, that the suspension will be lifted if the allegedly breaching party files a complaint with the PUCO to resolve the underlying dispute. If the alleged breach relates to the nonpayment of an invoice, the allegedly breaching party will place the disputed amounts in escrow. The agreement will make clear that a party is not considered in "default" solely by virtue of having to make a deficiency payment to the other party.

10. (a) The parties will conduct a joint pole survey not more often than once every ten years and only after one party gives the other party one year's notice of its desire to perform a joint pole survey. Notwithstanding the foregoing, the first joint survey will begin no earlier than July 1, 2008, provided that one party gives the other party six months notice of its desire to begin. AT&T Ohio and DP&L will work in good faith to contract with a mutually acceptable surveyor using mutually acceptable techniques. Prior to any survey, AT&T Ohio and DP&L agree to create a Memorandum of Understanding detailing both party's specific requirements, related to data provided and collected, expenses, etc. for a survey of each party's joint and non joint poles. Expenses related to joint pole data collected will be split 50/50 and both parties will receive each other's data related to jointly used poles.

(b) Pole survey results will be used to establish the actual ownership levels of each party prospectively only (i.e. no true-up), beginning with the first annual rental period that begins after the pole survey results have been received. Notwithstanding the foregoing, the results of the first pole survey shall not be used to establish the actual pole ownership levels for any period prior to the 10/1/10-9/30/11 rental period. For the period of time prior to the 10/1/10-9/30/11 rental period, the parties will continue to use the existing monthly recapitulation method to determine actual pole ownership levels and there shall be no true-up.

(c) With respect to the first pole survey, there shall be no payment pursuant to paragraph 11.303 of the Operating Routine to the extent that unauthorized use is identified as part of the survey. With respect to subsequent pole surveys that take place after the first pole survey, to the extent that unauthorized use is therein identified the provisions of 11.303 of the Operating Routine will apply.

(d) Nothing herein this section 10 shall be deemed to bar during any time period the operation of section 11.303 of the Operating Routine to the extent that unauthorized use is identified in the course of inspection or maintenance by a party of its poles and lines other than as part of a joint pole survey. Upon the discovery of an unauthorized use, the party making such discovery shall promptly notify the other party in writing and, if it is determined that there is an unauthorized use, a one-time payment under 11.303 of the Operating Routine shall be made, the parties shall work together in good faith to authorize such use to the extent feasible, and, the newly authorized attachment will be thereafter reflected in the monthly recapitulations.

11. Certain miscellaneous changes are made to Definitions or to harmonize provisions. In addition, an obsolete schedule is deleted.

12. The parties' revised agreement reflects that it is, in part, the product of negotiations and settlement to resolve past disputes.

B. **[BEGIN CONFIDENTIAL]** Within 28 days of execution of this Stipulation, AT&T Ohio will pay to DP&L the sum of \$2.0 million. DP&L will retain the \$1.087 million previously paid by AT&T Ohio. **[END CONFIDENTIAL]**

C. Within 15 days after the approval of this Stipulation by the Commission, the parties will present to the Common Pleas Court an Agreed Order of Dismissal in the form attached as Attachment 8.

D. Invoices will continue to be issued in November or December of a year for the past period (i.e., a November 2007 invoice would be for the period 10/1/06 – 9/30/07).

E. Assuming the parties cannot independently resolve such dispute, any disputes relating to this Stipulation, or the Agreements set forth in Attachments 1-4, rates, terms and conditions, or any alleged breach thereof, and any dispute between the parties concerning costs or the number of poles owned by each party shall be resolved by the Commission.

III. Other Documents Submitted in Conjunction with Stipulation.

For illustrative purposes only and using currently available data that would be superseded by the then available data, Attachments 5, 6 and 7 are provided to demonstrate how the deficiency rental would be reset beginning 10/1/11.

IV. Other Conditions.

In arms-length bargaining, the Stipulating Parties have negotiated terms and conditions that are embodied in this Stipulation and Recommendation. This agreement resolves a variety of difficult, complicated issues that would otherwise be resolved only through expensive, complex and protracted litigation. This Stipulation and Recommendation contains the entire agreement among the Signatory Parties, and embodies a complete settlement of all claims, defenses, issues, and objections that were or could have been raised in this proceeding. The Signatory Parties agree that the results of this Stipulation are just and reasonable, in the best interests of the public and all parties, and urge the Commission to adopt it.

This Stipulation and Recommendation is submitted for purposes of this case and should not be understood to reflect the position which the Signatory Parties would have taken if all of the issues in the proceeding had been litigated. The willingness of the Signatory Parties to sponsor this document jointly is predicated on the reasonableness of the Stipulations and Recommendation taken as a whole.


This Stipulation and Recommendation is not to be relied upon in any other proceedings, except as necessary to enforce the terms of this Stipulation and Recommendation. The parties agree that if the Commission rejects all or any part of this Stipulation, or otherwise materially modifies its terms, any adversely affected party shall have the right within thirty (30) business days of the Commission's order, either to file an application for rehearing or to terminate and withdraw from the Stipulation by filing a notice with the Commission. The Signatory Parties agree to, and intend to support the reasonableness of, this Stipulation and Recommendation before the Commission and in any appeal from the Commission's adoption or enforcement of this Stipulation and Recommendation. If not fully adopted by the Commission or if rejected by the Supreme Court of Ohio, the Stipulation and Recommendation shall not prejudice any of the positions taken by any party on any issue before the Commission in this or any other proceeding and shall not be admissible evidence in this or any other proceeding.

IN WITNESS WHEREOF, the undersigned parties agree to this Stipulation and Recommendation as of this 20<sup>th</sup> day of September 2007. The undersigned parties respectfully request the Commission to issue its Opinion and Order approving and adopting this Stipulation.

THE DAYTON POWER AND LIGHT  
COMPANY

By:   
Randall V. Griffin

AT&T OHIO

By:   
Michael T. Sullivan