BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Frontier North Inc.,	)	
Complainant,	)	Case No. 14-0759-AU-CSS
v.	)	
Ohio Power Company,	)	
Respondent.	)	

REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL DISCOVERY OF RESPONDENT OHIO POWER COMPANY

I. INTRODUCTION

Frontier North Inc.'s ("Frontier") opposition to the Motion for Protective Order of Respondent Ohio Power Company ("AEP Ohio's Motion") misstates the law, including Commission precedent issued the day before Frontier filed its opposition, regarding the standards the Commission will apply to adjudicate the parties' dispute regarding the prospective conditions and compensation that should apply to the parties' joint use of each other's utility poles in the future. As set forth in greater detail below, the Commission's regulations and recent decision in Case No. 13-579-AU-ORD[1] support Ohio Power Company's ("AEP Ohio") request for an order that discovery into AEP Ohio's agreements with entities other than Frontier not be had and in fact emphasize that such agreements simply are not relevant to the determination of the issues in this case. Moreover, the alleged relevance to the parties' pending civil dispute of Frontier's other discovery requests that are the subject of AEP Ohio's motion for protective order does not

[1] *In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-579-AU-ORD, Finding and Order (July 30, 2014) (the "*Pole Attachment Rulemaking Order*").

make those requests relevant to the narrow issues properly before the Commission here. Accordingly, the Commission should grant AEP Ohio's Motion and deny Frontier's motion to compel discovery that Frontier included in its memorandum in opposition to AEP Ohio's Motion.

II. LAW AND ARGUMENT

A. Frontier Is Not Entitled To Discovery Related To AEP Ohio's Other Joint Use And Pole Attachment Agreements.

AEP Ohio explained in its motion for protective order that Frontier's requests for documents relating to AEP Ohio's other joint use and pole attachment agreements with other entities in Ohio (Request for Production Nos. 4, 16, and 17) are inappropriate because (1) they contain confidential and competitively sensitive information, including information about Frontier's competitors; and (2) their production would give Frontier an unfair advantage in settlement negotiations, subsequent contract negotiations, and at the hearing of this case and would hamper AEP Ohio's ability to effectively negotiate a fair agreement with Frontier. (AEP Ohio Mot. at 7-8.) In response, Frontier contends that AEP Ohio's contracts – including contracts for other types of attachment than that which Frontier seeks in this case – should be produced because the FCC would require their production and, therefore, the Commission must too. (Frontier Mem. Opp. at 6-7, citing O.A.C. 4901:1-7-23(B) and 47 C.F.R. § 1.1424.)

Frontier misstates what O.A.C. 4901:1-7-23(B) and 47 C.F.R. § 1.1424 require and ignores what the Commission has repeatedly said (and recently reiterated) about the extent to which the FCC's regulations are incorporated into Ohio law. O.A.C. 4901:1-7-23(B) states:

> Rates, terms, and conditions for nondiscriminatory access to public utility poles, ducts, conduits, and right-of-way shall be established through negotiated arrangements or tariffs. Such access shall be established pursuant to 47 U.S.C. 224; 47 C.F.R 1.1401 to 47 C.F.R 1.1403; 47 C.F.R 1.1416 to 47 C.F.R 1.1418; and the

> formulas in 47 C.F.R 1.1409(e) , as effective in paragraph (A) of rule 4901:1-7-02 of the Administrative Code.

(Emphasis added). Nowhere does O.A.C. 4901:1-7-23(B) (or any other Commission regulation) adopt 47 C.F.R. § 1.1424's requirement that a respondent in a pole attachment complaint case before the FCC produce its agreements with other entities to the complainant upon request. Moreover, Frontier's quotation of 47 C.F.R. § 1.1424 tellingly omits that, by the regulation's plain language, the requirement to produce agreements is only applicable when an incumbent local exchange carrier "claims that it is similarly situated to an attacher that is a telecommunications carrier * * * or a cable television system for purposes of obtaining comparable rates, terms or conditions * * *." 47 C.F.R. § 1.1424. Leaving aside the fact that the Commission has not adopted 47 C.F.R. § 1.1424,[2] the provision nonetheless is inapplicable here because Frontier has not claimed to be similarly situated to any other telecommunications carrier or cable television system. (*See generally*, Frontier Compl.) Thus, neither the state nor the federal regulations that Frontier relies upon require AEP Ohio to produce its agreements with other attaching entities to Frontier.

Moreover, Frontier's misplaced reliance upon that federal regulation disregards that "Ohio has a long-standing tradition of adopting its own laws and regulations involving pole attachments." *Pole Attachment Rulemaking Order* at 8. Indeed, just last week, the Commission declined to rotely adopt FCC rules in favor of determining for itself what is appropriate for Ohio utilities. *See generally id.* One such example of the Commission's decision in this regard is particularly important here. In the *Pole Attachment Rulemaking Order*, the Commission ruled that "regarding the application of the default cost allocation mechanism provided for in proposed

[2] In fact, it does not appear that any electronically-available Commission order has ever even referenced that regulation.

Ohio Adm. Code 4901:1-3-04(D)(2) and (D)(3), the Commission finds that the default rate formulas may be negotiated among the parties to a joint use agreement but may not be unilaterally insisted upon due to the unique nature of joint use agreements." *Id*. at 42 (emphasis added). The newly-adopted O.A.C. 4901:1-3-04(D)(2) in turn provides that the Commission will apply the formula set forth in 47 C.F.R. 1.1409(e)(1) for determining the maximum just and reasonable rate for pole attachments. *Id.*, Attach. A at 11.

Thus, through its *Pole Attachment Rulemaking Order*, the Commission has decided that a party to a joint use agreement may not insist upon the application of the FCC's default rate formulas contained in 47 C.F.R. 1.1409(e). Frontier's request for copies of AEP Ohio's agreements with other entities that attach to AEP Ohio's poles, however, is premised upon Frontier's flawed argument that it can insist on the application of those default formulas here. (*See* Frontier Compl. at ¶ 3, 4, 13, 14, 18, 22, 25, 28, 29, 30, 37, 38, 41, 46, 47, 49, 50, 56; Frontier Mem. Opp. at 6-7.) Because the formulas do not automatically apply and Frontier may not unilaterally insist upon them, Frontier is not entitled to the confidential and proprietary information and agreements it seeks that it contends is necessary for them.

At a minimum, the Commission should grant AEP Ohio's Motion with respect to Frontier's requests that AEP Ohio produce pole license, pole attachment, and pole rental agreements (Request for Production No. 4) and "documents concerning historical attachments by other entities" (Request for Production Nos. 16-17) that were not joint use agreement attachments. Those agreements differ significantly from a joint use agreement in their terms, the nature of the attachment, and, consequently, in their rates. As the Commission has recognized, joint use agreements are unique. *Pole Attachment Rulemaking Order* at 29, 42. Thus, attachers that attach through arrangements other than a joint use agreement are not "comparable

attachers," despite Frontier's unsubstantiated assertion to the contrary. Because such agreements are not comparable to joint use agreements, Frontier is clearly not entitled to access those agreements' terms.

For each of these reasons, the Commission thus should grant AEP Ohio's request for protective order with respect to Request for Production Nos. 4, 16, and 17.

B. The Fact That The Irrelevant Discovery That Frontier Seeks Here May Be Relevant In Another Proceeding Does Not Make It Permissible In This One.

In response to AEP Ohio's demonstration that the majority of Frontier's discovery requests (specifically, Interrogatory Nos. 2, 3, 4, 5, 6, 7, 8, 9, and 11; Request for Production Nos. 1, 2, 3, 5, 6, 7, 9, 11, 12, 13, 15, 18, 19, 20, 28, and 29) are irrelevant to this proceeding because they relate to the parties' dispute about prior charges under their existing Joint Use Agreement (*see* AEP Ohio Mot. at 6-7), Frontier makes the circular argument that because it allegedly could properly obtain such discovery in the civil proceeding pending between the parties, it is entitled to them here. (Frontier Mem. Opp. at 9-11.) This argument, however, like Frontier' argument about AEP Ohio's attachment agreements with other entities, misinterprets Ohio law, as discussed above. It also misstates Frontier's Complaint in this case. (*Id.* at 11, citing Frontier Compl. at ¶ 40-58.) Frontier claims that the parties' existing Joint Use "[A]greement, its negotiations, the payments made under it, and the calculation of those payments * * * 'are all part and parcel of Frontier's Complaint and essential to its adjudication.'" (*Id.*) Paragraphs 40-58 of Frontier's Complaint, however, do not relate to any of those issues. The Commission should order that AEP Ohio is not required to respond to the Frontier's Requests related to issues outside the proper scope of this proceeding.

III. CONCLUSION

For each of the reasons set forth above and those included in AEP Ohio's Motion, the Commission should grant AEP Ohio's request for protective order, deny Frontier's motion to compel that Frontier included in its memorandum in opposition to AEP Ohio's Motion, and order that:

1. AEP Ohio is not required to respond to Interrogatory Nos. 2, 3, 4, 5, 6, 7, 8, 9, and 11; and Request for Production Nos. 1, 2, 3, 5, 6, 7, 9, 11, 12, 13, 15, 18, 19, 20, 28, and 29 contained in Frontier's Requests because those requests are not relevant to the issues in this proceeding over which the Commission has jurisdiction;

2. AEP Ohio is not required to respond to Request for Production Nos. 4, 16, and 17 because those requests seek competitively sensitive and confidential business information the disclosure of which to Frontier is inappropriate; and

3. AEP Ohio's responses to those of Frontier's Requests that remain after a ruling on this motion are due within twenty days after the parties' settlement conference in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply in Support of Motion for Protective Order and Memorandum in Opposition to Motion to Compel Discovery of Respondent Ohio Power Company* has been served upon the below-named counsel via electronic mail this 11th day of August, 2014:

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Summary: Reply in Support of Motion for Protective Order and Memorandum in Opposition to Motion to Compel Discovery of Respondent Ohio Power Company electronically filed by Ms. Christen M. Blend on behalf of Ohio Power Company