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

FRONTIER'S REPLY TO AEP OHIO'S OPPOSITION TO MOTION TO COMPEL DISCOVERY

AEP Ohio's discovery responses were due, after a three-week agreed extension, on July 17, 2014. One month later, and over ten weeks after Frontier's discovery requests were served, AEP Ohio has still not provided *any* responses, even though it does not challenge many of Frontier's discovery requests and previously agreed to produce requested rate calculations. *See* AEP Ohio Br. at 6 (not challenging Interrogatory Nos. 1, 10, 12-14 and Request for Production Nos. 8, 10, 14, 21-27); Mot. to Compel Br. at 5, 6. In other words, AEP Ohio has chosen to unilaterally stay discovery. And it has done so even though (1) it does not deny that its conduct will impede settlement at the Commission's rescheduled September 10, 2012 settlement conference, and (2) it has itself opposed any stay of discovery in the related federal court proceeding to allow the Court time to resolve the jurisdictional issues presented there. AEP Ohio's attempt to unilaterally set a discovery schedule and stall the progress of this case should be soundly rejected. As detailed below, the agreements and other documents that Frontier has requested are highly relevant to the pole attachment compensation at issue in this proceeding.

AEP Ohio should be compelled to provide complete answers to Frontier's discovery requests no later than August 27, 2014.[1]

I. ARGUMENT

AEP Ohio focuses its response on two arguments – one new argument about the relevance of its pole attachment agreements, AEP Ohio Br. at 2-5, and one rehashed argument about its unwillingness to produce anything that does not conform to its limited view of the Commission's jurisdiction, *id.* at 5. These arguments are meritless for reasons detailed below in Sections A and B. But the possibly most telling aspect of AEP Ohio's response relates to the arguments that AEP Ohio does *not* make. For example, AEP Ohio does *not*:

- contend that its request for nearly 4 months[2] to respond to discovery complies with the Commission's discovery rules, which require a response to discovery within twenty days and instruct parties that discovery should "be completed as expeditiously as possible," *see* Ohio Admin. Code §§ 4901-1-17(A), 4901-1-19(A), 4901-1-20(C); *see also* Mot. to Compel Br. at 8;

- explain how its request to stay discovery until 20 days after the upcoming settlement conference will serve the purpose of discovery, which is to ensure that parties are prepared for commission proceedings, such as the upcoming settlement conference, *see* Ohio Admin. Code § 4901-1-16(A); *see also* Mot. to Compel Br. at 8;

- refute Frontier's argument that settlement will be impossible at the upcoming conference if Frontier is forced to negotiate in the blind, without access to critical

[1] In its Motion to Compel, Frontier requested that all responses be provided by August 5, 2014, which would have given it one week to review the information and prepare for the settlement conference that was then scheduled for August 12, 2014. The settlement conference has now been rescheduled for September 10, 2014. In light of the additional time, Frontier proposes a response deadline of August 27, 2014, which will give it two weeks to review the information in preparation for the conference.

[2] Frontier served its discovery requests on June 6, 2014, making AEP Ohio's responses due twenty days later on June 26. Frontier agreed to a 3-week extension of AEP Ohio's responses, which set their due date as July 17. AEP Ohio now asks the Commission to set a due date of September 30, which is 20 days *after* the September 10 settlement conference. *See* AEP Ohio Br. at 6. If granted, AEP Ohio would be provided 3 months and 24 days to respond to discovery that was due after 20 days under the Commission's rules.

information such as the rate calculations and pole attachment agreements that Frontier has requested for nearly 3 years, *see id.* at 1-9;

- deny that it previously agreed to produce by July 17 the rate calculations that it has now withheld, *see id.* at 5, 7;

- claim that it will suffer any competitive disadvantage by producing its pole attachment agreements with other entities (nor can it so claim because Frontier and AEP Ohio are not competitors), while it nonetheless refuses to produce the documents calling them "competitively sensitive and confidential business information," *see id.*;

- contradict Frontier's representation that its discovery requests are not overly burdensome, *see id.* at 7-9;

- challenge the relevance of Interrogatory Nos. 1, 10, 12-14 and Request for Production Nos. 8, 10, 14, 21-27, *see* AEP Ohio Br. at 6; or

- mention that it has strongly opposed any stay of discovery in the related federal court case to preserve time and resources while the Court considers the jurisdictional issues presented there, *see* Dkt. No. 16, *Ohio Power Company v. Frontier North Inc.*, No. 2:14-cv-00341-MHW-EPD (S.D. Ohio July 14, 2014).

At the same time, AEP Ohio doubles down on its position that it can deny Frontier access to its pole attachment agreements in order to preserve its superior bargaining position and deny the Commission access to information that may cause it to reduce Frontier's rental rate. AEP Ohio Br. at 2. According to AEP Ohio, were Frontier and the Commission given access to the pole attachment agreements – even pursuant to the terms of a confidentiality agreement – it "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." *Id.*

AEP Ohio's response thus shows its fundamental disregard for the Commission's rules and the discovery process. It has not withheld production based on relevance or burden; it has withheld production because it wants to maintain its strategic advantage. Its effort must be rejected. *Cf., e.g.*, *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) ("[C]ivil trials . . . no longer

need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts . . . .").

A. AEP Ohio's Pole Attachment Agreements Are Relevant And Must Be Produced To Ensure Competitively Neutral Rates.

AEP Ohio accuses Frontier of misstating Ohio law as it relates to the relevance of its pole attachment agreements. AEP Ohio Br. at 1, 2-5. Frontier has not. Under currently effective Ohio law, Frontier is entitled to a pole attachment rental rate that is comparable to the rate charged its cable and competitive local exchange carrier ("CLEC") competitors if it uses AEP Ohio's utility poles pursuant to comparable terms and conditions. *See* Ohio Admin. Code § 4901:1-7-23(B) (incorporating 47 U.S.C. § 224); *see also Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217) (interpreting 47 U.S.C. § 224 to include a principle of competitive neutrality). The *only way* to determine whether Frontier uses, or seeks to use, AEP Ohio's poles pursuant to terms and conditions that are comparable to those provided its cable and CLEC competitors is to review AEP Ohio's agreements with its cable and CLEC attachers. These agreements are thus crucial to Frontier's settlement negotiations and, if necessary, the Commission's resolution of this dispute.

For good reason, then, the Federal Communications Commission ("FCC") clarified that pole attachment agreements – including cable and CLEC agreements – are discoverable in a Pole Attachment Complaint proceeding before its Enforcement Bureau. *See* 47 C.F.R. § 1.1424 ("If a respondent declines or refuses to provide a complainant with access to agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery."). The FCC's relevance determination is fully applicable here – absent such agreements, neither Frontier nor the Commission will be able to determine a rental rate that is competitively neutral.

AEP Ohio faults Frontier for relying on 47 C.F.R. § 1.1424 because it was not expressly incorporated into Ohio law. *See* AEP Ohio Br. at 2-3 (quoting Ohio Admin. Code § 4901:1-7-23(B). But Frontier never argued that 47 C.F.R. § 1.1424 was incorporated into Ohio law. Frontier instead argued that the FCC's determination of relevance, as codified in 47 C.F.R. § 1.1424, is fully applicable here because the Commission must undertake the same comparative analysis of rates, terms, and conditions.

AEP Ohio further asserts that 47 C.F.R. § 1.1424 does not apply by its plain terms "because Frontier has not claimed to be similarly situated to any other telecommunications carrier or cable television system." AEP Ohio Br. at 3. Therefore, according to AEP Ohio, there is no requirement to produce agreements because it "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 . . . .'" *Id.* (quoting 47 C.F.R. § 1.1424).

With this argument, AEP Ohio seeks to profit from its refusal for nearly three years to produce the pole attachment agreements that Frontier has requested. Frontier has not alleged that it is similarly situated to a cable or CLEC attacher because Frontier does not know what terms and conditions apply to AEP Ohio's cable or CLEC attachers. For that reason, Frontier clarified in its Complaint that "the Commission should (1) order AEP Ohio to file a copy of its existing pole attachment agreements with telecommunications carriers and cable companies so that Frontier can determine whether the terms and conditions of the parties' now-terminated Joint Use Agreement were comparable and whether it will seek attachment under comparable terms and conditions in the future and (2) compel AEP Ohio to provide Frontier attachment at rates, terms, and conditions that are just and reasonable in light of the terms and conditions upon

which Frontier attaches." Compl. ¶ 3.[3] Unless and until AEP Ohio produces its pole attachment agreements with all entities – including cable and CLEC companies – neither Frontier nor this Commission can determine whether Frontier is comparably situated.

AEP Ohio further argues that Frontier is not entitled to see its agreements because Frontier has no right to "insist" upon the application of the FCC's rate formulas for CLEC and cable attachers even if it were comparably situated to them. Such an insistence, AEP Ohio argues, is contrary to the Commission's recent Finding and Order that establishes new pole attachment rules. *See* AEP Ohio Br. at 1, 3-4.[4] Setting aside the fact that the new rules are not yet effective, Frontier's request that the Commission set a rate pursuant to the formulas of 47 C.F.R. § 1.1409(e)(1) is fully consistent with the new rules.[5] Under the new rules, the parties may *negotiate* a rental rate that deviates from the rate calculated using the FCC's formula. *See* Finding and Order at 42. However, where those negotiations are unsuccessful and result in a Complaint before the Commission, "[t]he commission *will apply* the formula set forth in 47

[3] *See also, e.g.*, Compl. ¶¶ 34 ("Frontier . . . cannot determine whether it seeks to attach on terms and conditions that are comparable to AEP Ohio's other attachers or whether the terms and conditions of the parties' now-terminated Joint Use Agreement were comparable to those of its competitors because AEP Ohio has refused to provide copies of its existing agreements in spite of Frontier's requests."); 43 ("AEP Ohio's refusal to provide Frontier with signed, existing agreements with other attaching entities, as requested, has denied Frontier the ability to determine whether the terms and conditions upon which it seeks to attach are comparable to those provided to other attaching entities on AEP Ohio's poles and whether the terms and conditions of the parties' now-terminated Joint Use Agreement were similarly comparable.").

[4] *See also 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).

[5] Frontier recognizes that other aspects of its Complaint may need to be amended in light of the new rules once they take effect. For example, the Commission concluded that the FCC's rate formula applicable to cable attachments should be applicable to all attachments. *See* Finding and Order at 40-41. Frontier, accordingly, again reserves the right to amend its Complaint after the new rules are effective. *See* Compl. ¶ 3 n.3 (reserving right to amend its Complaint "[s]hould the Commission adopt new pole attachment rules").

C.F.R. 1.1409(e)(1) . . . for determining a maximum just and reasonable rate for pole attachments." *See id.* at Attachment A, page 11 (showing revision to Ohio Admin. Code § 4901:1-3-04(D)(2)) (emphasis added). Frontier's request that the Commission set rental rates by looking to the FCC's rate formulas is thus fully compliant with current and future Ohio law. Frontier has a right to a competitively neutral rental rate calculated using the FCC's formulas.[6] AEP Ohio should therefore be compelled to produce all of its pole attachment agreements with attaching entities in Ohio in order to ensure that Frontier obtains a competitively neutral rate in this proceeding.

B. Information That Pre-dates Frontier's Complaint Is Relevant To Frontier's Request For Just And Reasonable Rental Rates As Of July 2011.

AEP Ohio concludes its response with a puzzling argument that is apparently premised on a misunderstanding of Frontier's Complaint and its Motion to Compel. According to AEP Ohio, Frontier has argued that it is entitled to information about the 2011, 2012, and 2013 rental years "because it allegedly could properly obtain such discovery in the civil proceeding pending between the parties." *See* AEP Ohio Br. at 5. AEP Ohio further argues that Frontier's Complaint does not relate to this earlier information, including information about the now-terminated "Joint Use Agreement, its negotiations, the payments made under it, and the calculation of those payments." *Id.* (internal alteration omitted).

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[6] *See, e.g.*, Ohio Admin. Code § 4901:1-7-23(B) (incorporating 47 U.S.C. § 224); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217) (interpreting 47 U.S.C. § 224 and concluding that "[w]here incumbent LECs are attaching to other utilities' poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator—which generally will be paying a rate equal or similar to the cable rate under our rules—competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator)"); *see also, e.g.*, Finding and Order at 40 ("The Commission concludes that a single rate formula for all pole attachments is appropriate and should be adopted. In coming to this conclusion, the Commission agrees that the cost incurred by the pole owner to provide attachment space is not affected by the service being provided by the attaching entity.").

Even a cursory review of Frontier's Complaint and Motion to Compel, however, shows that neither of these assertions is true. Frontier has sought information relevant to the 2011, 2012, and 2013 rental years because those rental years are at issue in its Complaint. Frontier's Complaint explicitly seeks recognition of its right to just and reasonable pole attachment rates as of July 12, 2011. *See, e.g.*, Compl. ¶¶ 29, 30, 33, 50-53, 57. The Complaint details the parties' prior practice under the now-terminated Joint Use Agreement, *id.* ¶¶ 9-11, explains why that prior practice – under which AEP Ohio was able to use its superior bargaining power to extract unreasonably high rental rates – is pertinent to the Commission's analysis, *id.* ¶¶ 12-15, 27-32, and describes the efforts that Frontier has taken to obtain a just and reasonable rental rate since 2011, *id.* ¶¶ 16-26. The Complaint further provides the Commission with Frontier's estimate of the rates that should apply to Frontier's attachments for the 2012 and 2013 rental years using the best available information. *Id.* ¶¶ 37-38, 46-47, 56. And it concludes with a request that the Commission order AEP Ohio to recognize that Frontier has the right, effective July 12, 2011, to use AEP Ohio's poles upon just and reasonable rates, terms, and conditions. *Id.* ¶¶ 56-57.

For this reason, Frontier moved to compel AEP Ohio to produce information relevant to its request for just and reasonable rental rates effective July 12, 2011. Mot. to Compel Br. at 10. In so doing, Frontier noted that AEP Ohio had conceded that discovery into these matters was available in the pending federal court proceeding even under AEP Ohio's restricted view of the Commission's jurisdiction. *See id.* at 11. As a consequence, Frontier argued, AEP Ohio waived any argument that production of the documents would be overly burdensome. *Id.* But Frontier did not peg its relevance argument on the pending federal court proceeding. Frontier has instead argued that there should be no pending federal court proceeding. *See* Mot. to Dismiss, Dkt. No.

8, *Ohio Power Company v. Frontier North Inc.*, No. 2:14-cv-00341-MHW-EPD (S.D. Ohio May 28, 2014) (seeking dismissal because the Commission has exclusive jurisdiction).

The entirety of the dispute presented by Frontier in its Complaint falls within the Commission's exclusive jurisdiction to "prescribe reasonable conditions and compensation" for joint use pursuant to Ohio Rev. Code § 4905.51.[7] AEP Ohio's attempt to restrict that jurisdiction through this discovery dispute must be rejected. Frontier is entitled to "obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding." Ohio Admin. Code § 4901-1-16(B). The information denied by AEP Ohio falls squarely within that standard.

II. CONCLUSION

For reasons detailed above and in Frontier's Motion to Compel, the Commission should deny AEP Ohio's Motion for a Protective Order and compel AEP Ohio to respond to Frontier's discovery requests on or before August 27, 2014.

Respectfully submitted,

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[7] Mot. to Dismiss, Dkt. No. 8, *Ohio Power Company v. Frontier North Inc.*, No. 2:14-cv-00341-MHW-EPD (S.D. Ohio May 28, 2014) (seeking dismissal because the Commission has exclusive jurisdiction); *see also* Frontier's Opp. to AEP Ohio's Mot. to Dismiss (P.U.C.O. May 29, 2014).

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Motions for pro hac vice admissions to be filed

Dated: August 18, 2014

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was provided to the persons listed below by electronic service on August 18, 2014:

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Summary: Reply Frontier's Reply to AEP Ohio's Opposition to Motion to Compel Discovery electronically filed by Michele L Noble on behalf of Frontier North Inc.