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Before the
Public Utilities Commission of Ohio

In the Matter of the Complaint of FRONTIER NORTH INC., Complainant, v. OHIO POWER COMPANY, Respondent.	Case No. 14-0759-AU-CSS

OPPOSITION TO MOTION TO DISMISS OF OHIO POWER COMPANY

Frontier North Inc. ("Frontier") hereby files its Opposition to the Motion to Dismiss of Ohio Power Company ("AEP Ohio").

I. BACKGROUND

This case presents a dispute between Frontier and AEP Ohio over the compensation that is reasonable for Frontier's use of AEP Ohio's utility poles under Ohio Rev. Code § 4905.51. AEP Ohio, which owns 83% of the poles that are jointly used by the two companies, has used its superior bargaining power to demand compensation from Frontier that is calculated using a rental rate that is *over three times* the rate that applies to Frontier's competitors for the same use of AEP Ohio's utility poles. *See, e.g.*, Compl. ¶ 2.

The unreasonableness of this compensation became abundantly clear when the Federal Communications Commission ("FCC") issued its *Pole Attachment Order* in 2011.[1] Reasonable compensation for pole attachments under Ohio law looks to the rates, terms, and conditions that

[1] *See* Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240 (2011), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert denied*, 134 S. Ct. 118 (2013) ("*Pole Attachment Order*" or "*Order*").

are reasonable for pole attachments under federal law. Ohio Admin. Code § 4901:1-7-23(B). And federal law, as clarified by the FCC's *Order*, provides that the pole attachment rate that is reasonable for an incumbent local exchange carrier ("ILEC") is one that is comparable to the rate charged the ILEC's competitors. *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶¶ 217-18). In other words, under federal law – and therefore under Ohio law – an ILEC like Frontier must be charged the pole attachment rate that is comparable to that charged other comparable attachers or, at most, a rate calculated using the FCC's pre-existing telecom formula if the ILEC attaches on terms that provide it a net material advantage to other attachers. *Id.*

The FCC further clarified that this standard of reasonableness, which has been incorporated into Ohio law, applies to ILEC pole attachments as of July 12, 2011.[2] And importantly, the FCC held that the right exists even where parties have an existing agreement. Specifically, the FCC recognized that ILECs generally have access to poles under joint use agreements and concluded that "where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable.'" *See Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202), 5334 (¶ 216). Also, the FCC confirmed that ILECs must be afforded an opportunity to "obtain a new arrangement" that follows principles of "competitive neutrality." *Id.* at 5336 (¶ 217).

As a result, after the FCC issued its *Pole Attachment Order*, Frontier quickly sought a new, and reasonable, arrangement for its attachments to AEP Ohio's poles. *See* Compl. ¶ 16. Indeed, Ohio law expressly directs public utilities to try "to agree . . . upon the conditions or

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[2] Final Rule, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 76 Fed. Reg. 40817 (2011).

compensation for . . . joint use." Ohio Rev. Code § 4905.51. However, during the more than two-and-a-half years that have followed, AEP Ohio has refused to renegotiate Frontier's rental rate.

About a year-and-a-half into the negotiations (and after the parties' Joint Use Agreement had terminated), Frontier adjusted AEP Ohio's invoice for 2012 rentals to reflect an estimated good faith payment of reasonable amounts due. *See* Compl. ¶ 22. AEP Ohio has now sued Frontier in Federal Court for breach of contract, asserting that it is entitled to the remaining amounts that it invoiced in 2012. However, as next detailed, the parties' dispute belongs before this Commission, which has exclusive jurisdiction to determine what compensation is reasonable for Frontier's attachments to AEP Ohio's poles (and for AEP Ohio's attachments to Frontier's poles) following the effective date of the *Pole Attachment Order*.[3]

II. ARGUMENT

AEP Ohio concedes that the Commission has jurisdiction "to prescribe reasonable conditions and compensation for the parties' joint use of each other's utility poles *going forward*." AEP Ohio Br. at 4 (emphasis in original). AEP Ohio, however, argues that Frontier's request for reasonable compensation as of the July 12, 2011 effective date of the *Pole Attachment Order* should be dismissed as a "pure contract dispute that is outside the

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[3] *See* Ohio Rev. Code § 4905.51 ("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.").

Commission's jurisdiction." *Id.* at 1. AEP Ohio's argument fails because every claim before the Commission falls squarely within its exclusive jurisdiction to "prescribe reasonable conditions and compensation" for joint use. *See* Ohio Rev. Code § 4905.51.

A. Frontier's Claims Require The Commission To Determine The Reasonable Compensation For Joint Use.

Even a cursory review of Frontier's Complaint shows that it presents much more than a "pure contract dispute." *See* AEP Ohio Br. at 1. The Complaint sets forth the Ohio standard for reasonable compensation at length. *See* Compl. ¶¶ 1, 12-14, 27-30. It invokes the Commission's jurisdiction to prescribe reasonable compensation pursuant to Ohio Rev. Code § 4905.51. *Id.* ¶¶ 3, 8. It details Frontier's efforts to obtain a reasonable rental rate from AEP Ohio following the issuance of the *Pole Attachment Order*. *Id.* ¶¶ 16-26. And it asks the Commission to prescribe reasonable compensation under Ohio Rev. Code § 4905.51. Compl. ¶¶ 3, 31-57.

No claim in Frontier's Complaint – whether backward or forward-looking – can be resolved by merely interpreting the parties' now-terminated contract. Rather, each and every claim requires an analysis of Ohio law, which has incorporated the federal standard for reasonableness. And, importantly, that federal standard seeks to ensure competitively neutral rates as of the July 12, 2011 effective date of the *Pole Attachment Order* – regardless of whether or not the parties were then operating under the terms of a Joint Use Agreement. *See Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 216) ("The record reveals that incumbent LECs frequently have access to pole attachments pursuant to joint use agreements today."); *id.* at 5328 (¶ 202) ("[W]e now conclude that where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1).").

In other words, irrespective of the rate contained in the parties' now-terminated Agreement, the Commission must decide what compensation is reasonable for Frontier's use of

AEP Ohio's utility poles (and AEP Ohio's use of Frontier's poles) in light of the FCC's new interpretation of the federal statute that is incorporated into Ohio law. *See* Ohio Admin. Code § 4901:1-7-23(B) (providing that rates, terms, and conditions for access to public utility poles "shall be established pursuant to 47 U.S.C. 224; 47 C.F.R 1.1401 to 1.1403; 47 C.F.R 1.1416 to 1.1418; and the formulas in 47 C.F.R 1.1409(e)").

That question of reasonable compensation falls squarely within the Commission's exclusive jurisdiction. Frontier has alleged that AEP Ohio has demanded compensation that is not reasonable as required by Ohio Rev. Code § 4905.51. *See, e.g.*, Compl. ¶ 41 ("Frontier is entitled to just and reasonable rates, terms and conditions of attachment under Ohio Rev. Code § 4905.51 and Ohio Admin. Code § 4901:1-7-23."). And the Supreme Court has held that "[a]llegations of violation of Ohio Rev. Code Chapter 4905 and commission regulations are within the exclusive initial jurisdiction of the commission." *Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St. 3d 69, 73 (2002); *see Dayton Power & Light Co. v. Kistler*, 57 Ohio St. 2d 21, 23 (1979) ("[A]lleged violations of Ohio Rev. Code Chapter 4905 . . . are the concern of the Public Utilities Commission in the first instance.").

Indeed, the Commission's jurisdiction over Frontier's claims "is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive." *Illuminating Co.*, 97 Ohio St. 3d at 72 (quoting *Ohio Tel. Co v. Winter*, 23 Ohio St. 2d 6, 9 (1970)); *see also Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 88 Ohio St. 3d 447, 450 (2000) ("The commission has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except [the Ohio Supreme Court]) any jurisdiction over such matters.").

Frontier, therefore, has properly asked the Commission to prescribe the reasonable compensation associated with its attachments to AEP Ohio's poles as of July 12, 2011 – because it is only this Commission that can decide that question. Indeed, for this reason, Frontier has filed a Motion to Dismiss AEP Ohio's federal Complaint based on the Commission's exclusive jurisdiction over AEP Ohio's claims. *See* Motion to Dismiss, Doc. No. 8, *Ohio Power Co. v. Frontier North Inc.*, No. 2:14-cv-341 (S.D. Ohio May 28, 2014).

B. AEP Ohio's Reliance On The Parties' Agreement Does Not Transform This Case Into A Breach Of Contract Action.

AEP Ohio seeks to avoid the Commission's jurisdiction by recasting Frontier's Complaint as a "pure contract dispute" and claiming that the Commission "has no power to determine legal rights and liability with regard to contract rights or property rights, even though a public utility is involved." AEP Ohio Br. at 3 (quoting *Marketing Research Servs., Inc. v. Pub. Util. Comm.*, 34 Ohio St. 3d 52, 56 (1987)). But, as noted above, Frontier has not asked the Commission to review the parties' Joint Use Agreement and determine whether AEP Ohio has breached that Agreement. Instead, Frontier has asked the Commission to prescribe reasonable compensation for its attachments pursuant to Ohio law, which now incorporates a federal standard that respects Frontier's right to a just and reasonable pole attachment rental rate as of July 12, 2011.

This case is thus wholly distinguishable from the case on which AEP Ohio relies to argue that the Commission has no authority to determine appropriate compensation before termination of the Joint Use Agreement. *See* AEP Ohio Br. at 4 (citing *In the Matter of the Complaint of Continental Energy Associates I, et al. v. Natural Gas Transmission Company of Ohio*, PUCO Case No. 85-220-PL-CSS, Entry, 1985 Ohio PUC LEXIS 1568, at *3 (May 10, 1985)). In the *Continental Energy* case, the complainant asked the Commission to "interpret . . . the contractual

agreements between the parties" and to order a refund "*as a result of an alleged breach of those agreements*." *Continental Energy*, 1985 Ohio PUC LEXIS 1568, at *3 (emphasis added). Here, Frontier instead seeks to enforce its right to provide AEP Ohio solely that compensation that is reasonable for its attachments to AEP Ohio's poles. Indeed, Frontier's Complaint is devoid of any claim that AEP Ohio has breached the parties' Agreement. *See Starlink v. Communications Buying Group, Inc.*, 1998 Ohio PUC LEXIS 611 (Ohio PUC 1998) (rejecting respondent's contention that the matter raised "pure contract issues" where the complainant "did not allege that [respondent] breached a contract, nor did it seek a determination of contractual rights and obligations. Rather, the issue presented . . . is whether [respondent's] refusal to provide service to [complainant] was unjust, unreasonable, or inadequate.")

Moreover, even if the parties' Joint Use Agreement were relevant to the issues before the Commission, the Commission would still have jurisdiction over the entirety of Frontier's Complaint. The Commission's decision in *AT&T Ohio v. Dayton Power & Light Co.*, 2007 Ohio PUC LEXIS 243 (Ohio PUC 2007), makes this clear. In *AT&T Ohio*, the ILEC complainant filed a Complaint that (unlike Frontier's Complaint) alleged that the electric utility breached the parties' joint use agreement. *Id.* at *1. In particular, the ILEC alleged that the utility (1) miscalculated pole attachment charges, (2) improperly subleased space exclusively reserved for the ILEC, and (3) unilaterally recalculated the pole rental rate using a methodology that was inconsistent with the joint use agreement. *Id.* The electric utility sought to dismiss these claims as presenting a simple contract dispute. *Id.* at *4-5. The Commission disagreed and denied the motion, finding jurisdiction even where a breach of contract was expressly alleged.

The respondent in *AT&T Ohio* argued that Ohio Rev. Code § 4905.51 only applies "when the two utilities can not reach an initial agreement" and that the section has no applicability after

a joint use agreement has been executed. *Id. at* *10. This argument is essentially identical to AEP Ohio's contention in this case that Ohio Rev. Code § 4905.51 does not apply to Frontier's claims for relief for any period before 2014. Yet the Commission explicitly disagreed with such a limited interpretation of Ohio Rev. Code § 4905.51. *Id.* at *13. The Commission noted that the parties in the dispute – the ILEC and the electric utility – were public utilities that were subject to the Commission's jurisdiction. Therefore, the Commission held in no uncertain terms: "the rates, terms, and conditions associated with the operation and maintenance of utility facilities and services, including poles, by [the ILEC and the electric utility] fall within the regulatory authority of the Commission by virtue of the commission's general supervisory powers contained in Ohio Rev. Code Sections 4905.06 and 4905.22." *Id.* at *12-13.

The Commission also explicitly rejected the argument that the parties' contract precluded its exercise of jurisdiction. According to the Commission, "[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 Ohio Rev. Code Section 4905.51." *Id.* "The fact is this case involves a dispute between two public utilities regulated by the Commission, over the rates they charge each other for pole attachments that the Commission has the authority to resolve." *Id.* Significantly, the Commission found that any payments were "subject to true-up pending the outcome of this complaint." *Id.* at *23.

So too here. Frontier asks the Commission to, among other things, prescribe the reasonable compensation that AEP Ohio may receive for Frontier's attachments as of July 12, 2011, and to find that any payments made by Frontier after July 12, 2011 are subject to true-up

upon the Commission's determination of reasonable compensation. Frontier's Complaint thus presents a dispute between two utility companies that falls squarely within the Commission's exclusive jurisdiction.

III. CONCLUSION

For the foregoing reasons, AEP Ohio's Motion to Dismiss should be denied.

Respectfully submitted,

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Motions for pro hac vice admissions to be filed

Dated: May 29, 2014

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was provided to the person listed below by electronic service and U.S. mail, postage prepaid, on May 29th, 2014:

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