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 MEMORANDUM OF OHIO POWER COMPANY
IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Respondent Ohio Power Company ("AEP Ohio") has moved to dismiss portions of Complainant Frontier North Inc.'s ("Frontier") Complaint against it because the Public Utilities Commission of Ohio ("Commission") does not have subject matter jurisdiction to decide the parties' pure contract dispute regarding the reciprocal rental rate charged under their Joint Use Agreement. In response, Frontier mischaracterizes the Federal Communications Commission's ("FCC") *Pole Attachment Order* and Ohio law and regulations and attempts to analogize this case to inapposite and distinguishable Commission precedent. Frontier has failed, however, to show that those portions of its Complaint that relate to the parties' Joint Use Agreement are anything other than a request for this Commission to interpret and abrogate or modify the parties' rights under that agreement. Because the United States District Court for the Southern District of Ohio and not the Commission is the proper forum to consider those issues, the Commission should dismiss Frontier's fundamentally contract-based claims with prejudice.

II. THE COMMISSION DOES NOT HAVE JURISDICTION OVER THE PARTIES' CONTRACT DISPUTE REGARDING THE JOINT USE AGREEMENT.

Much of Frontier's Opposition to AEP Ohio's Motion addresses the Commission's jurisdiction to prescribe reasonable conditions for compensation for joint use. (*See* Frontier Opp. at 3-5.) As it made clear in its Motion, AEP Ohio does not dispute the Commission's authority to do so prospectively. (AEP Ohio Mot. at 1, 4.) Frontier's requests at issue here, however, which boil down to a request that the Commission retroactively abrogate the parties' contract or modify its plain terms, are inappropriate. The Commission should dismiss them.

As an initial matter, Frontier's contention that no claim in its Complaint can be resolved by interpreting the parties' Joint Use Agreement (*see* Frontier Opp. at 3) is belied by the agreement's plain language. Indeed, the contract plainly provides that "[d]espite any termination * * *, this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination until a new agreement is entered into by the parties." (Compl. Ex. 1, § 21.01.) Frontier concedes that it chose to simply disregard the terms of and its obligations under that agreement after it notified AEP Ohio of its intent to terminate the agreement in October 2011. (Frontier Opp. at 2.) Although it claims not to have asked the Commission "to review the parties' Joint Use Agreement" (*see id.* at 5-6), Frontier's requests related to 2012 and 2013 reciprocal rental rate essentially seek the Commission to abrogate or reform the terms, conditions, and obligations set forth in that agreement, which by their terms were and remain binding upon the parties until a new agreement is entered into. Frontier's contention that the claims at issue here do not seek a determination of contractual rights or obligations thus is simply disingenuous.

Moreover, Frontier' assertion that the *Pole Attachment Order* somehow supersedes or nullifies the parties' existing Joint Use Agreement is also incorrect. (*See id*. at 4-5.) Far from

directing, as Frontier would have the Commission believe, that the rental rate paid under existing joint use agreements must be modified "in light of the FCC's new interpretation of the federal statute," (*see id*. at 4), the *Pole Attachment Order* made explicitly clear that "it is generally appropriate to defer to" existing joint use agreements. *Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 215). In fact, the FCC made clear that it would not upset the terms of such agreements:

> Although some incumbent LECs express concerns about existing joint use agreements, these long-standing agreements generally were entered into at a time when incumbent LECs concede they were in a more balanced negotiating position with electric utilities, at least based on relative pole ownership. As explained above, we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power. Consistent with the foregoing, the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable.

(Emphasis added.) *Id.* at 5334-5335 (¶ 216). This Commission, like the FCC, should decline to second guess the parties' Joint Use Agreement, the interpretation of which, in any event, is a matter for the federal district court and not the Commission under settled Ohio law. *See Marketing Research Services, Inc. v. Pub. Util. Comm.*, 34 Ohio St.3d 52, 56, 517 N.E.2d 540 (1987), citing *Milligan v. Pub. Util. Comm.*, 56 Ohio St.2d 191, 383 N.E. 2d 575 (1978), *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 132 N.E. 162 (1921), *Coss v. Pub. Util. Comm.* 101 Ohio St. 528, 130 N.E. 937 (1920); *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, *3 (May 10, 1985).

Finally, Frontier's reliance upon *AT&T Ohio v. Dayton Power & Light Co.*, Case No. 06-1509-EL-CSS, Entry, 2007 Ohio PUC LEXIS 243 (Mar. 28, 2007), is also misplaced. *AT&T Ohio* considered the question of whether R.C. 4905.51 applies only in when two utilities can not reach an initial joint use agreement. *AT&T Ohio*, 2007 Ohio PUC LEXIS 243, at *10. That

issue is not before the Commission here. Moreover, the dispute in *AT&T Ohio* involved complex questions related to the appropriate methodology to be used to calculate pole attachment charges under that joint use agreement's terms. *Id.* at *2-3. There is no such dispute here, as the reciprocal rental rate charged under the parties' Joint Use Agreement is easily calculable, pegged to the annual CPI-U index, and clearly and unambiguously set forth in the contract. (*See* AEP Ohio Mot. at 2.) Finally, the Commission's direction that payments in that case were "subject to true-up pending the outcome of this complaint" related not to the jurisdictional dispute, but to AT&T Ohio's request for emergency relief, which the Commission denied. *See AT&T Ohio*, 2007 Ohio PUC LEXIS 243, at * 23. That portion of the Commission's decision thus is of no consequence here. Accordingly, the Commission should disregard Frontier's attempt to expand and apply its limited decision in *AT&T Ohio* to a factually and legally inapposite dispute.

III. CONCLUSION

For the reasons set forth above and those contained in AEP Ohio's Motion, the Commission should decline to exercise jurisdiction over the parties' purely contractual dispute regarding the reciprocal rental rate charged under their Joint Use Agreement for 2012 and 2013. Accordingly, AEP Ohio respectfully requests that the Commission dismiss Count Two of Frontier's Complaint and Frontier's request that the Commission retroactively modify the reciprocal rental rate set forth in that contract.

Respectfully submitted,

/s/ Christen M. Blend

Christen M. Blend (Counsel of Record)
Daniel R. Conway
Porter Wright Morris & Arthur, LLP
41 South High Street, 30th Floor

Columbus, Ohio 43215
Telephone: (614) 227-2086/2270
Facsimile: (614) 227-2100
cblend@porterwright.com
dconway@porterwright.com

Steven T. Nourse
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com

Counsel for Respondent
Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Motion to Dismiss of Ohio Power Company* has been served upon the below-named counsel via electronic mail this 5th day of June, 2014:

Michele L. Noble
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215
Michele.Noble@ThompsonHine.com

Joseph J. Starsick, Jr.
Associate General Counsel
Frontier Communications
1500 MacCorkle Avenue, S.E.
Charleston, West Virginia 25314
joseph.starsick@ftr.com

Christopher S. Huther
Claire J. Evans
WILEY REIN LLP
1776 K. Street, NW
Washington, DC 20006
chuther@wileyrein.com
cevans@wileyrein.com

Counsel for Complainant
Frontier North Inc.

/s/ Christen M. Blend
Christen M. Blend

Summary: Reply Memorandum of Ohio Power Company in Support of Motion to Dismiss electronically filed by Ms. Christen M. Blend on behalf of Ohio Power Company