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December 4, 2014

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
Office 8 the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554

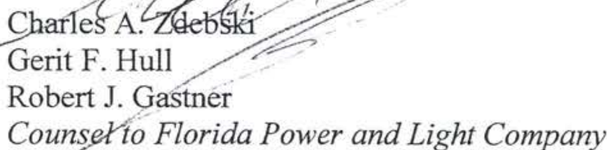
Re: Verizon Florida LLC v. Florida Power & Light Company
File No. EB-14-MD-003

Dear Secretary Dortch:

Enclosed please find an original and four copies of Florida Power & Light Company's Motion for Leave to File and Motion to Establish Case Schedule and Declare Verizon's Self-Help Measures Unjust and Unreasonable for filing with the Commission in the above-referenced matter. Please date stamp the fifth copy of this filing as having been received by your office and return it to the courier in attendance.

Thank you for your assistance in this matter.

Sincerely,



Charles A. Zdebski
Gerit F. Hull
Robert J. Gastner
Counsel to Florida Power and Light Company

Encls.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

VERIZON FLORIDA LLC,	*	
	*	
Complainant,	*	
	*	
v.	*	File No.: EB-14-MD-003
	*	
FLORIDA POWER AND LIGHT COMPANY,	*	
	*	
	*	
Respondent.	*	
	*	

RESPONDENT FLORIDA POWER AND LIGHT COMPANY'S MOTION FOR LEAVE TO FILE

Respondent Florida Power and Light Company ("FPL"), by and through its attorneys, respectfully submits this Motion for Leave to File and requests that the Bureau grant FPL leave to submit the accompanying Motion to Establish Case Schedule and Declare Verizon's Self-Help Unjust and Unreasonable which asks that the Bureau issue an order: (i) confirming that it will issue a decision on the merits in this matter on or before February 2, 2015 or, in the alternative, staying this matter or dismissing it without prejudice so that the parties can pursue a prompt resolution in their state law contract dispute before the Circuit Court for Miami-Dade, Florida (the "Florida Court"); and, (ii) declaring that it is an unjust and unreasonable term or condition of attachment for Verizon Florida LLC ("Verizon") not to remit immediately to FPL all fees owed to date under the parties' joint use agreement as invoiced by FPL pursuant to the terms of that agreement and consistent with the FCC's previously established position, subject to any adjustment required by any order deciding the merits of this proceeding or the Florida Court proceeding.

1. As more fully discussed in the attached Motion to Establish Case Schedule and Declare Verizon's Self-Help Unjust and Unreasonable, the Florida Court's stay order and Verizon's litigation strategy have left the parties without any case schedule or established timeframe to provide clarification and certainty as to the parties' rights and obligations. In addition, Verizon has to date engaged in unlawful self-help resulting in its underpaying FPL approximately $4.3 million to date. As this pattern continues into next year, Verizon's self-help underpayments will reach approximately $6 million.

2. Good cause therefore exists to permit the filing and consideration of the Motion to Establish Case Schedule and Declare Verizon's Self-Help Unjust and Unreasonable. FPL is aware that the Commission has limited resources and innumerable policy, rulemaking, inquiry and other proceedings which demand the dedication of those resources. To the extent that the press of the Commission's business does not allow the Bureau to address this matter fully before February 2, 2015, the Bureau can dismiss Verizon's Complaint without prejudice, or hold this proceeding in abeyance, pending the resolution of the parties' state-court litigation.

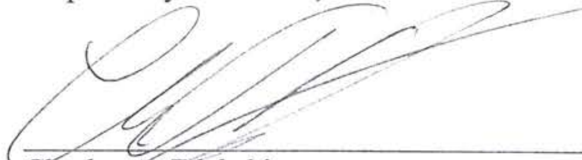
3. In the accompanying Motion to Establish Case Schedule and Declare Verizon's Self-Help Unjust and Unreasonable, FPL requests that the Bureau declare that it will rule on this matter by February 2, 2015 or, if it will be prevented from doing so, issue a ruling stating so now rather than awaiting the expiration of the state-court litigation stay. In doing so, the Bureau will provide the prospect for a meaningful, prompt resolution of this long-lingering contractual stalemate. No interests are served by an indefinite delay. If the Bureau cannot reach the merits of this matter in the near-term, the Florida Court should be given the opportunity to deal with issues with which it customarily and effectively deals.

4. FPL's motion also requests that, in all events, the Bureau put a stop to Verizon's egregious and unlawful self-help. The proper course of action for an ILEC which believes it is paying unreasonable rates subject to 47 U.S.C. § 224 is to continue paying the disputed rates while simultaneously challenging them. The FCC made this clear when it provided its interpretation of the Act to the United States Court of Appeals for the Eleventh Circuit: "[I]n the absence of an FCC adjudication, a cable company seeking pole access must pay the rate that the utility demands." Letter Brief of United States Department of Justice at 2, March 29, 1999, *Gulf Power Co. v. United States*, No. 98-2403 (11th Cir.). FPL therefore requests that the Bureau declare that it is an unjust and unreasonable term and condition of attachment for Verizon not to remit immediately to FPL all amounts owed under the parties' joint use agreement, as invoiced by FPL, subject to any adjustment required by a final order of the Commission or the Florida Court.

5. In sum, FPL believes it is efficient and reasonable to address the timing issue and self-help issue through the accompanying motion so that the parties may proceed to resolve their dispute and clarify their legal and regulatory rights and obligations as efficiently, fairly and promptly as possible. Good cause thus exists to grant this motion for leave.

For the foregoing reasons, FPL respectfully requests that the Commission grant it leave to file the attached Motion to Establish Case Schedule.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2014, I caused a copy of the foregoing Respondent's Motion for Leave to File to be served on the following by hand delivery, U.S. mail or electronic mail (as indicated):

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Nathaniel J. Davis, Sr., Deputy Secretary
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(Via U.S. Mail)

Charles A. Zdebski

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

VERIZON FLORIDA LLC,	*	
	*	
Complainant,	*	
	*	
v.	*	File No.: EB-14-MD-003
	*	
FLORIDA POWER & LIGHT COMPANY,	*	
	*	
	*	
Respondent.	*	
	*	

RESPONDENT FLORIDA POWER & LIGHT COMPANY'S MOTION TO ESTABLISH CASE SCHEDULE AND DECLARE VERIZON'S SELF-HELP MEASURES UNJUST AND UNREASONABLE

Respondent Florida Power and Light Company ("FPL"), by and through its attorneys, respectfully submits this Motion to Establish Case Schedule and Declare Verizon's Self-Help Unjust and Unreasonable, and requests that the Bureau issue an order: (i) confirming that it will issue a decision on the merits in this matter on or before February 2, 2015 or, in the alternative, staying this matter or dismissing it without prejudice so that the parties can pursue a prompt resolution in their state law contract dispute before the Circuit Court for Miami-Dade, Florida (the "Florida Court"); and, (ii) declaring that it is an unjust and unreasonable term or condition of attachment for Verizon Florida LLC ("Verizon") not to remit immediately to FPL all fees owed to date under the parties' joint use agreement as invoiced by FPL pursuant to the terms of that agreement and consistent with the FCC's previously established position, subject to any adjustment required by any order deciding the merits of this proceeding or the Florida Court proceeding. In support of this Motion, FPL states as follows.

BACKGROUND

1. The present dispute between FPL and Verizon Florida LLC ("Verizon" or "Complainant") dates back to June 27, 2011, when Verizon sent FPL a letter seeking to revise the parties' longstanding 1975 joint-use agreement and retroactively apply its unilateral, unauthorized interpretation of the 2011 Pole Attachment Order.[1] *See* Respondent Florida Power And Light Company's Response to Verizon Florida LLC's Complaint, April 4, 2014 ("Response"), 7. Although FPL engaged Verizon in rate-related discussions, Verizon, nonetheless, gave FPL notice on December 9, 2011 of its intent to terminate the joint use agreement, which notice became effective on June 9, 2012. *Id.*, 8. However, under the long-standing terms of the parties' joint use agreement, the parties were to continue to honor their obligations under the agreement, with respect to existing attachments, unless and until a new agreement could be reached or those attachments were removed from the poles. Verizon has remained attached to FPL's poles without a new agreement in place but has failed to honor its contractual payment obligations. Verizon has paid only 25 percent of the contractual pole attachment fees for 2011, 2012 and 2013. *Id.*

2. Verizon's refusal to make the payments required by its express contractual obligations forced FPL to file suit against Verizon in the Florida Court on April 23, 2013. The Florida Court action is a simple collection action against Verizon alleging straightforward breach of contract claims for unpaid joint use fees. The Florida Court denied Verizon's motions to dismiss, to stay or to transfer the case.[2] It also dismissed Verizon's counterclaim, advising Verizon that it was obligated to pursue its administrative remedy. Response, 8-9.

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[1] *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 (April 7, 2011) ("Pole Attachment Order" or "2011 Pole Attachment Order").

[2] Verizon was simultaneously litigating an essentially identical case in another circuit court in Florida in which it had not moved to dismiss or stay the action.

3. On January 31, 2014, Verizon filed its Complaint in the above-captioned proceeding.[3] After filing the Complaint, Verizon went back to the Florida Court and filed amended counterclaims against FPL, asking, somewhat curiously, that the state court decide the very issues Verizon had now brought to this Commission. Understandably, the amended counterclaims were also dismissed. On April 4, 2014, FPL filed its Response in this proceeding. Verizon filed its Reply on April 24, 2014.

4. Although the Florida Court had previously denied Verizon's motions to dismiss or stay, on November 3, 2014 the court *sua sponte* reconsidered the motion approximately one month before the trial. *See* Florida Court Order dated November 3, 2014, attached as Exhibit A. The Florida Court deferred ruling on FPL's pending summary judgment ruling and continued the scheduled December 1, 2014 trial of the case "pending resolution of Verizon's pending matter before the FCC." *Id.* FPL moved for reconsideration of the November 3, 2014 order on November 11, 2014 and that request remains pending. A hearing is scheduled for December 9, 2014.

5. In the November 3, 2014 Order, the Florida Court expressly declared: "The parties shall schedule a status conference on the Court's motion calendar, approximately ninety (90) days from the date hereof, to advise the status of the FCC proceeding." *Id.* That date is approximately February 2, 2015.

DISCUSSION

6. Significantly, Verizon continues to maintain and operate all of its attachments on FPL's poles and to enjoy all of the attendant benefits. *Id.* However, beginning with calendar year 2011, Verizon has engaged in unlawful self-help and, without FPL's consent, has paid only 25

[3] Pole Attachment Complaint, File No. EB-14-MD-003 (filed January 31, 2014) ("Complaint").

percent of the fees due under the ongoing obligations imposed by the joint use agreement that Verizon terminated. *Id.*

7. The proper course of action for an ILEC which believes it is paying unreasonable rates subject to 47 U.S.C. § 224 is to continue paying the disputed rates while simultaneously challenging them. The FCC made this clear when it provided its interpretation of the Act to the United States Court of Appeals for the Eleventh Circuit: "[I]n the absence of an FCC adjudication, a cable company seeking pole access must pay the rate that the utility demands." Letter Brief of United States Department of Justice at 2, March 29, 1999, *Gulf Power Co. v. United States*, No. 98-2403 (11th Cir.), attached as Exhibit B. *See also Fiber Technologies Networks, LLC v. Duquesne Light Co.,* 18 FCC Rcd. 10628 (2003) (holding that complainant attacher would not suffer irreparable harm by paying alleged overcharges for pole attachment fees and then filing a complaint seeking a refund).

8. Verizon, however, as detailed in FPL's Response, has ignored the FCC's longstanding position and engaged in unlawful, unprecedented self-help, resulting in its underpaying FPL approximately $4.3 million to date. As this pattern continues into next year, Verizon's self-help underpayments will reach approximately $6 million. Any further delay in the resolution of the parties' dispute will result in significant, obvious financial harm to FPL and its customers.

9. Verizon's calculated and deliberate manipulation has resulted in its desired – and profitable - state of limbo. Verizon continues to enjoy the benefits, privileges and revenues of having its network deployed on FPL's poles. Verizon has done so despite having no current contract with FPL and while withholding approximately 75 percent of the fees owed FPL, an amount rapidly growing from $4.3 million to $6 million. And Verizon's carefully crafted

litigation strategy has left the parties without a trial schedule or a timeframe for regulatory clarity: the Florida Court case is stayed and this proceeding has no established schedule. Verizon has left FPL with no choice but to seek the specialized relief necessitating this motion.

10. FPL is aware that the Commission has limited resources and innumerable policy, rulemaking, inquiry and other proceedings which demand the dedication of those resources, ranging from Net Neutrality to the proper allocation of the nation's available spectrum. FPL is also aware that the priorities of the full Commission itself may dictate to some extent where those resources are deployed with regard to the Enforcement Bureau. Given all of this, it may prove difficult for the Bureau to dedicate resources to proceedings such as this.

11. FPL is obviously encouraged by the fact that the new Chief of the Enforcement Bureau has announced an intent to expedite matters on the Bureau's docket. To the extent that the Bureau can implement the Chief's initiative, FPL requests simply that the Bureau declare that it will rule by February 2, 2015. If the Bureau will be unable to address this matter fully before February 2, 2015, FPL asks, alternatively, that the Bureau hold this proceeding in abeyance or dismiss Verizon's Complaint without prejudice pending the resolution of the Florida Court case.

12. A regulatory ruling would, of course, be in the best interests of both parties and the FCC itself. However, in granting either of the alternative forms of relief FPL requests here, the Bureau will provide the prospect for a meaningful, prompt resolution of this long-lingering contractual stalemate. No interests are served by an indefinite delay. If the Bureau cannot reach the merits of this matter in the near-term, the Florida Court should be given the opportunity to deal with issues with which it customarily and effectively deals.

13. Commission precedent is clear that it will defer to local courts for resolution of disputes involving breach of contract and non-payment of pole attachment fees:

> Although the Commission's jurisdiction encompasses certain practices growing out of a contractual relationship between a utility and a cable operator, it does not extend to adjudication of the legal impact of the failure of a party to fulfill its contractual obligations, nor to the determination of what contract rights exist once a party has unilaterally moved to terminate an agreement. In other words, as we read both the legislative history and the statute itself, Congress has nowhere expressed its intent that this Commission be accorded the authority to preempt local jurisdiction in such matters. Rather, such matters are left to the existing state law governing breach of contract, whether express or implied, and questions of unjust enrichment. For these reasons, Appalachian must pursue in state courts any complaint that Capitol has continued to use its poles without paying for these services.

Appalachian Power Co. v. Capitol Cablevision Corp., 49 RR 2d 574, 578 (1981).

14. In fact, other very similar cases involving joint use disputes between ILECs and electric utilities have followed paths clearly allowing them to be resolved either in state court, federal court or in arbitration. First, casting a revealing light on Verizon's deplorable tactics in its conduct with FPL, Verizon litigated a similar dispute in a different Florida state court against Tampa Electric Company, without engaging in the forum-shopping with which we are burdened here. Instead Verizon asked that court to decide whether the joint use rate was just and reasonable, without bringing either the case or specific issues to the Commission. That case has been dismissed pursuant to a joint stipulation because, upon information and belief, the parties recently settled their dispute. *See* Docket of *Tampa Elec. Co vs. Verizon Florida LLC*, Case No. 12-CA-016349 (Hillsborough Fla. Cir. Ct. 2012) (www.http://pubrec10.hillsclerk.com/ Unsecured/CaseDetail.aspx?CaseID=2857099 last visited December 2, 2014), attached as Exhibit C.

15. Similarly, two cases involving the ILEC Frontier are moving towards resolution in other forums. In the United States District Court for the Eastern District of North Carolina, Western Division, a joint use dispute between Frontier and Duke Energy has been ordered to arbitration. *Frontier Communications of the Carolinas, LLC v. Duke Energy Carolinas LLC*,

No. 5:13-CV-791-FL (EDNC), order dated August 15, 2014, attached as Exhibit D. In Ohio, a state that has certified that it regulates the field of pole attachments under the reverse preemption authority of Section 224, a joint use dispute between Frontier and Ohio Edison is on track for trial after the court, among other things, denied Frontier's motion to dismiss. Frontier has made no argument in that case that the rates, terms or conditions of attachment must be decided by the Ohio Public Utilities Commission. *See Ohio Edison Co. v. Frontier North, Inc. et al.*, No. 5:14cv321 (N.D. Ohio), order dated November 14, 2014, attached as Exhibit E.

16. Verizon therefore can make no legitimate argument that this case is unique and must be decided only by the Commission in order to establish federal law and policy and avoid other cases going forward in other forums. Indeed, as noted above, Verizon did not even seek to invoke this Commission's jurisdiction in its case against Tampa Electric Company.

17. In all events, to ensure fair and common-sense resolutions of disputes such as these, Verizon should not be allowed to engage in self-help at an egregious pace, soon to reach almost $6 million, in complete disregard of the law and the Commission's express position in its letter to the United States Court of Appeals for the Eleventh Circuit in *Gulf Power Co. v. United States*, No. 98-2403 (11th Cir.). *See* Exhibit B at 2. Verizon's conduct is an unjust and unreasonable term and condition of attachment in violation of Section 224 and 47 C.F.R. § 1.1410. The Commission should conclude as much and declare that it is unjust and unreasonable for Verizon not to remit immediately to FPL all fees owed to date invoiced by FPL in accordance with the agreed contractual rate under the parties' joint use agreement. The Commission can issue such a declaration pursuant to its authority under Section 1.1410 based on the claims in Verizon's Complaint. The FCC also should declare that such payment is subject to any

adjustment that may be ultimately required by any order deciding the merits of this proceeding or the Florida Court proceeding.

18. In conclusion, if the Bureau is unable to resolve this matter during the time period of the stay imposed by the Florida Court, there is no reason to engage the resources and time of both parties and the Commission by retaining jurisdiction when there is another forum that is prepared, competent and authorized to adjudicate the parties' conflict. There is also no reason, under any circumstances or scenario, not to declare that it is unjust and unreasonable for Verizon to withhold nearly $6 million from FPL's customers.

WHEREFORE, FPL respectfully requests that the Bureau expeditiously grant this motion, and (i) either establish a schedule declaring that it will issue a ruling in this matter by February 2, 2015, or in the alternative, promptly stay this matter or dismiss it without prejudice; and (ii) declare it an unjust and unreasonable term and condition of attachment for Verizon not to remit immediately to FPL all fees owed to date under the parties' joint use agreement, subject to any adjustment that may be required by any order deciding the merits of this proceeding or the Florida Court proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2014, I caused a copy of the foregoing Respondent's Motion to Establish Case Schedule and Declare Verizon's Self-Help Unjust and Unreasonable to be served on the following by hand delivery, U.S. mail or electronic mail (as indicated):

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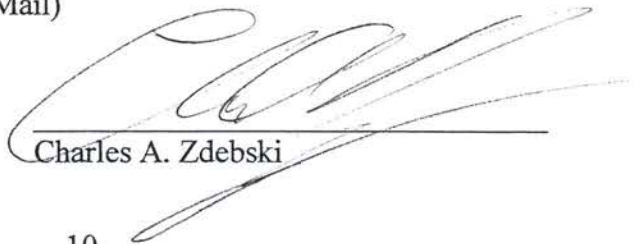

Charles A. Zdebski

Exhibit A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT CO.

Plaintiffs,

vs.

VERIZON FLORIDA, LLC

Defendants

Complex Business Litigation Division
Case No.13-14808 CA-40

ORDER DEFERRING AND STAYING MATTER; REMOVING FROM TRIAL CALENDAR

_______________________________________/

THIS MATTER came before the Court, sua sponte, and the Court having reviewed the file, the pending motion for summary judgment, materials in preparation for the December 1, 2014 trial period, and being otherwise fully advised in the premises, it is

ORDERED and **ADJUDGED** as follows:

The Court defers hearing and ruling on the Plaintiff's Motion for Summary Judgment pending resolution of Verizon's pending matter before the FCC.

The December 1, 2014 trial setting in this cause is continued pending resolution of Verizon's pending matter before the FCC.

The parties shall schedule a status conference on the Court's motion calendar, approximately ninety (90) days from the date hereof, to advise the status of the FCC proceeding.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 11/03/14.

JOHN W. THORNTON
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

cc: Counsel / Parties of record
adavis@ssd.com;lcollins@butlerpappas.com;wschoel@butlerpappas.com

Exhibit B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-2403

D.C. Docket No. 3:96cv381/LAC

GULF POWER COMPANY, ALABAMA

POWER COMPANY, an Alabama corporation,

et al.,

Plaintiffs - Appellants,

Cross-Appellees,

versus

UNITED STATES OF AMERICA,

FEDERAL COMMUNICATIONS COMMISSION,

Defendants - Appellees,

Cross-Appellants.

Appeals from the United States District Court

for the Northern District of Florida

(September 9, 1999)

Before EDMONDSON and CARNES, Circuit Judges, and WATSON*, Senior Judge.

---

*Honorable James L. Watson, Senior Judge, U.S. Court of International Trade, sitting by designation.

CARNES, Circuit Judge:

The plaintiffs-Gulf Power Co., Alabama Power Co., Georgia Power Co., Mississippi Power Co., Ohio Edison Co., Duke Power Co., and Florida Power

Corp.-are electric utility companies who brought suit against the United States and the Federal Communications Commission seeking a declaration that the 1996 amendment to the Pole Attachment Act, as codified at 47 U.S.C. § 224(f), is facially unconstitutional because it effects a taking of their property without an adequate process for securing just compensation, in violation of the Fifth Amendment. The district court agreed that the amendment effected a taking of property, but granted summary judgment in favor of the defendants after concluding the amendment did not deny the utilities an adequate process for securing just compensation. For the reasons set forth below, we affirm the district court's judgment.

I. BACKGROUND

The plaintiffs, like other electrical utilities in this country, own vast networks of poles, ducts, conduits, and rights-of-way which are used to supply electricity to consumers. Power lines are strung across public and private lands and millions of poles support those lines.[(1)] Ducts and conduits-usually underground pipes encased in concrete-house electric conductors. Although the utilities were able to negotiate privately with some land-owners to secure rights-of-way, they also received substantial assistance from state governments in acquiring their networks. States routinely delegated to utilities their sovereign power of eminent domain so

that they could acquire the needed rights-of-way. In addition, states allowed utilities to locate their network facilities, e.g., poles, on public rights-of-way.

As with electric utilities, cable television companies must have a physical carrier for their cables in order to supply television signals to their customers. Because "underground installation of the necessary cables is impossible or impracticable[,] [u]tility company poles provide . . . virtually the only practical physical medium for the installation of television cables." FCC v. Florida Power Corp., 480 U.S. 245, 247, 107 S. Ct. 1107, 1109 (1987). With the advent of cable television in the 1950's, it became common practice for cable companies to lease access to utility companies' poles.

Over time, however, cable companies grew upset with the access rates and complained to Congress that utilities "were exploiting their monopoly position by engaging in widespread overcharging." Id. at 247, 107 S. Ct. 1109-10. Congress responded in 1978 by enacting the Pole Attachments Act, which was codified at 47 U.S.C. § 224. In that act, Congress empowered the Federal Communications Commission ("FCC"), in those states in which access rates were not already regulated, to determine "just and reasonable" rates a utility could charge cable companies for access to its poles, ducts, conduits, and rights-of-way. See 47 U.S.C. § 224(b). Congress restricted the FCC, however, to setting a rate within a statutorily defined range of minimum to maximum rates. See 47 U.S.C. § 224(d)(1).[(2)] Significantly, the Pole Attachments Act, as originally enacted in 1978, did not require a utility to provide cable companies access to its property. Instead, it provided that if a utility voluntarily chose to provide access, the rate charged for that access was subject to FCC regulation.

Things stayed that way until 1996, when telecommunication carriers joined cable companies in demanding a right of access to utilities' networks of poles, ducts, conduits, and rights-of-way. Telecommunication carriers were interested in using wire communications to carry their signals and, like cable companies, needed a physical carrier for their wires. Congress responded to these demands by amending the Pole Attachments Act as part of the Telecommunications Act of 1996. For the purposes of this case, the most significant amendment is a mandatory access provision which provides that a "utility shall provide a cable television system or any telecommunications

carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). The only exceptions to a utility's mandatory obligation to provide access are where there is insufficient capacity or some safety, reliability, or other engineering problem. See 47 U.S.C. § 224(f)(2).

Although Congress amended the Pole Attachments Act to require utilities to provide access to their property, it left intact the FCC's authority to determine the compensation a utility is entitled to receive for providing that access. Hence, as before, the FCC determines the compensation a utility may receive for providing access by setting a "just and reasonable" rate within the range of minimum to maximum rates Congress set forth in the Act[(3)]; 47 U.S.C. § 224(d) describes the range of rates for cable companies' access, while 47 U.S.C. § 224(e) describes the range of rates for telecommunication carriers' access.

The FCC's rate order, however, is not final. If a utility believes the rate set by the FCC fails to provide adequate compensation, it may seek relief by appealing directly to a United States Court of Appeals. See 47 U.S.C. § 402 (a). Among other things, the court of appeals is empowered to enter "a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part" the FCC's order. 28 U.S.C. § 2349(a).

As mentioned earlier, the plaintiffs are seven electric utility companies. Each falls within the Act's definition of a "utility"[(4)] and is therefore required to provide cable companies and telecommunication carriers access to its poles, ducts, conduits, and rights-of-way under the Act's mandatory access provision. See 47 U.S.C. § 224(f). The plaintiffs brought this suit in federal district court against the United States and the FCC (the "defendants") seeking a declaration that the Act's mandatory access provision is facially unconstitutional because it constitutes a taking of property without an adequate process for securing just compensation, as required by the Fifth Amendment. They also sought to permanently enjoin and restrain the defendants from enforcing the mandatory access provision.

After the plaintiffs filed suit, the Association for Legal Telecommunication Services, which is a non-profit, national trade association representing

telecommunications companies, and American Communication defendants. In addition, several national and state cable television associations participated as amici curiae supporting the defendants.

The plaintiffs, defendants, and intervenors all moved for summary judgment. The district court agreed with the plaintiffs that the Act's mandatory access provision effected a taking of property under the Fifth Amendment. However, it concluded the plaintiffs' facial challenge failed because the Act provided an adequate process for securing just compensation for that taking. Accordingly, the district court denied the plaintiffs' motion for summary judgment but granted the defendants' and intervenors' motions for summary judgment. The plaintiffs appealed, contending that the district court erred in not finding that the Act's mandatory access provision was unconstitutional. The defendants cross-appealed the court's determination that the Act's mandatory access provision effected a taking of property.

II. DISCUSSION

The plaintiffs' contention that the Act's mandatory access provision is facially unconstitutional requires us to address the following two issues. First, does the Act's mandatory access provision effect a taking of property? Second, if it does, is an adequate process available to a utility to secure just compensation for that taking? We address each issue in turn, applying a de novo standard of review. See, e.g., Rodriguez ex. rel. Rodriguez v. United States, 169 F.3d 1342, 1346 (11th Cir. 1999) (de novo standard applies to determination of a statute's constitutionality). In addition, we note that because the plaintiffs are bringing a facial challenge to the Act, they must "establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) (emphasis added). See also New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11, 108 S. Ct. 2225, 2233 (1988) ("to prevail on a facial attack the plaintiff must demonstrate that the challenged law . . . could never be applied in a valid manner.") (quotation and citation omitted); Jacobs v. The Florida Bar, 50 F.3d 901, 906 n.20 (11th Cir. 1995) ("[w]hen a plaintiff attacks a law facially, the plaintiff bears the burden of proving that the law could never be constitutionally applied.")

A. THE ACT'S MANDATORY ACCESS PROVISION EFFECTS A TAKING OF PROPERTY

In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982), the Supreme Court considered whether a statute which required landlords to permit permanent, physical occupation of their property by cable companies constituted a taking. The Court held that it did and, in doing so, announced the following takings rule: "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Id. at 426, 102 S. Ct. at 3171. Among other arguments the Court rejected in announcing that rule was the argument that the statute was merely a "permissible regulation of the use of real property." Id. at 439, 102 S. Ct. at 3178. The Court held that although property is subject to broad regulatory power, a regulation becomes a taking when the government authorizes permanent physical occupation by a third party. Id. at 439-40, 102 S. Ct. at 3178-79.

We agree with the district court that Loretto dictates the conclusion that the Act's mandatory access provision, 47 U.S.C. § 224(f), effects a taking of a utility's property. Under § 224(f), a utility has no choice but to permit a cable company or telecommunication carrier to permanently occupy physical space on its poles, ducts, conduits and rights-of-way. See 47 U.S.C. § 224(f)(1) ("[a] utility shall provide a cable television system or any telecommunication carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.") (emphasis added). Such a permanent, physical occupation of property falls squarely within the Loretto rule.

Our conclusion in that regard is consistent with FCC v. Florida Power Corp., 480 U.S. 245, 107 S. Ct. 1107 (1987), in which the Supreme Court unanimously reversed this circuit's holding in Florida Power Corp. v. FCC, 772 F.2d 1537 (11th Cir. 1985), that the pre-1996 version of this Act effected a taking of property under Loretto. In reaching that result, the Supreme Court stressed that unlike the statute in Loretto where the landlord was required to submit to permanent physical occupation, the pre-1996 version of the Act did not require a utility to give a third party access to its property. Without the "element of required acquiescence," there was no taking under

Loretto. FCC v. Florida Power Corp., 480 U.S. at 252, 107 S. Ct. at 1112. The Court went on to note, however, that it was not deciding "what the application of [Loretto] would be if the FCC in a future case required utilities, over objection to enter into . . . pole attachment agreements." Id. at 251-52 n. 6, 107 S. Ct. at 1111-12 n.6. Today, that "future case" is before us: the "element of required acquiescence" lacking in the pre-1996 version the of the Act is now present in § 224(f). Because § 224(f) requires a utility to acquiesce to a permanent, physical occupation of its property, we conclude that the Act's mandatory access provision effects a per se taking of a utility's property under the Fifth Amendment.

We are unconvinced by the defendants' attempt to distinguish Loretto. In contending the mandatory access provision does not effect a taking, the defendants do not deny that § 224(f) compels a utility to submit to a permanent, physical occupation of its property. Instead, their primary contention is that there is no taking because the utilities covered by the Act, including the plaintiffs, never had an absolute right to exclude permanent, physical occupation of their poles, ducts, conduits, and rights-of-way where that permanent occupation is for a public purpose authorized by the sovereign.

The defendants' argument in support of this contention that the utilities' bundle of rights never included the power to exclude, runs as follows. Utilities obtained the rights-of-way on which they constructed their poles, ducts, and conduits via the eminent domain power which states had conferred upon them.[(5)] Necessary to the utilities' ability to obtain property via eminent domain was that a public purpose was being served. That is so because private property may only be taken under the eminent domain power for a "public use." See, e.g., Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 245, 104 S. Ct. 2321, 2331 (1984). Because the utilities took the property with the understanding that they would have to put it to a public use, they were necessarily on notice that, in the future, the sovereign could require them to allow permanent occupation of their property by another entity also serving the public interest.[(6)]

We find that argument unpersuasive. The Supreme Court has expressly recognized that the fact property was taken for a public use to begin with

does not mean that it may be taken again for another public use without the payment of just compensation to its owner. In Western Union Telegraph Co. v. Pennsylvania R.R. Co., 195 U.S. 540, 573, 25 S. Ct. 133, 142 (1904), the Supreme Court stated: "The "right of way of a railroad is property devoted to a public use, and . . . as such is subject, to a certain extent, to state and Federal control. . . . But it has always been recognized . . . that a railroad right of way is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of [just] compensation." The Court has also noted that "the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property, and neither the corpus of that property nor the use thereof constitutionally can be taken for a compulsory price which falls below the measure of just compensation." United Rys. & Elec. Co. v. West, 280 U.S. 234, 249, 50 S. Ct. 123, 125 (1930), overruled on other grounds by, Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S. Ct. 281 (1944).

Consistent with these principles, we conclude that the fact a utility gained its property knowing it would be subject to extensive regulation for the public use does not means its property may be taken for a public purpose without payment of just compensation, however laudable that public purpose might be. See also GTE Northwest, Inc. v. Public Utility Commission, 900 P.2d 495, 504 (Or. 1995) (en banc) ("[t]he facts that an industry is heavily regulated, and that a property owner acquired the property knowing that it is heavily regulated, do not diminish a physical invasion to something less than ed his property for public use should henceforth be on notice that the sovereign can authorize permanent occupation of his property without payment of just compensation has it backwards. A property owner is entitled to expect that the property it acquired via eminent domain, and paid just compensation for, came with the right all property has - not to be subject to government-coerced, permanent physical occupation without just compensation.

We also find unpersuasive the three arguments raised by the amici in support of the defendants' position that the mandatory access provision does not effect a taking of property. First, the amici argue the mandatory access provision should be viewed merely as part of Congress' broad power to

regulate property being used for the public interest. Because a utility's rights-of-way are regularly used for serving the public, a utility may not exclude others whom Congress has determined require access, amici argue. That argument fails because it ignores the Loretto rule that "[a] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Loretto, 458 U.S. at 426, 102 S. Ct. at 3171 (emphasis added).

Next, amici point out that the Supreme Court in Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 109 S. Ct. 609, 615 (1989), recognized that a utility has a "partly public, partly private status." That status, they argue, distinguishes a utility from the purely private property owner who suffered the taking in Loretto. Because a utility has a "partly public" status, the argument goes, a utility lacks a right to exclude others whom Congress has determined must have access to serve the public. But Duquesne's discussion of utilities was not in the context of a takings case dealing with the permanent occupation of property. Nothing in Duquesne suggests a utility's property is less subject to protection against permanent, physical occupation than anyone else's property. It is not. Put differently, we do not believe that Duquesne carved out an exception to the Loretto rule for the property of utilities.

Third, amici characterize the mandatory access provision as a simple regulatory condition designed to prevent utilities from exercising monopoly control over their network of poles, ducts, conduits, and rights-of way, and which is thereby intended to promote the Telecommunications Act of 1996's general goal of fostering competition in the communications market. Such a regulation is particularly necessary, they say, because the Telecommunications Act of 1996, among its other provisions, made it easier for electric utilities to enter and compete in the communications market. This argument is meritless. Characterizing the mandatory access provision as a regulatory condition, even one allegedly designed to foster competition, cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property. However laudatory its motive, Congress' power to regulate utilities does not extend to taking without just compensation the right of a utility to exclude unwanted occupiers of its property.

Finally, we reject the intervenors' argument that the mandatory access provision is not a taking because electric utilities, such as the plaintiffs, could avoid the effect of the Act by refraining from using their poles, ducts, conduits, and rights-of-way for wire communications. This argument is made possible because the Act's definition of a "utility" subject to the mandatory access provision covers only electric utilities who use their poles, ducts, conduits, and rights-of-way for wire communications. See 47 U.S.C. § 224(a). We see the point, but we think this argument is foreclosed by Loretto. The protection against a permanent, physical occupation of one's property does not hinge on the choice of use for that property. See Loretto 458 U.S. at 439 n.17, 102 S. Ct. at 3178 n.17 ("A landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. [This] broad 'use-dependency' argument proves too much. . . . The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated."). Put another way, the bundle of rights that a utility has in its property includes the right to permit its use for wire communications, and exercise of that right may not be conditioned on being forced to submit to a permanent, physical occupation of its property without payment of just compensation.

In sum, we agree with the district court's holding that the mandatory access provision effects a per se taking of property under the Fifth Amendment, which leads us to the issue of whether the Act provides an adequate process for obtaining just compensation for the taking.

B. THE ACT PROVIDES AN ADEQUATE PROCESS FOR OBTAINING JUST COMPENSATION FOR THE TAKING EFFECTED BY THE MANDATORY ACCESS PROVISION

The fact that the Act's mandatory access provision effects a taking of property does not, by itself, make it unconstitutional. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Williamson County Regional Planning Com'n v. Hamilton Bank, 473 U.S. 172, 194, 105 S. Ct. 3108, 3120 (1985). The Supreme Court has made the requirements clear: "[A]ll that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking. If the government has provided

an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." Id. at 194-95, 105 S. Ct. at 3120-21 (internal citation and quotations omitted).

The plaintiffs contend the Act fails to provide a constitutionally adequate process for obtaining just compensation, for two reasons. First, they argue the process is constitutionally inadequate because it violates separation of power principles by delegating to the FCC, instead of a court, the initial task of determining the compensation a utility receives. Second, they argue the Act's provision limiting the FCC to awarding a "just and reasonable" rate within the range of rates set by Congress, see 47 U.S.C. § 224(b), will prevent a utility from receiving the constitutionally required rate of just compensation. We address each argument in turn.

1. Whether the Act Violates Separation of Power Principles

In support of their argument that the Act's process for providing compensation violates separation of power principles, the plaintiffs rely primarily on Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S. Ct. 622 (1893). In that case, the Supreme Court had before it a statute in which Congress had imposed limits on the amount of compensation a property owner could receive after Congress had authorized the taking of his property. The property owner contended that under Congress' limitations, he had not received just compensation. The Supreme Court agreed, rejecting the notion Congress could both authorize a taking and conclusively determine the level of just compensation due. The Court stated:

By this legislation [C]ongress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through [C]ongress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation.

The [C]onstitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Id. at 327, 13 S. Ct. at 626. The Court went on to note that "[t]he right of the legislature . . . to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the 'just compensation' it ought to pay therefor, . . . cannot for a moment be admitted or tolerated under our [C]onstitution." Id. at 327-28, 13 S. Ct. at 627 (internal quotation and citation omitted).

According to the plaintiffs, Monongahela requires us to hold that the Act fails to provide a utility an adequate process to obtain just compensation for the taking of its property. That is so, they argue, because under the Act, the FCC has the initial task of determining the compensation a utility receives for the taking of its property by setting a "just and reasonable" rate within the range of minimum to maximum rates established by Congress. The plaintiffs assert that such a legislative delegation of power to the FCC usurps their right, as recognized in Monongahela, to a judicial ascertainment of just compensation.

The plaintiffs also seek to support their position by citing our opinion in Florida Power Corp. v. FCC, 772 F.2d 1537 (11th Cir. 1985), a decision which was reversed by the Supreme Court, see, FCC v. Florida Power Corp., 480 U.S. 245, 107 S. Ct. 1107 (1987). As mentioned earlier, we held in Florida Power that an FCC rate order issued pursuant to the pre-1996 version of the Act constituted a taking under Loretto. That holding led us to also address whether the utility had received just compensation for that taking. The pre-1996 version of the Act was identical to the current Act insofar as it assigned to the FCC the initial task of setting the compensation a utility received for providing access to its property.

We said in Florida Power that this process was unconstitutional under Monongahela because it "does not allow for a judicial determination of what constitutes just compensation." Id. 772 F.2d at 1546. It was our view at the time that Congress had prescribed in the Act "a 'binding rule' in regard to the ascertainment of just compensation" and therefore had "usurped what has long been held an exclusive judicial function." Id. The plaintiffs concede

that in light of the Supreme Court's reversal of our Florida Power decision, our statements concerning the adequacy of the process for obtaining just compensation are not binding under the prior panel precedent rule.(7) Nonetheless, they argue our reasoning in that prior decision supports their position that the Act's process for providing just compensation is constitutionally inadequate.

Although the concerns raised by the plaintiffs and discussed in our opinion in Florida Power merit consideration, we are unpersuaded that the Act's process for providing a utility with compensation amounts to an impermissible invasion of the judicial branch's realm. True, it is ultimately the responsibility of the judicial branch to ensure that the compensation awarded for a taking satisfies the constitutional standard of just compensation. See Monongahela, 148 U.S. at 327, 13 S. Ct. at 626. Thus, if Congress (or the executive branch) attempts to impose a limitation on the measure of compensation for a taking, a court must evaluate that standard to see if it is consistent with the constitutionally mandated level of just compensation, and a court is not bound to follow that standard in making judicial determinations of the compensation due if the standard fails to secure just compensation.

However, the fact that our constitutional scheme dictates that the judicial branch is entrusted with the ultimate responsibility for ensuring that just compensation is awarded does not mean the other branches of government must be excluded from the process of determining the proper level of just compensation. Nothing in Monongahela or any other Supreme Court precedent compels such a conclusion. To the contrary, the Supreme Court has stated that "all that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." Williamson County, 473 U.S. at 194-95, 105 S. Ct. at 3120-21 (citation and quotation omitted). While a process in which the judicial branch does not make the final determination of what constitutes just compensation may be constitutionally inadequate, we see no constitutional problem with a process that employs an administrative body, such as the FCC, to determine just

compensation in the first instance. Indeed, use of an administrative body with some technical expertise over the subject matter of the property to be valued likely will aid the judiciary in arriving at a more reliable determination of the proper level of just compensation. So long as an administrative body's decision concerning the level of compensation owed for a taking remains subject to judicial review to ensure just compensation, use of an administrative body can be a valid part of "provid[ing] an adequate process for obtaining compensation." Id.

Our conclusion that an administrative body may participate in the process of determining just compensation where its decision is subject to judicial review is consistent with the Seventh Circuit's decision in Wisconsin Central Limited v. Public Service Commission of Wisconsin, 95 F.3d 1359, 1369 (7th Cir. 1996). In that case, some railroads argued that the procedures Wisconsin had provided for obtaining just compensation for a taking were constitutionally inadequate because the Wisconsin legislature had authorized an administrative body to set the level of compensation in the first instance. But the administrative determination was subject to judicial review in the Wisconsin courts. The Seventh Circuit decided that: "The railroads are quite correct that a decision concerning the just compensation owed one whose property is taken is the province of judicial -- not legislative -- determination. However, as Williamson County illustrates, this requirement is satisfied by the availability of judicial review. The Fifth Amendment does not require a judicial determination of just compensation in the first instance on each occasion of a taking of private property." Id. at 1369.

Accordingly, we conclude that the fact that the Act assigns to the FCC, an administrative body with some special expertise in the technical aspects of pole attachments, the task of initially determining a utility's compensation does not, by itself, render the process for providing compensation constitutionally inadequate. The more relevant issue is whether the judicial review of the FCC's determination that is available ensures that the final and conclusive determination of the just compensation owed to a utility is made by the judicial branch. We turn now to that issue.

A utility that believes the rate ordered by the FCC fails to provide just compensation for the taking of its property may appeal the FCC's rate order

directly to a federal appeals court. See 47 U.S.C. § 402(a) (providing generally for appeals from FCC orders). The appeals court has jurisdiction to enter a judgment concerning the validity of the FCC's order and may enforce its judgment with an injunction. See 28 U.S.C. § 2342(1) ("The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC] made reviewable by [47 U.S.C. § 402(a)]"; 28 U.S.C. § 2349(a) ("The court of appeals . . . has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency."). In addition, 5 U.S.C. § 706(2)(B) provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity . . .

(emphasis added). The issue of whether the rate ordered by the FCC provides a utility just compensation for a taking effected by the Act is, of course, a constitutional issue. Thus, the federal appeals court to which an appeal is taken has jurisdiction to decide that an FCC rate order is constitutionally invalid because it does not provide just compensation. Under the statutory scheme, it is the judicial branch which will, consistent with Monongahela, make the ultimate determination of just compensation due for a taking of a utility's property under the Act.

To be sure, an appellate court is not the usual forum in which factual issues such as the proper level of just compensation are resolved, and is not the forum we would have chosen. But Congress has the right to specify the process so long as it is adequate for a judicial determination of just compensation. An appellate court has at least five means at its disposal to gather the information needed to determine just compensation, and those means are sufficient to provide a utility with a full and fair opportunity to submit for judicial consideration all relevant evidence bearing on the question of just compensation. The five means are as follows:

1) The court may rely on the evidentiary submissions in the record from the FCC proceeding when they are sufficient for the task.

2) If the court determines the record from the FCC proceeding is insufficient, it may remand the case and direct the FCC to supplement the record. See 28 U.S.C. § 2347(c) (the court of appeals may "order . . . additional evidence . . . to be taken by the agency" where requested to do so by one of the parties).

3. The court may transfer the case to the district court for a full hearing pursuant to 28 U.S.C. § 2347(b)(3).[(8)]

4. The court may appoint a special master pursuant to F.R.A.P. 48 to hold hearings and gather any additional information the court needs to decide the just compensation issue.

5. The court may fashion any other "appropriate modes of procedure" to gather the evidence it needs to conduct its factual inquiry pursuant to its authority under the All Writs Act, 28 U.S.C § 1651. See Harris v. Nelson, 394 U.S. 286, 299, 89 S. Ct. 1082, 1090-91 (1969) (recognizing that courts may rely on their authority under the All Writs Act "in issuing orders appropriate to assist them in conducting factual inquiries.").

Depending on the particular facts of a case, one or some combination of those five means will provide the appellate court with a sufficient basis to determine the proper level of just compensation owed to a utility. That part of the process is adequate.

Once the appellate court has made a determination of the proper level of just compensation owed, it is positioned to resolve a utility's appeal of the FCC rate order and ensure that the utility does not suffer a taking without just compensation. If the court, based on its determination of the proper level of just compensation, concludes the rate awarded by the FCC provides just compensation, then it will simply affirm the FCC's rate order. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 104 S. Ct. 2862, 2878 (1984) (where statutory arbitration procedure for providing compensation for a taking of property results in payment of just compensation, property

owner has no claim against the government for a taking without just compensation).

On the other hand, if the court determines the FCC rate fails to provide just compensation and the rate which would do so falls within the range of rates specified in 47 U.S.C. § 224(d)-(e) which the FCC is authorized to award, then the court will set aside the FCC rate order and order (or as the relevant statutory provision says, "enjoin") the FCC to enter a new rate order designed to provide that the utility receives just compensation calculated from the date the cable company or telecommunication carrier first obtained access under the Act's mandatory access provision. See 28 U.S.C. § 2349(a) ("The court of appeals . . . has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, . . the [FCC's] order . . . .") Directing the FCC to issue a rate order providing that a utility receive the just compensation rate from the date it was first required to provide access under the mandatory access provision will ensure a utility receives just compensation both prospectively and in the period prior to the court's determination of the just compensation rate. Cf. Multimedia Cablevision, Inc. v. Southwestern Bell Tel. Co., 11 FCC Rcd. 11202, 11216 (1996) (in the event "the recomputed rates are in excess of that paid by [the attacher], we require [the attacher] to pay the difference, with interest, to [the utility]."). Such an order ensures that a utility is not forced to continue to provide mandatory access to its property unless it receives just compensation, as determined by a court, for the taking. See Williamson County, 473 U.S. at 194, 105 S. Ct. at 3120 ("[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.")

Nonetheless, the plaintiffs contend that even if the court can guarantee the award of just compensation in some cases, there might be cases in which it could not do so. Specifically, they raise the possibility that the just compensation rate might exceed the statutory maximum rate, as defined in 47 U.S.C. § 224(d)-(e), which the FCC is authorized to award. Were that to occur, they assert that the court could not order the FCC to award a rate above the maximum rate specified in the Act and that a utility would therefore not receive the just compensation rate. Accordingly, they argue

that because the process fails to ensure that a utility receives just compensation in those situations, the Act is unconstitutional.

That argument does not fit in this lawsuit, because this is a facial challenge. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) (emphasis added). See also New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11, 108 S. Ct. 2225, 2233 (1988) ("[t]o prevail on a facial attack the plaintiff must demonstrate that the challenged law . . . could never be applied in a valid manner."); Jacobs v. The Florida Bar, 50 F.3d 901, 906 n.20 (11th Cir. 1995) ("[w]hen a plaintiff attacks a law facially, the plaintiff bears the burden of proving that the law could never be constitutionally applied.")

The plaintiffs have not carried that burden in this case. As we have already discussed, there are a readily identifiable set of circumstances in which the Act provides a constitutionally adequate process for ensuring a utility receives just compensation. Specifically, where the court determines that the rate awarded by the FCC provides just compensation, the court can affirm the FCC rate order. Conversely, if the FCC rate does not provide just compensation, the court can direct the FCC to enter a new order providing the just compensation rate, at least in those circumstances where the just compensation rate falls within the statutory range specified in 47 U.S.C. § 224(d)-(e).

Even if the plaintiffs are correct in stating that the court could not direct the FCC to award a rate exceeding the statutory maximum -- an issue we need not decide here -- the plaintiffs have identified, at most, one hypothetical set of circumstances in which the Act would not provide an adequate process to ensure a utility receives just compensation. But conjuring up one hypothetical set of circumstances in which the Act could operate in an unconstitutional manner does not suffice to establish that the Act is facially unconstitutional.[(9)]

In sum, we reject the plaintiffs' contention that the Act fails to provide an adequate process for a utility to obtain just compensation because it violates separation of power principles. Had the Act eliminated all possibility of judicial review and made the FCC the final arbiter of a utility's compensation, we would be faced with a different situation, but the Act does not do that. Instead, as we have explained, the Act merely provides that the FCC has the first cut at fashioning the compensation a utility receives for the taking of its property. Allowing an administrative body, such as the FCC, a role in the process of determining just compensation for a taking is permissible so long as its order is subject to judicial review to ensure that a court makes the ultimate determination of just compensation. That is what we have here: the FCC's rate order is subject to review by an appellate court which has the power both to determine the proper level of just compensation and to ensure that the utility receives just compensation, at least where the just compensation rate falls within the statutory range of rates specified in 47 U.S.C. § 224(d)-(e).

2. Whether Limiting the FCC to Awarding a "Just and Reasonable" Rate Makes the Act's Process for Awarding Just Compensation Constitutionally Inadequate

We turn now to the plaintiffs' alternative argument in support of their position that the Act fails to provide a constitutionally adequate process for a utility to obtain just compensation. They argue the Act's provision limiting the FCC to awarding a "just and reasonable" rate within the range of rates set by Congress, see 47 U.S.C. § 224(b), will prevent the FCC from awarding a utility the constitutionally required rate of just compensation. The plaintiffs begin by noting that the Act's "just and reasonable" rate formula is the same formula the FCC was required to apply in calculating compensation for access to a utility's property before the mandatory access provision was added to the Act. Hence, a utility's rate of compensation for forced access to its property (a taking) is governed by the same standard as when it voluntarily provided access. The plaintiffs say that fact renders the process for awarding just compensation for the taking constitutionally inadequate.

According to the plaintiffs, because a utility's property is now being taken, the rate it was able to collect when it was voluntarily providing access is no longer appropriate. That is so, they argue, because the standard for determining just compensation for a taking should be more rigorous than that for determining a rate for providing voluntary access. Citing Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 109 S. Ct. 609, 615 (1989), the plaintiffs point out that the rate a utility is entitled to receive for providing access voluntarily must only be "not so unjust as to be confiscatory." In contrast, they say, the Supreme Court has defined "just compensation" more expansively. (citation and quotation omitted). For example, in United States v. Miller, 317 U.S. 369, 374, 63 S. Ct. 276, 280 (1943), the Court defined just compensation as "fair market value," which is "what it fairly may be believed that a purchaser in fair markoviding that a utility receive the same rate for forced access as it received for voluntary access, the Act fails to provide an adequate process for a utility to obtain just compensation. Cf. Consolidated Gas Co. v. City Gas Co., 912 F.2d 1262, 1314-19 (11th Cir. 1990) (en banc) (Tjoflat, C.J., dissenting) (endorsing the proposition that the "just compensation price" a utility receives for a taking should satisfy a "more stringent standard" than the standard that applies in setting rates, because in one instance the utility is acting under compulsion while in the other instance it has "voluntarily undertaken to operate in a regulated industry"), vacated, City Gas Co. v. Consolidated Gas Co., 499 U.S. 915, 111 S. Ct. 1300 (1991).

As an initial matter, we do not believe this issue is ripe for decision. Shorn of its packaging about the regulatory price versus the just compensation price, the issue comes down to whether the Act is unconstitutional because it says the FCC shall order a "just and reasonable" rate instead of saying it shall order a rate that provides "just compensation." At this point, however, we are merely dealing with abstractions and not with concrete facts; it would require sheer speculation for us to conclude that the actual rates ordered by the FCC will fail to provide just compensation. Even the plaintiffs seem to concede this point when they note in their reply brief that they are not challenging the Act's "formula" for providing compensation. In light of the speculative nature of the inquiry, this issue is not "fit[] . . . for judicial decision" at this juncture. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515 (1967) ("basic rationale" of the ripeness

requirement is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements").

We do not mean to imply that if this issue were ripe for decision we would be persuaded by plaintiffs' argument. The Duquesne decision they rely upon was not interpreting any aspect of this Act, either before or after its 1996 amendment. Instead, that decision merely held that in a regulated industry the level of compensation set by the government must not be so low as to be confiscatory. See Duquesne, 488 U.S. at 307, 109 S. Ct. at 615. There is nothing in Duquesne, or in the record before us, which indicates that the rate of compensation provided in this Act (before its amendment) for voluntarily provided access was just above confiscation. We have no reason to assume that the rate under the prior version of the Act was only minimally adequate to meet constitutional requirements for voluntary access, and thus, in the plaintiffs' view, constitutionally inadequate under the current Act for forced access situations. Indeed, for all we know, it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum.

In any event, as we have explained, the FCC's determination of the compensation a utility receives is not conclusive under the Act. A utility that believes the FCC's rate order fails to provide just compensation may appeal that order to the court of appeals. The court will then make a judicial determination of the proper level of just compensation and ensure that the utility is not required to provide access to its property at a rate that does not provide just compensation.[(10)] That said, we decide nothing about the relationship between the "just and reasonable" rate specified in the Act and just compensation required by the Constitution, because that issue is not ripe for decision.

III. CONCLUSION

To sum up, we conclude the Act's mandatory access provision effects a taking of a utility's property but that the Act is not facially unconstitutional under the Fifth Amendment, because, at least in most cases, it provides a constitutionally adequate process which ensures a utility does not suffer that

taking without obtaining just compensation. Accordingly, the district court's judgment in favor of the defendants is AFFIRMED.

NOTES

1. For example, plaintiff Duke Power owns 1.8 million distribution poles located on 74,134 miles of public and private rights-of-way.

2. Section 224(d)(1) provides: "[a] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." 47 U.S.C. § 224(d)(1). As the Supreme Court has explained, "[t]he minimum measure is thus equivalent to the marginal cost of attachments, while the statutory maximum measure is determined by the fully allocated cost of the construction and operation of the pole to which the cable is attached." FCC v. Florida Power Corp. 480 U.S. at 253, 107 S. Ct. at 1113.

3. For convenience, we will hereinafter use the term "Act" to refer to the Pole Attachments Act as amended in 1996.

4. The Act defines "utility" as "any person who is . . . an electric . . . public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used in whole or in part, for any wire communications." 47 U.S.C. § 224(a).

5. The defendants concede some of the rights-of-way were obtained without resort to eminent domain, but argue these were acquired in the shadow of eminent domain because private parties knew that utilities could resort to eminent domain if their efforts to negotiate an agreement failed. So, we should treat all the rights-of-way as though obtained through the use of eminent domain, the defendants reason.

6. In addition, the defendants argue that the Act's provision for payment to a utility for the permanent, physical occupation of its property somehow

makes that occupation less of a taking. Although the fact of payment is, of course, relevant to the just compensation issue, we fail to see how it makes the taking any less a taking. By analogy, a tort is not any less a tort because some compensation will be paid for the injury suffered.

7. The plaintiffs are correct to concede that our Florida Power decision is not binding. For any part of a decision to be binding under the prior panel precedent rule, the decision must not have been vacated or reversed by the Supreme Court--it must have survived the possibility of Supreme Court review. Our statements about the constitutional adequacy of the process for obtaining just compensation do not meet that test, because the Supreme Court had no occasion to address the issue in light of its holding that the pre-1996 version of § 224 did not result in a taking of a utility's property. See FCC v. Florida Power Corp., 480 U.S. at 254 n.8, 117 S. Ct. at 1113 n.8 ("Our disposition of the takings question makes it unnecessary to review on the merits the Court of Appeals' holding that Congress may not establish standards under which the initial determination of compensation will be made by an administrative authority subject to final judicial review.").

8. We note that the option of transferring the case to the district court for a hearing is available only when the FCC has not conducted a formal hearing prior to issuing its rate order. See 28 U.S.C. § 2347(b)(3). Of course, if the FCC has conducted a hearing, we would expect the record available to the appellate court to be more complete and hence there would be less need for transferring the case to the district court for a hearing. Any incompleteness in the FCC hearing record could also be rectified by a remand to the FCC.

9. We use the word "hypothetical" because the plaintiffs have not pointed to any evidence demonstrating that the just compensation rate will ever exceed the statutory maximum rate. Their failure to do so is significant for another reason as well. Three Supreme Court Justices have recently questioned Salerno's "no set of circumstances" formulation of the facial challenge standard and suggested that a plaintiff can prevail on a facial challenge by merely showing the Act is unconstitutional in most cases. See City of Chicago v. Morales, - U.S. -, -, 119 S. Ct. 1849, 1858-59 n.22 (1999) (plurality op.) (Stevens, J., Souter, J., and Ginsburg, J.); Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 & n.1, 116 S. Ct. 1582, 1583 & n.1 (1996)

(Memorandum respecting the denial of certiorari.) (Stevens, J.). See also Florida League of Professional Lobbyists, Inc. v. Meggs, 87 F.3d 457, 459 (11th Cir. 1996) (recognizing disagreement among the Justices concerning "how high the threshold for facial invalidation should be set."). Because the plaintiffs have not shown the just compensation rate will ever fall outside the statutory range, let alone that it will do so in most cases, their facial challenge fails even under the more permissive formulation suggested by Justices Stevens, Souter, and Ginsburg.

10. As with our discussion of the first argument, we are assuming here that the just compensation rate falls within the statutory range specified in 47 U.S.C. § 224(d)-(e) and, in the absence of any evidence that the just compensation rate will ever fall outside that range, we leave for another day the issue of what happens if it does.

Exhibit C

Civil Cases

Skip to Main Content Logout My Account Search Menu New Civil Search Refine Search   Location : Hillsborough County, FL   Help

Record Count: 1
Search By: Case **Exact Name:** on **Case Search Mode:** Number **Case Number:** 12-CA-016349 **Sort By:** Filed Date

Case Number	Style	Filed/Location/Judicial Officer	Type/Status
12-CA-016349	TAMPA ELECTRIC CO vs VERIZON FLORIDA LLC	10/17/2012 Division H Silver, Bernard C	Breach of Contract Closed

CASE SUMMARY
CASE NO. 12-CA-016349

TAMPA ELECTRIC CO vs VERIZON FLORIDA LLC

Case Type:	**Breach of Contract**
Date Filed:	**10/17/2012**
Location:	**Division H**
Judicial Officer:	**Silver, Bernard C**
Uniform Case Number:	**292012CA016349A001HC**

PARTY INFORMATION

		Attorneys
Counter-Defendant	**TAMPA ELECTRIC CO**	**DAVID WILLIAM MCCREADIE** *Retained* 813-229-2121(W)
Counter-Plaintiff	**VERIZON FLORIDA LLC**	**LEWIS F COLLINS, Jr** *Retained* 813-281-1900(W) WILLIAM PHILIP SCHOEL *Retained* 813-281-1900(W)
Defendant	**VERIZON FLORIDA LLC**	**CHRISTOPHER S HUTHER** *Retained* CLAIRE J EVANS *Retained* LEWIS F COLLINS, Jr *Retained* 813-281-1900(W) WILLIAM PHILIP SCHOEL *Retained* 813-281-1900(W)
Plaintiff	**TAMPA ELECTRIC CO**	**DAVID WILLIAM MCCREADIE** *Retained* 813-229-2121(W) ERIC B LANGLEY *Retained* JOSEPH D LEAVENS, Esquire *Retained* 205-251-8100(W)

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

11/26/2014 **STIPULATION OF DISMISSAL**
Party()
Party()
JOINT STIP- W/ PREJ

OTHER EVENTS AND HEARINGS

10/17/2012 **COMPLAINT**
10/17/2012 **CIVIL COVER SHEET**
10/17/2012 **SUMMONS ISSUED**
X1
Party: TAMPA ELECTRIC CO
12/03/2012 **SUMMONS RETURNED SERVED**
VERIZON FLORIDA LLC C/O CT CORPORATION SYSTEM AS RA

	Date Served: 10/23/2012
12/11/2012	**ANSWER AND COUNTERCLAIM** *OF VERIZON FLORIDA LLC*
12/11/2012	**MOTION FOR ADMISSION PRO HAC VICE** *CLAIRE J EVANS* Party: VERIZON FLORIDA LLC
12/11/2012	**MOTION FOR ADMISSION PRO HAC VICE** *CHRISTOPHER S HUTHER* Party: VERIZON FLORIDA LLC
12/11/2012	**MOTION FOR ADMISSION PRO HAC VICE** Party: TAMPA ELECTRIC CO
12/11/2012	**MOTION FOR ADMISSION PRO HAC VICE** Party: TAMPA ELECTRIC CO
12/11/2012	**MOTION TO TRANSFER TO COMPLEX BUSINESS LITIGATION DIVISION** *(DIVISION L)* Party: VERIZON FLORIDA LLC Party: VERIZON FLORIDA LLC
12/14/2012	**ORDER GRANTING MOTION FOR PRO HAC VICE** (Judicial Officer: Silver, Bernard C) Date 2: 12/13/2012
12/14/2012	**ORDER GRANTING MOTION FOR PRO HAC VICE** (Judicial Officer: Silver, Bernard C) Date 2: 12/13/2012
12/18/2012	**ORDER GRANTING** *VERIFIED MOTION TO ADMIT CLARIE J EVANS PRO HAC VICE FOR DEFT / ORDERED 12-18-2012 BCS*
12/18/2012	**ORDER GRANTING MOTION FOR PRO HAC VICE** (Judicial Officer: Silver, Bernard C) *CHRISTOPHER S HUTHER IS ADMITTED TO APPEAR AS COUNSEL OF RECORD PRO HAC VICE FOR DEFT VERIZON FLORIDA LLC; LEWIS F COLLINS JR AND WILLIAM P SCHOEL BE DESIGNATED AS LOCAL COUNSEL OF RECORD FOR DEFT IN CONNECTION WITH THIS MATTER 12/18/12 BCS* Party: VERIZON FLORIDA LLC Date 2: 12/18/2012
01/11/2013	**DESIGNATION OF EMAIL ADDRESS**
01/11/2013	**ANSWER TO COUNTERCLAIM** Party: TAMPA ELECTRIC CO
01/11/2013	**EXHIBIT** *"A"*
01/11/2013	**EXHIBIT** *"B"*
01/11/2013	**EXHIBIT** *"C"*
01/11/2013	**EXHIBIT** *"D"*
02/13/2013	**REPLY TO AFFIRMATIVE DEFENSES** Party: VERIZON FLORIDA LLC
03/21/2013	**NOTICE OF TAKING DEPOSITION** *TO VERIZON FLORIDA LLC AND CHRISTOPHER S. HUTHER - TIME: TBD*
03/21/2013	**NOTICE OF TAKING DEPOSITION WITH SUBPOENAS ATTACHED** *TO ED DUDLEY AND CHRISTOPHER S. HUTHER - TIME: TBD*
03/21/2013	**INTERROGATORIES** *FIRST SET TO DEFENDANT*
03/21/2013	**REQUEST FOR PRODUCTION** *FIRST TO DEFENDANT*
04/08/2013	**NOTICE OF SERVICE OF INTERROGATORIES** *TO TAMPA ELECTRIC COMPANY*
04/08/2013	**REQUEST FOR PRODUCTION** *OF DOCUMENTS TO TAMPA ELECTRIC COMPANY*
06/04/2013	**NOTICE OF SERVICE OF ANSWERS TO INTERROGATORIES**
06/04/2013	**RESPONSE TO REQUEST FOR PRODUCTION**
08/30/2013	**NOTICE TO SET FOR TRIAL**
09/03/2013	**NOTICE OF HEARING** *(UMC) SEPTEMBER 25, 2013 AT 9:A.M.*
09/18/2013	**NOTICE OF CANCELLING HEARING**
10/02/2013	**AGREED ORDER** *TAMPA ELECTRIC COMPANY FILED A NOTICE FOR TRIAL ON 08/30/13. ALL PARTIES HAVE AGREED FOR THE COURT TO SET A NJT ON THE FIRST AVAILABLE NJT DATE IN 05/14 10/01/13 BCS*
12/05/2013	**ORDER SETTING PRE TRIAL AND NON JURY TRIAL** (Judicial Officer: Silver, Bernard C) *NON-JURY TRIAL THE WK(S) OF 5/12/14 & 5/23/14 W/ PRE-T ON 5/5/14 @ 9 AM IN CTRM 500 BCS- 12/2/13* Party: TAMPA ELECTRIC CO Party: VERIZON FLORIDA LLC Party: VERIZON FLORIDA LLC Date 2: 12/02/2013
02/04/2014	**NOTICE OF TAKING VIDEO DEPOSITION** *WITH SUBPOENA*
02/04/2014	**WITNESS LIST**
02/21/2014	**NOTICE OF TAKING DEPOSITION**
02/21/2014	**NOTICE OF TAKING DEPOSITION**
02/24/2014	**NOTICE OF SERVICE**
02/24/2014	**WITNESS LIST**
03/25/2014	**MOTION FOR SUMMARY JUDGMENT** *ON DEFENDANT'S COUNTERCLAIM* Party: TAMPA ELECTRIC CO
03/26/2014	**NOTICE OF HEARING** *4/16/14 2PM*
03/28/2014	**NOTICE OF TAKING DEPOSITION**
03/28/2014	**NOTICE OF TAKING DEPOSITION**
03/28/2014	**NOTICE OF TAKING DEPOSITION**

04/01/2014	**NOTICE OF MEDIATION CONFERENCE** *4/21/14 12PM*
04/01/2014	**AMENDED NOTICE OF HEARING** *5/7/14 @ 1:30 P.M.*
04/04/2014	**MOTION FOR CONTINUANCE** *OF TRIAL* Party: VERIZON FLORIDA LLC
04/04/2014	**NOTICE OF HEARING** *04/09/2014 3 PM*
04/04/2014	**NOTICE OF TAKING VIDEO DEPOSITION**
04/04/2014	**MOTION FOR LEAVE TO** *HEAR MOTION FOR SUMMARY JUDGMENT OUT OF TIME OR, ATERNATIVELY, MOTION TO RESCHEDULE PRETRIAL CONFERENCE* Party: TAMPA ELECTRIC CO
04/07/2014	**RESPONSE IN OPPOSITION TO** *MOTION TO CONTINUE TRIAL*
04/11/2014	**NOTICE OF MEDIATION CONFERENCE** *(AMENDED)*
04/30/2014	**OPPOSITION TO** *TAMPA ELECTRIC COMPANY'S MOTION FOR SUMMARY JUDGMENT ON VERIZON FLOIRIDA LLC'S COUNTERCLAIMS / EXHIBIT(S) ATTACHED*
05/07/2014	**MOTION TO COMPEL DISCOVERY** Party: VERIZON FLORIDA LLC Party: VERIZON FLORIDA LLC
05/07/2014	**MOTION FOR SUMMARY JUDGMENT** *EXHIBIT(S) ATTACHED* Party: VERIZON FLORIDA LLC
05/09/2014	**NOTICE OF HEARING** *05-27-2014 @10:15AM / CRT RM #500 / RE: VERIZON FLORIDA LLC'S MOTION FOR SUMMARY JUDGMENT*
05/09/2014	**NOTICE OF HEARING** *05-27-2014 @3PM / CRT RM #500 / RE: VERIZON FLORIDA LLC'S MOTION TO COMPEL DISCOVERY*
05/14/2014	**ORDER SETTING PRETRIAL AND JURY TRIAL** (Judicial Officer: Silver, Bernard C) *AMENDED; PT RM 500 5/29/14@11:15AM / NJT 6/9/14-6/20/14 - 5/13/14 BCS* Date 2: 05/13/2014
05/19/2014	**MEMORANDUM OF LAW** *OF VERIZON FLORIDA LLC*
05/19/2014	**PRE-TRIAL MEMORANDUM**
05/20/2014	**AMENDED NOTICE OF HEARING** *06/04/2014 3 PM*
05/21/2014	**EMERGENCY MOTION** ***UNOPPOSED** TO CONTINUE TRIAL* Party: VERIZON FLORIDA LLC
05/21/2014	**NOTICE OF HEARING** *VERIZON FLORIDA LLC'S UNOPPOSED EMERGENCY TO CONTINUE TRIAL; 5/28/14 @ 9AM ROOM 519*
05/23/2014	**NOTICE OF CANCELLING HEARING** *5/28/14 @9AM UMC HEARING*
06/03/2014	**NOTICE OF CANCELLING HEARING** *HEARING- 6/4/14 @ 3 PM*
06/03/2014	**ORDER GRANTING** (Judicial Officer: Silver, Bernard C) *VERIZON'S **UNOPPOSED** EMERGENCY MOTION TO CONTINUE TRIAL. BCS 6/2/14*
06/04/2014	**AMENDED NOTICE OF HEARING** *SECOND - 7/17/14 1:30PM / MOTION FOR SUMMARY JUDGMENT; MOTION TO COMPEL DISCOVERY / ROOM 519*
08/14/2014	**ORDER SETTING PRE TRIAL AND NON JURY TRIAL** (Judicial Officer: Silver, Bernard C) *NJT 12/15 - 12/19/14 & PRETRIAL CONFERENCE 12/4/14 11:45AM- AMENDED* Date 2: 08/14/2014

FINANCIAL INFORMATION

	Counter-Plaintiff VERIZON FLORIDA LLC		
	Total Financial Assessment		1,900.00
	Total Payments and Credits		1,900.00
	Balance Due as of 12/02/2014		**0.00**
12/11/2012	Transaction Assessment		395.00
12/11/2012	Transaction Assessment		1,505.00
12/11/2012	CHECK Mail in payment Receipt # 08-00056324	VERIZON FLORIDA LLC	(1,900.00)

	Defendant VERIZON FLORIDA LLC		
	Total Financial Assessment		200.00
	Total Payments and Credits		200.00
	Balance Due as of 12/02/2014		**0.00**
12/11/2012	Transaction Assessment		100.00
12/11/2012	Transaction Assessment		100.00
12/11/2012	CHECK Mail in payment Receipt # 08-00056326	VERIZON FLORIDA LLC	(200.00)

	Plaintiff TAMPA ELECTRIC CO		
	Total Financial Assessment		610.00

	Total Payments and Credits			610.00
	Balance Due as of 12/02/2014			**0.00**
10/17/2012	Transaction Assessment			400.00
10/17/2012	Transaction Assessment			10.00
10/17/2012	CHECK Mail in payment	Receipt # 08-00049622	TAMPA ELECTRIC CO	(410.00)
12/12/2012	Transaction Assessment			100.00
12/12/2012	CHECK Mail in payment	Receipt # 08-00056495	TAMPA ELECTRIC CO	(100.00)
12/12/2012	Transaction Assessment			100.00
12/12/2012	CHECK Mail in payment	Receipt # 08-00056496	TAMPA ELECTRIC CO	(100.00)

Unofficial Record

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:13-CV-791-FL

FRONTIER COMMUNICATIONS OF THE CAROLINAS LLC,	)	
Plaintiff,	)	
	)	ORDER
v.	)	
DUKE ENERGY CAROLINAS, LLC,	)	
Defendant.	)	

This matter comes before the court upon defendant's motion to dismiss and compel arbitration, or, in the alternative, to stay and compel arbitration (DE 9), together with plaintiff's motion to stay ruling on defendant's motion (DE 18). The issues raised are ripe for ruling. For the reasons that follow, the court will grant defendant's motion and deny plaintiff's motion.

BACKGROUND

The court draws from the record the following uncontested facts and briefly summarizes here the respective arguments of the parties. Plaintiff is an incumbent local exchange carrier, which is a local exchange carrier that meets the requirements of 47 U.S.C. § 251(h). A local exchange carrier is "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(32). Defendant is a utility company that distributes electricity to retail customers in North Carolina and South Carolina.

Three agreements between the parties ("Joint Use Agreements"), executed between 1983 and 1985, authorize each party to attach its cables, which are used in the transmission of the party's retail

services, to poles owned by the other party.[1] Plaintiff's decision to terminate the Joint Use Agreements effective as of August 8, 2012, was recognized by defendant related to new or additional pole attachments. The underlying dispute between the sides appears related to a reduction of rates demanded by plaintiff at or around the same time for existing attachments.

The Joint Use Agreements, referenced in the complaint and submitted as exhibits to defendant's motion, each contain a mandatory arbitration provision which provides as follows:

> Should disputes arise between the parties concerning matters pertaining to this agreement, and such differences cannot be amicably settled by the parties hereto, the matters in dispute shall be submitted to arbitration as follows:
>
> 1. Either party desiring arbitration shall give written notice thereof to the other party setting forth the matter to be arbitrated. Within ten (10) days after receipt of such notice each party shall name their own arbitrator to serve on an Arbitration Panel.
>
> 2. The two arbitrators thus named shall within ten (10) days after their appointment, jointly request the Regional Director of the American Arbitration Association, Charlotte, N.C. to submit a list of five qualified arbitrators, residents of North Carolina, South Carolina, Virginia, or Georgia. The impartial arbitrator shall be selected by alternate striking of the names therein with the party requesting arbitration striking first.
>
> 3. The Arbitration Panel as herein provided for in this article, shall promptly act on any question or questions in controversy, and shall within 30 days after the close of the evidence render its majority decision in writing. Such decision shall be final and binding on both parties.
>
> 4. Each party shall bear all expenses of its own representatives and the compensation and expenses of the impartial arbitrator shall be borne equally

[1] These include the Joint Use Agreement between Duke Power Company and Continental Telephone Company of North Carolina, dated November 1, 1983, a copy of which is attached to the arbitration demand as "Exhibit A"; the Joint Use Agreement between Duke Power Company and Continental Telephone Company of South Carolina, dated November 1, 1983, a copy of which is attached thereto as "Exhibit B"; and the Joint Use Agreement between Duke Power Company and General Telephone Company of the Southeast, dated November 1, 1985, a copy of which is attached to the arbitration demand as "Exhibit C".

by the parties hereto.

(Compl. DE 1, ¶ 12; Exh. 1, Mem. in Support of Mot. to Dismiss, DE 10-1).

Defendant sought to put the disputed issues of or relating to claims under the Joint Use Agreements for breach of contract and unjust enrichment, before an arbitration panel. In its October 15, 2013, arbitration demand ("Arbitration Demand"), defendant asserts unpaid pole rent for 2012 and unpaid inventory settlement amounts totaling $1,042,126.66. The following month, on November 12, 2013, plaintiff filed the instant declaratory judgment action against defendant.

Plaintiff seeks a declaratory judgment that the Federal Communications Commission ("FCC") has primary jurisdiction over issues raised in the Arbitration Demand, regarding rates, terms, and conditions that defendant may charge plaintiff for attachments to defendant's utility poles.[2] Because the FCC has primary jurisdiction over the dispute raised in the Arbitration Demand, plaintiff urges, the dispute is outside the scope of the arbitration provision. Plaintiff also seeks a declaration that the Arbitration Demand is null, void, and of no effect.

In response, on December 5, 2013, defendant filed the instant motion to dismiss and compel arbitration, or, in the alternative, to stay and compel arbitration pursuant to Federal Rule of Civil Procedure 12(b)(1) and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq.[3] Plaintiff responded in opposition to the motion to compel arbitration on January 21, 2014, on which date it

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[2] The primary jurisdiction doctrine applies "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." United States v. W. Pac. R.R., 352 U.S. 59, 64 (1956).

[3] Defendant also moves to dismiss the complaint pursuant to Rule 12(b)(6). Defendant argues plaintiff relies in its complaint on a federal statute that does not provide a private right of action for the enforcement of alleged rights under the statute. The court will not address this argument further where defendant's arguments related to the FAA are determinative of the instant motions, as discussed herein.

also filed the motion to stay. Four days prior thereto, on January 17, 2014, plaintiff filed a pole attachment complaint before the FCC concerning related issues with defendant in this case. Plaintiff seeks a stay of this action until the FCC decides that matter.

Defendant depicts the motion to stay as a blatant attempt to construct a further delay of ruling in this action initiated by plaintiff, which characterization plaintiff vigorously disputes. Plaintiff contends even if the court has the authority to compel immediate arbitration, the more prudent decision would be to stay arbitration to allow address of disputed issues by the FCC. Threaded among its various filings, defendant argues that plaintiff has not produced any evidence that the arbitration provision is invalid or that the dispute raised in the Arbitration Demand is outside the scope of the arbitration provision. Thus, defendant urges, the court must compel arbitration.

DISCUSSION

A. Applicability of the FAA

The FAA governs the rights and responsibilities of the parties with respect to an arbitration agreement.[4] Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc., 380 F.3d 200, 204 (4th Cir. 2004). The FAA provides, in pertinent part, that:

> [a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. As a result of this federal policy favoring arbitration, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the

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[4] The parties do not dispute the applicability of the FAA.

construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Thus, a court "has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview." Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002).

To further facilitate arbitration, Section 3 of the FAA authorizes a party to an arbitration agreement to demand a stay of court proceedings in order to pursue arbitration, provided, however, that "the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. "Although this principle of 'default' is akin to waiver, the circumstances giving rise to a statutory default are limited and, in light of the federal policy favoring arbitration, are not to be lightly inferred." Maxum Founds., Inc. v. Salus Corp., 779 F.2d 974, 981 (4th Cir. 1985); see also Forrester v. Penn Lyon Homes, Inc., 553 F.3d 340, 342 (4th Cir. 2009). Default is not at issue in this case.

The FAA reflects "a liberal policy favoring arbitration agreements." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011). In the Fourth Circuit, a litigant can compel arbitration under the FAA if he can demonstrate (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the other party to arbitrate the dispute. Adkins, 303 F.3d at 500-01. "[T]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217, 221 (4th Cir. 2014) (quotation omitted).

B. Analysis

The court takes up both motions below, as plaintiff's motion to stay is nested firmly within its defense of defendant's motion. In this case, there is no question that a dispute exists between the parties, and that plaintiff has refused to arbitrate the dispute. In addition, the transaction evidenced in the Joint Use Agreements is related to interstate commerce. See Rota-McLarty v. Santander Consumer USA, Inc., 700 F.3d 690, 697 (4th Cir. 2012) ("[T]he FAA does not impose a burden upon the party invoking the FAA to put forth specific evidence proving the interstate nature of the transaction."); see also Maxum, 779 F.2d at 978 n.4 ("Where . . . the party seeking arbitration alleges that the transaction is within the scope of the [FAA], and the party opposing application of the [FAA] does not come forward with evidence to rebut jurisdiction under the federal statute, we do not read into the [FAA] a requirement of further proof by the party invoking the federal law.").

The heart of this dispute lies then with plaintiff's contest that the arbitration provision at issue here covers the instant dispute, or the second element outlined in the Adkins decision above. Plaintiff characterizes the dispute as regarding whether the rates for pole attachments in the Joint Use Agreements comply with federal law. Because, it asserts, the FCC has primary jurisdiction over the dispute raised in the Arbitration Demand (as buttressed by its filing January 17, 2014, of the pole attachment complaint against defendant before the FCC), the arbitration provision does not apply.

Plaintiff details recent developments in the FCC's interpretation of its regulatory authority, specifically the application of a statute related to rates for utility pole attachments. Pursuant to what is commonly referred to as the Pole Attachments Act ("PAA"), 47 U.S.C. § 224, the FCC is required to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable," except under certain circumstances not applicable here. On

April 7, 2011, the FCC issued an order that extended application of the PAA to incumbent local exchange carriers ("ILECs") like plaintiff, thus entitling them to just and reasonable rates for pole attachments. See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 26 FCC Rcd. 5240, 5328-33, 2011 WL 1341351 (2011) ("Pole Attachment Order").

The changes provided for under the Pole Attachment Order became effective on July 12, 2011. See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 76 Fed. Reg. 40817 (2011). The District of Columbia Circuit upheld the Pole Attachment Order on February 26, 2013. See Am. Elec. Power Serv. Corp. v. Fed. Commc'ns Comm'n, 708 F.3d 183 (D.C. Cir.), cert. denied, 134 S. Ct. 118 (2013).

In the Pole Attachment Order, the FCC "declined . . . to adopt comprehensive rules governing" the pole attachments of ILECs, opting instead "to proceed on a case-by-case basis" in complaint proceedings brought before the FCC. Pole Attachment Order, 26 FCC Rcd. at 5334. The FCC recognized the existence of agreements between ILECs and utility companies, such as defendant, for joint use of utility poles. Id. In addition, the FCC acknowledged the concern some ILECs expressed about these existing joint use agreements. Id. at 5334-35. However, the FCC stated that it "is unlikely to find the rates, terms, and conditions in existing joint use agreements unjust or unreasonable." Id. at 5335. Plaintiff argues here that the rates in the Joint Use Agreements violate the PAA, and that the FCC has the primary jurisdiction to determine what rate is appropriate.

"Primary jurisdiction applies to claims 'properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.'" In re Bulldog Trucking, Inc., 66 F.3d 1390, 1399 (4th Cir. 1995) (quoting

Reiter v. Cooper, 507 U.S. 258, 268 (1993)). "Despite what the term primary jurisdiction may imply, it does not speak to the jurisdictional power of the federal courts. It simply structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts." Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 789 n.24 (4th Cir. 1996) (quotation omitted). "No fixed formula exists for applying the doctrine of primary jurisdiction." Id. at 789 (quotation omitted). "Generally speaking, the doctrine is designed to coordinate administrative and judicial decision-making by taking advantage of agency expertise and referring issues of fact not within the conventional experience of judges or cases which require the exercise of administrative discretion." Id.

Plaintiff's assertion of primary jurisdiction is misplaced here. While the decision whether to refer an issue under the doctrine of primary jurisdiction is "a matter of judicial discretion," Envtl. Tech., 98 F.3d at 789 n.24, "[b]y its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Peabody Holding Co. v. United Mine Workers of Am., 665 F.3d 96, 103 (4th Cir. 2012) (quotation omitted).

> When interpreting a contract containing an arbitration clause, "there is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"

Id. at 104 (quoting Concepcion, 475 U.S. at 650). "An issue will be classified as being outside the

scope of an arbitration provision only when the parties have manifested such an intent in their written agreement." Great Am. Ins. Co. v. Hinkle Contracting Corp., 497 F. App'x 348, 352 (4th Cir. 2012) (citing Peabody, 665 F.3d at 104).

The arbitration provision in the Joint Use Agreements provides, in relevant part, that "[s]hould disputes arise between the parties concerning matters pertaining to this agreement, and such differences cannot be amicably settled by the parties hereto, the matters in dispute shall be submitted to arbitration . . . ." Both the Fourth Circuit and the Supreme Court have characterized similar arbitration provisions as "broad arbitration clauses capable of an expansive reach." Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967) (labeling as "broad" an arbitration clause that covered "[a]ny controversy or claim arising out of or relating to this Agreement"); J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988) (construing as "broad" an arbitration clause that covered "[a]ll disputes arising in connection with" a contract)). A broad arbitration provision, as exists here, "render[s] arbitrable all disputes having a significant relationship to the [underlying] agreement regardless of whether those claims implicated the terms of the . . . agreement." Id.

Here, the Arbitration Demand implicates the terms of the Joint Use Agreements because it seeks to enforce the terms of the Joint Use Agreements relating to the rates the parties can charge each other for utility pole attachments. Thus, the broad arbitration provision in the Joint Use Agreements renders arbitrable the instant dispute. The arbitration provision in the Joint Use Agreements does not manifest an intent by the parties to exclude from arbitration issues relating to primary jurisdiction. Although plaintiff argues it is "doubtful" whether the parties agreed to arbitrate

these issues, "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses, 460 U.S. at 24-25.

Plaintiff does not argue the primary jurisdiction issue is outside the purview of arbitrators, only that it was not required to present the primary jurisdiction argument to arbitrators or the FCC in the first instance because it has the right to ask the court to enjoin arbitration. "Of course, . . . the party opposing arbitration . . . can ask the court to enjoin arbitration on the ground that the underlying dispute is not arbitrable." Logan & Kanawha Coal Co. v. Detherage Coal Sales, LLC, 514 F. App'x 365, 370 (4th Cir. 2013) (internal quotation marks omitted). However, "an injunction against arbitration is appropriate only where an asserted claim clearly falls outside of the substantive scope of the agreement." Smith Barney Inc. v. Vogele, 967 F. Supp. 165, 169 (E.D. Va. 1997) (internal quotation marks omitted); see Stedor Enters., Ltd. v. Armtex, Inc., 947 F.2d 727, 728-29, 32-33 (4th Cir. 1991) (affirming district court's order compelling arbitration and dismissing request to enjoin arbitration where a valid arbitration agreement existed); Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 116-19 (4th Cir. 1993) (affirming district court's order enjoining arbitration where the issue in dispute was not arbitrable). An injunction against arbitration is not appropriate here where the arbitration provision is broad enough to cover the dispute.

In sum, a valid arbitration provision exists in the Joint Use Agreements. In addition, the dispute raised in the Arbitration Demand is within the scope of the arbitration provision. The court's role in determining whether a dispute is one to be resolved through arbitration is limited "to ensur[ing] that the dispute is arbitrable – i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." Murray v. United Food & Commercial Workers Int'l Union, 289 F.3d 297, 302 (4th Cir. 2002) (citations

omitted). Accordingly, after determining the parties' instant dispute is arbitrable, the court must compel arbitration. Adkins, 303 F.3d at 500.

The issues raised by plaintiff concerning potential deficiencies in the Joint Use Agreements can be raised before the arbitrators. See Jeske v. Brooks, 875 F.2d 71, 75 (4th Cir. 1989) ("Because the alleged defects pertain to the entire contract, rather than specifically to the arbitration clause, they are properly left to the arbitrator for resolution."); Muriithi v. Shuttle Express, Inc., 712 F.3d 173, 183-84 (4th Cir. 2013) ("A party challenging the enforceability of an arbitration clause under Section 2 of the FAA must rely on grounds that relate specifically to the arbitration clause and not just to the contract as a whole. Thus, a challenge specific to an arbitration clause is considered by the court in a motion to compel, while a challenge relating to the entire contract is heard only after the merits of a case have been referred to an arbitrator . . . .") (internal quotation marks omitted).

Plaintiff nonetheless argues the court should exercise discretion to stay a motion to compel arbitration pending primary jurisdiction referral, even if the court has the authority to compel immediate arbitration. Plaintiff cites in support of this argument N. Cal. Dist. Council of Hod Carriers v. Opinski, 673 F.2d 1074, 1076 (9th Cir. 1982) and Hawaii Nurses' Ass'n v. Kapiolani Health Care Sys., 890 F. Supp. 925, 930-31 (D. Haw. 1995).

In Opinski, a union commenced litigation "to compel arbitration over a clause in a collective bargaining agreement between the union and Opinski (employer)." 673 F.2d at 1075. However, "[t]he union filed the action after the employer had already filed an unfair labor practice charge before the [administrative agency] to have the clause declared illegal on its face." Id. The Opinski court determined that

> where a union has filed suit in a district court on a collective bargaining agreement

> claim which is closely related to an unfair labor practice charge the employer has already presented to the [administrative agency], the district court must exercise its discretion to determine whether proceedings should be stayed until final disposition of the [agency] proceeding.

Id.

Hawaii Nurses' concerned a dispute regarding the scope of two collective bargaining agreements between the parties. 890 F. Supp. at 927. The employer filed a petition with an administrative agency before the union subsequently filed an action in the district court to compel arbitration. Id. at 928. The court noted that the issue the union wished to arbitrate was virtually identical to the issue before the agency. Id. at 930. The court agreed with the union that it had the authority to compel arbitration. Id. at 931. However, the court stayed the litigation pending the agency's determination, noting the following:

> [I]t would seem imprudent to compel an arbitration proceeding where the very same matter has already been heard, and is under consideration, by the [agency]. The more measured and judicious path would appear to be to stay the proceedings until the [agency] has made its ruling. At that point, if arbitration is still warranted, either the parties will agree to arbitrate the remaining issues or the Union may then proceed with its motion to compel arbitration.

Id.

Opinski and Hawaii Nurses' reference the court's exercise of discretion to decide whether to stay arbitration once the court has already determined certain issues are within an administrative agency's primary jurisdiction. These cases, however, are in conflict with the court's obligation to refer a matter to arbitration if it falls within the scope of a valid arbitration agreement. See Dean, 470 U.S. at 218; Adkins, 303 F.3d at 500. Other courts more recently have recognized that the court lacks discretion to stay ruling on a motion to compel arbitration, even where primary jurisdiction has been raised. See Global Crossing Telecomms., Inc. v. 3L Commc'ns Mo., LLC, No. 4:13CV00885

ERW, 2013 WL 3893321, at *4 (E.D. Mo. July 26, 2013) ("Having determined that the tariff's arbitration provision constitutes a valid agreement between 3LCom and Plaintiffs, and that the parties' dispute is not outside the scope of the tariff's arbitration clause, the Court must deny Plaintiffs' request to stay this action and the related arbitration proceeding, as well as their request to refer the matter to the FCC."); N.Y. Cross Harbor R.R. Terminal v. Consol. Rail Corp., 72 F. Supp. 2d 70, 82 (E.D.N.Y. 1998) ("[H]aving decided that the . . . claims must be decided by an arbitrator, this court lacks the authority to make the discretionary decision whether those claims require preliminary referral to the [administrative agency]. This is not to say that the defendant is foreclosed from framing its primary jurisdiction arguments to the arbitrator. To the contrary, the doctrine of primary jurisdiction applies to arbitrators as well as courts."). Moreover, as discussed previously, arbitration may be enjoined only where the dispute is not arbitrable. See Smith, 967 F. Supp. at 169.

Plaintiff also seeks a declaration that defendant's Arbitration Demand is "null, void, and of no effect." Plaintiff suggests, however, that the Arbitration Demand is void solely because the FCC has primary jurisdiction. Plaintiff does not suggest the arbitration provision, pursuant to which the Arbitration Demand is issued, is invalid or unenforceable based on "any grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Moreover, "general contract defenses that are applicable to the entire contract . . . are reserved for the [arbitral] forum in which the dispute ultimately will be resolved." Muriithi, 712 F.3d at 184. Where the court has determined that plaintiff's primary jurisdiction argument does not foreclose arbitration in this case, this request is without merit.

In sum, a valid arbitration agreement exists between the parties. In addition, all issues involved in this litigation are arbitrable. "Dismissal [of the complaint] is a proper remedy when all of the issues presented in a lawsuit are arbitrable." Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001). Accordingly, the court grants defendant's motion and compels arbitration of the dispute raised in the Arbitration Demand. The complaint is dismissed.

CONCLUSION

For the foregoing reasons, the court GRANTS defendant's motion to dismiss and compel arbitration (DE 9), and DENIES plaintiff's motion to stay ruling on defendant's motion (DE 18). The clerk is DIRECTED to close this case.

SO ORDERED, this the 15th day of August, 2014.

LOUISE W. FLANAGAN
United States District Court Judge

Exhibit E

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO EDISON COMPANY,	)	
	)	CASE NO. 5:14cv321
Plaintiff,	)	
	)	
v.	)	JUDGE BENITA Y. PEARSON
	)	
FRONTIER NORTH INC., *et al.*,	)	
	)	**MEMORANDUM OF OPINION AND**
Defendants.	)	**ORDER** [Resolving ECF Nos. 17; 18; 20]

Pending before the Court are Defendant Frontier Communications Corporation's ("Frontier Communications") Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6) (ECF No. 17) and Defendant Frontier North Inc.'s ("Frontier North") Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). ECF Nos. 18; 20. The Court has been advised, having reviewed the record, including the parties' briefs and the applicable law. For the reasons provided below, the Court grants Frontier Communication's Motion to Dismiss and denies Frontier North's Motion to Dismiss.

I. Factual and Procedural Background

This is a case about utility pole rents. Plaintiff Ohio Edison is an Ohio corporation with its principal place of business in Ohio. ECF No. 1-1 ¶ 2. Defendant Frontier North is a Wisconsin corporation that Ohio Edison alleges has its principal place of business in Ohio. ECF No. 1-1 ¶ 3. Defendant Frontier Communications is a Delaware corporation with its principal place of business in Connecticut, and is the parent company of Frontier North. ECF No. 1-1 ¶ 4.

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Effective January 1, 2008, Ohio Edison and Frontier North's predecessor-in-interest, Verizon North, entered into a Joint Use Agreement.[1] The Joint Use Agreement now governs Ohio Edison and Frontier North, and provides the terms by which the parties may jointly use utility poles. ECF No. 1-1 ¶ 9. Specifically, the Joint Use Agreement permits Ohio Edison to attach its electric facilities to Frontier North poles and Frontier North to attach its communications facilities to Ohio Edison poles. ECF No. 1-1 ¶ 11. The Joint Use Agreement also sets forth the rates each party pays for the use of the other's poles. ECF No. 1-1 ¶ 12. For calendar year 2011, the Joint Use Agreement provided that Ohio Edison owed Frontier North $33.02 per pole that Ohio Edison used and that Frontier North owed Ohio Edison $23.74 per pole that Frontier North used. ECF No. 1-1 ¶ 17.

Ohio Edison alleges that, for calendar year 2011, Frontier North owed Ohio Edison $140,176.12 in utility pole rent.[2] ECF No. 1-1 ¶ 22. Ohio Edison further alleges that it mailed an invoice to Frontier North on October 19, 2012, detailing its and Frontier North's rent obligations under the Joint Use Agreement. ECF No. 1-1 ¶ 25. Ohio Edison received a partial payment on its invoice on March 20, 2013. An entity identified as "Frontier Communications Inc." made a $45,789.59 payment on the October 19, 2012 invoice that Ohio Edison sent to Frontier North. ECF No. 1-1 ¶ 26. Ohio Edison alleges that it has not received any other

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[1] Ohio Edison alleges that the Joint Use Agreement remains in full force and effect, and neither Frontier Communications nor Frontier North has disputed its binding effect. *See* ECF No. 1-1 ¶ 9.

[2] This figure reflects the net amount for each party's use of the other's poles. Ohio Edison alleges that, for 2011, Frontier North owed $1,012,036.20 for the use of Ohio Edison poles while Ohio Edison owed Frontier North $871,860.08 for the use of Frontier North's poles. ECF No. 1-1 ¶¶ 20–21.

payments on the October 19, 2012 invoice. ECF No. 1-1 ¶ 29. Ohio Edison sent letters, through its service company FirstEnergy Service Company, to Frontier Communications on June 5, 2013 and October 10, 2013, notifying the parent company that Frontier North had been in default of the Joint Use Agreement for its failure to make a full payment on the October 19, 2012 invoice. ECF No. 1-1 ¶ 31. Ohio Edison alleges, however, that neither Frontier Communications nor Frontier North has paid the remaining balance on the October 19, 2012 invoice. ECF No. 1-1 ¶ 32.

Ohio Edison filed a complaint against both Frontier Communications and Frontier North on January 16, 2014 in the Summit County Court of Common Pleas. ECF No. 1-1. Defendants removed the case to federal court on February 14, 2014. ECF No. 1. Thereafter, the parties sought numerous extensions of time in order to attempt to settle this and other lawsuits pending between the two sides. ECF Nos. 5; 10; 11; 12; 13. The Court stayed the case on May 27, 2014. The Court reopened the case after the parties had stated they unable to reach a settlement. ECF No. 15. Defendants then filed the pending motions to dismiss. Frontier Communications moved to dismiss for lack of personal jurisdiction or, alternatively, for failure to state a claim on the grounds that it is not a party to the breach of contract claim between Ohio Edison and Frontier North. ECF No. 17. Frontier North moved to dismiss for failure to state a claim on the grounds that Ohio Edison has failed to adhere to the Joint Use Agreement's mandatory dispute resolution provisions. ECF Nos. 18; 20. Ohio Edison has replied to both motions. ECF Nos. 28; 29; 30. Frontier Communications and Frontier North have replied. ECF Nos. 35; 36. The matter is ripe for adjudication.

II. Legal Standard

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A. Personal Jurisdiction

The party resisting a Rule 12(b)(2) motion to dismiss bears the burden of demonstrating that personal jurisdiction exists. *Air Prods. and Controls, Inc. v. Safetech Intern., Inc.*, 503 F.3d 544, 549 (6th Cir. 2007). The party's burden depends on whether the court conducts an evidentiary hearing on the question of jurisdiction. If an evidentiary hearing is held, the party carrying the burden must establish jurisdiction by a preponderance of evidence. *Kroger Co. v. Malease Foods Corp.*, 437 F.3d 506, 510 & n.3 (6th Cir.2006). If the court rules on the motion to dismiss without an evidentiary hearing, the party need only make a *prima facie* showing that jurisdiction exists. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996). When evaluating the *prima facie* showing, the court must consider the pleadings and affidavits in the light most favorable to the non-moving party. *Id.* Moreover, the court "does not weigh the controverting facts of the party seeking dismissal." *Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991). The court, however, is permitted to consider the moving party's "undisputed factual assertions." *Conn v. Zakharov*, 667 F.3d 705, 711 (6th Cir. 2012).

B. Failure to State a Claim

To survive a Rule 12(b)(6) motion to dismiss, the complaint must allege enough facts to "raise a right to relief above the speculative level." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). It also must "state a claim that is plausible on its face." *Id.* at 570. Upon reviewing a motion to dismiss, the Court shall take the pleadings as true and construe them "liberally in favor of the party opposing the motion to dismiss." *Scott v. Ambani*, 577 F.3d 642, 646 (6th Cir. 2009). A court may dismiss a claim if the Court finds on the face of the pleading that "there is an insurmountable bar to relief indicating that the plaintiff does not have a claim." *Ashiegbu v.*

Purviance, 76 F. Supp.2d 824, 828 (S.D. Ohio 1998), *aff'd* 194 F.3d 1311 (6th Cir. 1999), *cert. denied*, 529 U.S. 1001 (2000).

Claims set forth in a complaint must be plausible, rather than conceivable. *Twombly*, 550 U.S. at 570. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]'— 'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (citing Fed. R. Civ. Pro. 8(a)(2)). The factual allegations in the complaint "must contain something more . . . than . . . merely creat[ing] a suspicion of a legally cognizable right." *Twombly*, 550 U.S. at 555-56 (quoting 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, p. 235–236 (3d ed. 2004)). In addition to reviewing the claims set forth in the complaint, a court may also consider exhibits, public records, and items appearing in the record of the case as long as the items are referenced in the complaint and are central to the claims contained therein. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

III. Discussion

A. Frontier Communications' Motion to Dismiss

Frontier Communications argues that two separate reasons justify granting its motion to dismiss. First, Frontier Communications argues that the Court lacks personal jurisdiction over the company. ECF No. 17 at 5. Second, assuming the Court may exercise personal jurisdiction, Frontier Communications argues that Ohio Edison has failed to state a breach of contract claim against Frontier Communications. ECF No. 17 at 7. Because the Court agrees that Ohio Edison has failed to establish that the Court may exercise personal jurisdiction over Frontier Communications, the Court need only address Frontier Communications' first argument.

(5:14cv321)

1. Principles of Personal Jurisdiction

"A federal court sitting in diversity may not exercise jurisdiction over a defendant unless courts of the forum state would be authorized to do so by state law—and any such exercise of jurisdiction must be compatible with the due process requirements of the United States Constitution." *Int'l Techs. Consultants v. Euroglas S.A.*, 107 F.3d 386, 391 (6th Cir. 1997) (citation omitted). Under Ohio law, personal jurisdiction exists over a non-resident defendant when Ohio's long arm-statute confers jurisdiction and the exercise of jurisdiction over the non-resident defendant comports with the Federal Due Process Clause. *Kauffman Racing Equip., L.L.C. v. Roberts*, 2010-Ohio-2551, 126 Ohio St.3d 81, 930 N.E.2d 784, 790. Ohio's long-arm statute provides nine specific bases for the exercise of personal jurisdiction over a non-resident defendant.[3] R.C. § 2307.382(A). Ohio's long-arm statute further limits personal jurisdiction

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[3] Under R.C. § 2307.382(A), the bases for jurisdiction are:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury ... by an act or omission outside this state . . . ;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state . . . ;

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons . . . ;

(7) Causing tortious injury to any person by a criminal act . . . ;

(8) Having an interest in, using, or possessing real property in this state;

(9) Contracting to insure any person, property, or risk located within this state at

over non-resident defendants to causes of action "arising from" the basis for personal jurisdiction. R.C. § 2307.382(C). The "arising from" requirement for long-arm jurisdiction has been interpreted as requiring a "proximate cause" relationship between the plaintiff's injury and the defendant's conduct in Ohio. *Brunner v. Hampson*, 441 F.3d 457, 466 (6th Cir. 2006) (concluding the Ohio long-arm statute requires the tighter fit of proximate causation and not the "but-for" approach used under the Due Process Clause).

Before an Ohio court may exercise long-arm jurisdiction, however, the court must ensure that the exercise of jurisdiction over the defendant comports with the requirements of the Due Process Clause: the defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Third Nat. Bank in Nashville v. WEDGE Grp. Inc.*, 882 F.2d 1087, 1089 (6th Cir. 1989) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted). General personal jurisdiction—when the suit does not arise out of the defendant's contacts with the forum state—may be exercised when the defendant's contacts with the forum state are "continuous and systematic." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014). Specific personal jurisdiction allows a state to "exercise[] personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Third Nat. Bank in Nashville*, 882 F.2d at 1089 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). The Sixth Circuit has set forth the following three-part test for analyzing whether specific jurisdiction may be exercised consistent with due process:

First, the defendant must purposefully avail himself of the privilege of acting in

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the time of contracting.

> the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

S. Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968).

Ohio Edison advances three different arguments for the exercise of personal jurisdiction over Frontier Communications. First, Ohio Edison argues that "Frontier Communications is subject to general jurisdiction in Ohio." ECF No. 29 at 14. Second, Ohio Edison argues that the Court may exercise specific jurisdiction over Frontier Communications because the breach of contract arises from Frontier Communications' contacts with Ohio. ECF No. 29 at 14–15. Finally, Ohio Edison argues that the alter ego theory of jurisdiction applies, and that Frontier Communications is subject to jurisdiction in Ohio based on Frontier North's contacts with the state. ECF No. 29 at 15–16. At the outset, the Court rejects Ohio Edison's argument that the Court may exercise general jurisdiction over Frontier Communications. "Ohio law does not appear to recognize general jurisdiction over non-resident defendants, but instead requires that the court find specific jurisdiction under one of the bases of jurisdiction listed in Ohio's long-arm statute." *Conn*, 667 F.3d at 717. Therefore, Ohio Edison must demonstrate that the Court may either exercise specific personal jurisdiction over Frontier Communications or apply the alter ego theory of personal jurisdiction.

2. Specific Jurisdiction

Ohio Edison next argues that the Court may exercise specific jurisdiction over Frontier Communications. For the reasons discussed below, however, the Court concludes that it may not exercise specific jurisdiction over Frontier Communications because Ohio Edison has failed to

show that Ohio's long-arm statute confers jurisdiction.

Section (A)(1) of the long-arm statute confers jurisdiction over a defendant engaged in transacting business in Ohio. R.C. § 2307.382(A)(1). The Ohio Supreme court defines "transacting any business" broadly: "The term 'transact' as utilized in the phrase '[t]ransacting any business' encompasses 'to carry on business' and 'to have dealings,' and is 'broader . . . than the word 'contract.'" *Goldstein v. Christiansen*, 1994-Ohio-229, 70 Ohio St. 3d 232, 236, 638 N.E.2d 541, 544 (quoting *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73, 75, 559 N.E.2d 477, 480 (1990)). Given the "bare wording" of the statute, courts must make a case-by-case determination of whether a non-resident defendant has transacted business in Ohio. *Hitachi Med. Sys. Am., Inc. v. St. Louis Gynecology & Oncology, LLC*, 2011 WL 711568, at *4 (N.D. Ohio Feb. 22, 2011). "The mere existence of a contract is insufficient to support jurisdiction." *Burnshire Development LLC v. Cliffs Reduced Iron Corp.*, 198 F. App'x 425, 431 (6th Cir. 2006). Moreover, the plaintiff needs to establish that there is a substantial connection between the defendant and the forum state. *U.S. Sprint Commc'ns Co. P'ship v. Mr. K's Foods, Inc.*, 1994-Ohio-504, 68 Ohio St. 3d 181, 185, 624 N.E.2d 1048, 1052. Courts have identified two factors that guide the analysis of whether a non-resident defendant has transacted business within Ohio. As another unit of the instant Court observed:

> The first factor is whether the out-of-state defendant initiated the dealing. If it were the defendant who reached out to the forum state to create a business relationship, the defendant has transacted business within the forum state. The question of who initiates the contact, however, is but one factor to be considered and the determination is not always dependent upon who initiates the contact. With regard to reaching out, as a general rule, the use of interstate lines of communication such as mail and telephones does not automatically subject a defendant to the jurisdiction of the courts in the forum state.

> The second factor is whether the parties conducted their negotiations or discussions in the forum state, or with terms affecting the forum state. If the parties negotiated in Ohio with provisions affecting Ohio, the non-resident transacted business in Ohio. However, merely directing communications to an Ohio resident for the purpose of negotiating an agreement, without more, is insufficient to constitute transacting business. Rather, there must additionally be some continuing obligation that connects the non-resident defendant to the state or some terms of the agreement that affect the state.

Hitachi, 2011 WL 711568 at *4 (citations, internal quotation marks omitted).

Here, Ohio Edison cannot show that Frontier Communications transacts business in Ohio. First, Frontier Communications has submitted an affidavit from Vice President David G. Schwartz that contains assertions that Ohio Edison has not contested. Crucially, Schwartz avers that Frontier Communications has no license to transact business in Ohio. ECF No. 17-1 ¶ 3. Schwartz further avers that Frontier Communications is not a party to the Joint Use Agreement between Ohio Edison and Frontier North. ECF No. 17-1 ¶ 7. In its Complaint, Ohio Edison acknowledges that Frontier North, not Frontier Communications, is a party to the Joint Use Agreement with Ohio Edison. ECF No. 1-1 ¶ 8. Ohio Edison also acknowledges that Frontier North, not Frontier Communications, is the "local exchange carrier providing telephone service in Ohio." ECF No. 1-1 ¶ 3. Ohio Edison has pleaded that "Frontier Communications served approximately 258,730 customers, or 9.0% of the total residential customers in the [sic] Ohio." ECF No. 1-1 ¶ 4. Moreover, Ohio Edison presents a Frontier Communications press release from 2010 which states, in pertinent part, that "Ohio is one of Frontier's largest operations, spanning 77 counties and with more than 1,000 employees." ECF No. 29-3 at 33. At the same time, however, Ohio Edison has stated Frontier Communications "is the parent company of Defendant Frontier North and is responsible for its operation," and that Frontier

Communications' involvement as to the Joint Use Agreement is "overseeing" the agreement between Ohio Edison and Frontier North through Centralized Joint Use Team. ECF No. 1-1 ¶ 4. By contrast, Ohio Edison's Complaint discusses in far greater detail Frontier North's involvement in the breach of contract claim. *E.g.*, ECF No. 1-1 ¶¶ 7 ("Ohio Edison and Frontier *North* each own utility poles . . . .") 11 ("The Joint Use Agreement enables Ohio Edison to attach electric facilities to poles owned by Frontier *North* . . . .") 18 ("During calendar year 2011, Ohio Edison was attached to, or reserved space on, 26,404 Frontier *North* poles.") 23 ("Ohio Edison invoiced Frontier *North* . . . .") (emphasis added). There is nothing inconsistent between Ohio Edison's position that Frontier Communications provides service to 258,730 customers and Frontier Communications' position that *it* does not do business or provide services in Ohio other than through its subsidiary Frontier North.

Moreover, neither of the *Hitachi* factors warrant concluding that Frontier *Communications* transacted business in Ohio, even when construing the facts in the light most favorable to Ohio Edison. The lone basis for finding that Frontier Communications initiated any business dealing is that another subsidiary of Frontier Communications—"an entity identified as Frontier Communications Inc."—sent Ohio Edison a payment on Frontier North's invoice. *See* ECF No. 1-1 ¶ 26. Ohio Edison does not allege that Frontier Communications Inc. is the same entity as Defendant Frontier Communications. Furthermore, even if it were assumed that Frontier Communications sent the payment on the invoice, "as a general rule, the use of interstate lines of communication such as mail and telephones does not automatically subject a defendant to the jurisdiction of the courts in the forum state." *Hitachi*, 2011 WL 711568 at *4. Likewise, the Court cannot conclude that alleging a single instance of paying a subsidiary's bill through the

mail is sufficient to establish personal jurisdiction over the parent company.

As to the second factor, "whether the parties conducted their negotiations or discussions in the forum state, or with terms affecting the forum state," the Joint Use Agreement undoubtably involves terms affecting Ohio. Ohio Edison has not shown any facts that establish that Frontier Communications is a party to the Joint Use Agreement, however. Instead, Ohio Edison acknowledges that the subsidiary company Frontier North is the party to the Joint Use Agreement. ECF No. 1-1 ¶ 8. As previously discussed, Ohio Edison's Complaint makes it evident that Frontier North, not Frontier Communications, is the party with the "continuing obligation" that connects them to Ohio. *Hitachi*, 2011 WL 711568 at *4.

In its Opposition Brief, Ohio Edison points to Frontier's website as evidence that Frontier Communications transacts business in Ohio. The website states that Frontier Communications "offers voice, broadband, satellite video, wireless Internet data access, data security solutions, bundled offerings, specialized bundles for small businesses and home offices, and advanced business communications for medium and large businesses in 27 states"—including Ohio. ECF No. 29-3 at 94. The website also allows potential customers to order services from Frontier and has pages which allow existing customers to pay their bills. ECF No. 29-5 ¶ 4. Ohio Edison argues that its poles are the means by which Frontier Communications is capable of communicating with customers and providing its services to Ohio residents through its website. The Joint Use Agreement at issue in this case discusses, among other things, how much it costs to jointly use Ohio Edison's utility poles. ECF No. 1-1 ¶ 7. Therefore, Frontier Communications' activities in Ohio make use of the same Ohio Edison utility poles which formulate the basis for Ohio Edison's breach of contract claim.

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Even if the website is accepted as evidence that Frontier Communications transacts business in Ohio,[4] Ohio Edison cannot show that the breach of contract claim arose from the website. Ohio Edison correctly observes that a plaintiff has only a slight burden under the constitutional analysis for establishing that a claim arises from a defendant's contacts. CompuServe, 89 F.3d at 1467 ("If a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts."). That burden is much higher under Ohio's long-arm statute. *Brunner*, 441 F.3d at 465–66 ("We thus conclude that the Ohio Supreme Court in *Goldstein* [*v. Christiansen* (1994), 70 Ohio St. 3d 232, 236] rejected *Creech*'s "but for" approach under the Due Process Clause and that the long-arm statute requires a "proximate cause" relationship between a plaintiff's personal injury claim and the defendant's conduct in Ohio."). In this case, it is undisputed that Frontier North is a party to the Joint Use Agreement, Frontier Communications is not. ECF No. 1-1 ¶ 7. Frontier North is obligated to pay for the use of the utility poles that it shares with Ohio Edison, Frontier Communications is not. Without more, the Court cannot conclude Frontier Communications' website is the proximate cause of Frontier North's alleged breach of contract.

In order to avoid this undisputed fact, Ohio Edison alleges that Frontier Communications directed Frontier North not to pay the disputed pole rents subject to Joint Use Agreement. ECF

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[4] Ohio Edison argues that the website establishes that Frontier Communications has purposefully availed itself of Ohio, not that Frontier Communications transacts business in Ohio. ECF No. 29 at 14–15. In order to reach the question of whether asserting jurisdiction over a non-resident defendant comports with due process, the Court must first conclude that state law allows the exercise of jurisdiction. *Theunissen*, 935 F.2d at 1459. In Ohio, that requires first concluding that Ohio's long-arm statute provides a basis for exercising jurisdiction. *Conn*, 667 F.3d at 713. But, because the "transacting any business" standard is "coextensive" with the purposeful availment prong of the due process analysis, *see Burnshire Dev., LLC*, 198 F. App'x. at 432, the Court will consider Ohio Edison's arguments here.

No. 29 at 15 (alleging that Frontier Communications "direct[ed] that the pole rent not be paid in full"). Ohio Edison, however, cannot connect Frontier Communications' alleged direction to the website—the basis for exercising personal jurisdiction under the long-arm statute—because the pole rent decision can be made without any connection to the forum state. As Ohio Edison recognizes in the Complaint, Frontier Communications is a Delaware corporation with its principal place of business in Connecticut. ECF No. 1-1 ¶ 4. Ohio Edison further alleges that an entity that shares the same address as Frontier Communications made an alleged short payment to Ohio Edison. ECF No. 1-1 ¶ 26. If, as Ohio Edison suggests, Frontier Communications made the decision not to pay the pole rent owned under the Joint Use Agreement, then Ohio Edison's breach of contract claim arises out of Frontier Communications' transacting business in Connecticut, not Ohio. *See* Kreller Consulting Group, Inc. v. PrimeLending, 2014 WL 3689148, at *5 (S.D. Ohio July 23, 2014) ("Plaintiff does not allege facts to support a finding that the cause of action "arises from" Defendant's contacts with Ohio. The alleged breach of contract occurred in Texas where Defendant refused to pay."); *see also* Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d 147,152 (6th Cir. 1997) (concluding that plaintiff failed to show cause of action "ar[o]se from defendant's activities" in forum state when refusal to pay for goods was made outside of the forum state). This cannot satisfy the proximate causation required to establish that Ohio Edison's claim arises from Frontier Communications transacting business in Ohio.

The Court concludes that Ohio Edison has failed to demonstrate that Ohio's long-arm statute confers jurisdiction over Frontier Communications. Ohio Edison has failed to show that Frontier Communications transacts business in Ohio. As an alternative basis for its conclusion, the Court also notes that Ohio Edison has failed to demonstrate that the instant breach of contract

claim arises from any contacts with Ohio that Frontier Communications may have.

3. Alter Ego Doctrine

Ohio Edison also argues that the Court can exert general jurisdiction over Frontier Communications by treating Frontier North as the alter ego for Frontier Communications. For the reasons described below, the Court concludes that Ohio Edison has failed to satisfy the standard for applying the alter ego doctrine to establish personal jurisdiction over Frontier Communications.

The Sixth Circuit recognizes that:

> it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court.

Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 362 (6th Cir. 2008). Courts apply the alter ego theory of personal jurisdiction to a parent-subsidiary relationship when "the parent company exerts so much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction." Id. Because this case is an action based on diversity subject matter jurisdiction, the Court must apply Ohio's alter ego doctrine. Although Ohio law sets forth a test for piercing the corporate veil, "the legal conception [of alter-ego liability] has historical antecedents in both federal and state law. Such cases may provide sound analogies or insightful analyses relating to the formal test set forth in [Ohio law] without usurping its authority." Music Express Broad. Corp. v. Aloha Sports, Inc., 2005-Ohio-3401, 161 Ohio App. 3d 737, 742, 831 N.E.2d 1087, 1091. The Court may therefore rely on Sixth Circuit case law applying the alter ego theory of personal jurisdiction

as long as the cases are consistent with Ohio law.

Under Ohio law, a court may disregard the corporate form when the plaintiff shows the following:

> (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Belvedere Condo. Unit Owners' Assn. v. R.E. Roark Cos., Inc., 1993-Ohio-119, 67 Ohio St. 3d 274, 288, 617 N.E.2d 1075, 1086. With respect to the first prong of the veil-piercing analysis, courts consider a number of factors to determine whether the parent and subsidiary are "fundamentally indistinguishable." *Id.* "In determining whether a subsidiary is an alter ego of the parent corporation, Ohio courts consider factors such as whether (1) corporate formalities are observed, (2) corporate records are kept, and (3) the corporation is financially independent." *Estate of Thomson*, 545 F.3d at 362. The Sixth Circuit also considers the following factors: (1) sharing the same employees and corporate officers; (2) engaging in the same business enterprise; (3) having the same address and phone lines; (4) using the same assets; (5) completing the same jobs; (6) not maintaining separate books, tax returns, and financial statements; and (7) exerting control over the daily affairs of another corporation. *Id.* While the plaintiff merely needs to make a *prima facie* case at this stage of litigation, the plaintiff must provide "sufficient facts to overcome the general presumption that one company operates independently from another." *Microsys Computing, Inc. v. Dynamic Data Sys., LLC*, 2006 WL 2225821, at *7 (N.D. Ohio Aug. 2, 2006) (citing *Belvedere*, 617 N.E.2d at 1085).

In this case, Ohio Edison has presented the following facts to support its position that Frontier North is the alter ego of Frontier Communications. There is some evidence before the Court that Frontier Communications and Frontier North share some common officers and employees. Mary Wilderotter, Daniel McCarthy, John Jureller, and Andrew Cain hold leadership positions in both Frontier Communications and Frontier North. ECF No. 29-3 ¶¶ 9–11. Moreover, Ohio Edison has alleged that the Central Joint Use Team is a Frontier Communications controlled group responsible for, among other things, overseeing Frontier North's Joint Use Agreement with Ohio Edison. ECF No. 1-1 ¶ 4. Frontier Communications and Frontier North also share a common mailing address. ECF No. 29-3 ¶¶ 9–11. Ohio Edison has also alleged that Frontier Communications and Frontier North share some common assets: all correspondence associated with the Frontier North Joint Use Agreement bore the service mark owned by Frontier Communications. ECF No. 29 ¶ 25. Ohio Edison also indicates that Frontier North filed a report with the Ohio Public Utilities Commission that shows Frontier Communications and Frontier North share the same website address. ECF No. 29 ¶ 17.

The Court holds, however, that this evidence is insufficient to establish the *prima facie* case that Frontier Communications and Frontier North are fundamentally indistinguishable. Belvedere, 617 N.E.2d at 1085. As important as what Ohio Edison has alleged is what Ohio Edison has not alleged. Ohio Edison has not alleged that Frontier Communications has disregarded corporate formalities with regard to Frontier North. There is no evidence that Frontier North is financially dependent upon Frontier Communications, or that the two companies commingled funds. *See Microsys*, 2006 WL 2225821 at *6 ("Sixth Circuit cases and Ohio law require demonstration of financial dependency between corporations and demonstration

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of nonobservance of corporate formalities. Microsys fails to demonstrate the state of financing between DDS and KAN, describe any commingling of funds between DDS and KAN, or detail KAN's nonobservance of corporate formalities.") (internal citations omitted). There is also no evidence that Frontier Communications and Frontier North failed to maintain separate books, tax returns, and financial statements. If anything, the record reveals that Frontier Communications diligently records earnings of gross income deriving from its various subsidiaries. *See* ECF No. 29-3 at 45 (Statement of Intrastate-Gross Earnings for Frontier North); 50 (Statement of Intrastate-Gross Earnings for Frontier Communications of Michigan). Ohio Edison has also failed to identify any other assets common to both Frontier Communications and Frontier North aside from the Frontier Communications service mark. Finally, while Ohio Edison alleges that Frontier Communications operates the Centralized Joint Use Team that oversees the Frontier North Joint Use Agreement, Ohio Edison has not presented other evidence of "exerting control over the daily affairs of another corporation." *Estate of Thomson*, 545 F.3d at 362. At most, the evidence concerning the Centralized Joint Use Team proves that Frontier Communications exerts some control over a single matter for its subsidiary. On the balance of these factors, the Court concludes that Ohio Edison has failed to meet its burden of establishing alter ego liability.

A survey of alter ego case law confirms that Ohio Edison has failed to establish that Frontier North is merely the alter ego of Frontier Communications. For instance, in *Glover v. Small Bone Innovations, Inc.*, 2012 WL 2412068 (N.D. Ohio June 26, 2012), another unit of the Court concluded that alter ego liability existed because "the majority of the factors weigh in favor of this defendant being considered an alter ego." Specifically, the *Glover* Court found alter ego personal jurisdiction when the plaintiff alleged that the actions of the subsidiary "ha[d] been

controlled exclusively by the corporate officers" of the parent; the parent company's Executive Officer for Sales and Marketing also served as the subsidiary company's lone corporate officer; the parent company wrote checks from the subsidiary company's bank account; the parent and subsidiary companies shared the same website; the parent and subsidiary companies' assets overlapped; and the subsidiary company merely served as a "representation office" of the parent company. *Id.* at *5–6. Conversely, other units of the Court declined to pierce the corporate veil for personal jurisdiction even when the parent and subsidiary shared a common manager, the same business enterprise, same phone line, and same address without additional evidence that other corporate formalities had been disregarded. *Microsys*, 2006 WL 2225821 at *6–7. Likewise, the Court in *Garlock v. Ohio Bell Telephone Co.*, 2014 WL 2006781 (N.D. Ohio May 15, 2014) declined to exercise alter ego jurisdiction over the parent company when the plaintiff alleged that the parent company "holds itself out to the public via advertising, as a provider of telecom services and does not distinguish services which it offers through its subsidiaries," and shared common management, officers, directors, board members, offices, corporate logo, and website with its subsidiary. *Id.* at *1.

The Court finds the instant case more akin to *Garlock* and *Microsys*. Unlike in *Glover*, Ohio Edison has failed to allege a majority of the factors that allow a court to pierce the corporate veil for purposes of personal jurisdiction. Like in *Microsys*, Ohio Edison has shown some overlap among managers and employees of Frontier Communications and Frontier North without adducing additional evidence that the parent and subsidiary were ignoring other corporate formalities. *See Matthews v. Kerzner Int'l Ltd.*, 2011 WL 5122641 (N.D. Ohio Oct. 27, 2011) ("'[I]t is entirely appropriate for directors [and officers] of a parent corporation to serve as

directors [and officers] of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts.'") (quoting United States v. Bestfoods, 524 U.S. 51, 69 (1998)). The Court also finds, like the *Garlock*, that the fact that Frontier Communications "does not distinguish services which it offers through" Frontier North is insufficient to establish alter ego liability, even when Frontier Communications and Frontier North have some corporate officers and employees in common and share a website and corporate logo.

Even if the Court concluded that the balance of factors weighed in favor of finding that Frontier Communications and Frontier North, however, Ohio Edison's argument fails for a second reason. Ohio Edison has not presented any evidence allowing the Court to conclude that Frontier Communications used Frontier North "to commit fraud or an illegal act" against Ohio Edison. *Belvedere*, 617 N.E.2d at 1086. Ohio Edison's breach of contract allegation is insufficient as a matter of Ohio law to satisfy the second prong for piercing the corporate veil.

The Ohio Supreme Court modified the second prong of *Belvedere* in *Dombroski v. WellPoint, Inc.*, 2008-Ohio-4827, 119 Ohio St. 3d 506, 513-14, 895 N.E.2d 538, 545. In *Dombroski*, the Ohio Supreme Court confronted question of whether a court could pierce the corporate veil when a party alleged unjust or inequitable acts that do not rise to the level of fraud or illegal act. The *Dombroski* Court rejected the expanded application of *Belvedere* to acts that were merely unjust or inequitable because it found this approach inconsistent with the plain language of *Belvedere*. *Id.* at 511. The Ohio Supreme Court also found the more expansive approach "significantly increase[d] the number of cases in which a plaintiff could pierce the corporate veil. *Id.*; *see also id.* at 512 (continuing to adhere to the principle that "piercing the

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corporate veil is the rare exception that should only be applied in the case of fraud or certain other exceptional circumstances"). Accordingly, the *Dombroski* Court modified the second prong of the *Belvedere* analysis to require that the plaintiff "demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Id.* at 513. At the same time, the *Dombroski* Court cautioned that "[c]ourts should apply this limited expansion cautiously toward the goal of piercing the corporate veil only in instances of extreme shareholder misconduct." *Id.* The *Dombroski* Court concluded that insurer bad faith—a straightforward tort—is unjust conduct that "does not represent the type of exceptional wrong that piercing is designed to remedy." *Id.* at 513–14.

In this case, Ohio Edison's sole allegation against Frontier Communications is that it is responsible for Frontier North's breach of the Joint Use Agreement. ECF Nos. 1-1 ¶ 35; 29 at 2. This is not a fraudulent, illegal, or similarly unlawful act required by *Dombroski*. Courts prior to *Dombroski* did not consider a breach of contract action, without more, sufficient to justify piercing the corporate veil. *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 608 (6th Cir. 2005) ("Breach of contract might give rise to a civil suit, but it is not illegal."); *see also* *Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670, 674 (6th Cir. 1999); *Nursing Home Group Rehab. Servs., Inc. v. Suncrest Health Care, Inc.*, 2005-Ohio-3945, 162 Ohio App.3d 577, 834 N.E.2d 382, 386–88; *Connolly v. Malkamaki*, 2002-Ohio-6933, ¶ 34. The modified standard in *Dombroski* has not changed this conclusion. *See Transition Healthcare Associates, Inc. v. Tri-State Health Investors, LLC*, 306 F. App'x 273, 282 and n.14 (6th Cir. 2009) ("Mere breach of contract is insufficient to satisfy prong two, and that is the most that Transition has presented."); *Advantage*

Bank v. Waldo Pub, LLC, 2009-Ohio-2816, ¶ 42. The Court likewise concludes that a simple breach of contract by Frontier North—a party whom Ohio Edison is capable of (and is actively) suing—is insufficient grounds to justify piercing the corporate veil to allow suit against Frontier Communications.

For the reasons discussed above, the Court concludes that Ohio Edison has failed to establish that the Court may exercise personal jurisdiction over Frontier Communications. Ohio Edison has not showed that Ohio's long-arm statute confers jurisdiction over Frontier Communications. Ohio Edison has also failed to demonstrate that the Court may pierce the corporate veil in order to confer jurisdiction over Frontier Communications based on the contacts of Frontier North. Accordingly, the Court grants Frontier Communications' motion to dismiss.

B. Frontier North's Motion to Dismiss

Frontier North argues that Ohio Edison's lawsuit should be dismissed because Ohio Edison has failed to adhere to the mandatory dispute resolution procedures contained in the Joint Use Agreement. ECF No. 18 at 3. Specifically, Frontier North maintains that Ohio Edison had an obligation under the Joint Use Agreement to initiate the process if it disputed the amount Frontier North paid on the October 19, 2012 invoice. ECF No. 36 at 2. Ohio Edison counters that the Joint Use Agreement requires Frontier North, not Ohio Edison, to initiate the dispute process if Frontier North had believed that it owed Ohio Edison less than the amount included on the invoice. ECF No. 28 at 3. According to Ohio Edison, Frontier North's failure to do so placed Frontier North in material default of the Joint Use Agreement, which relieved Ohio Edison of its obligation to adhere to the mandatory dispute resolution process. ECF No. 28 at 3. The Court agrees with Ohio Edison. For the reasons discussed below, Frontier North's motion to

dismiss is denied.

Article 17 of the Joint Use Agreement sets forth the process by which a party may dispute an invoice. It provides:

> **17.1 Notice**. Within sixty (60) days of receipt of an invoice, a Party may send notice to the invoicing Party under Article 28 (Notice) that it disputes a portion or all of an invoice. A Party may request from the invoicing Party an extension of this sixty (60) day period, approval of which will not be unreasonably withheld. The notice will contain: (1) a general description of each item or amount in dispute, (2) to the extent available, documents supporting each claim, and (3) payment of any non-disputed amounts. While an invoice is in dispute, the disputing Party may continue to place Attachments on the other Party's poles.
>
> **17.2 Payment**. If a Party does not pay or dispute an invoice within the sixty (60) day period, or any approved extension thereof, the invoicing Party will send notice of such failure to the other Party in accordance with Article 28 (Notice). The invoicing Party's failure to pay the invoice within sixty (60) days of receipt of such notice may be deemed a material Default under Article 20 [sic] (Defaults).

ECF No. 27 at 24. The Joint Use Agreement places the burden on the recipient of the invoice to initiate the dispute process through specific means, or else risk being deemed in default of the Joint Use Agreement.

Frontier North has failed to abide by the terms of Article 17. Contrary to Frontier North's position, Ohio Edison had no obligation to initiate the dispute process over the October 19, 2012 because Ohio Edison was the invoicing party. Paragraph 17.1 plainly indicates that Frontier North had 60 days within which to send notice to Ohio Edison that Frontier North disputed a portion of the invoice. ECF No. 27 at 24. Moreover, ¶ 17.1 delineates specific steps by which Frontier North could dispute the invoice; namely, by providing the invoicing party with a description of the disputed amount, support for its position, and payment of any non-disputed amount. ECF No. 27 at 24. Frontier North argues that it acted in compliance with ¶ 17.1 when it

paid the invoice on March 20, 2013. There is no evidence in the limited record before the Court, however, that suggests that Frontier North explained its position to Ohio Edison. More importantly, Ohio Edison received partial payment on the invoice 152 days after Ohio Edison had sent the invoice to Frontier North—well beyond the 60 day window in which to either pay the invoice, dispute the invoice, or request an extension of time. ECF No. 1-1 ¶ 26. Again, no evidence suggests that Frontier North took any of these steps prior to making the partial payment on March 20, 2013. Because Frontier North failed to abide by Article 17's procedures for disputing the October 19, 2012 invoice, Ohio Edison was entitled to treat Frontier North's partial payment of the invoice as a material default pursuant to ¶ 17.2.

Article 21 of the Joint Use Agreement governs defaults. Paragraph 21.1 lists various events which constitute default under the Joint Use Agreement. One such event is when "a party fails to pay any non-disputed amount due under Article 14 [sic] (Invoice Dispute) within sixty (60) days after receipt of the invoicing Party's notice of the failure pursuant to Article 28 (Notice)." ECF No. 27 at 31. Article 21 proceeds to describe the remedies that a non-defaulting party may pursue against the party in default:

> **21.2 Default Remedies**. If a Party is in Default under this Agreement and fails either to correct such Default or initiate the dispute resolution procedures under Article 29 (Resolving a Dispute) within the sixty (60) day cure period specified below, the other Party may, *in addition to all remedies available by contract, law, and equity*, with sixty (60) days prior notice to the defaulting Party under Article 28 (Notice) . . . .

ECF No. 27 at 31 (emphasis added). Finally, ¶ 21.3 provides a 60 day cure period in which "the Party in Default will be entitled to take all steps necessary to cure any defaults." ECF No. 27 at 32. The Complaint presents sufficient facts to show that Ohio Edison complied with Article 21.

As discussed above, Ohio Edison received partial payment for the October 19, 2012 invoice on March 20, 2013—a full 152 days after Ohio Edison had sent the invoice to Frontier North. ECF No. 1-1 ¶ 26. Ohio Edison pleaded that it had sent notices to Frontier Communications that Frontier North was in default of the Joint Use Agreement on June 5, 2013 and October 10, 2013, satisfying the 60-day notice requirement of ¶ 21.1.1. There is no evidence suggesting that Frontier North availed itself of the cure period described in ¶ 21.3. Consequently, the Joint Use Agreement entitled Ohio Edison to pursue "all remedies available by contract, law, and equity" pursuant to ¶ 21.2.

Frontier North argues that it could not be considered in default because ¶ 21.1.1 only treats the failure to pay non-disputed amounts as grounds for default. The partial payment reflects, according to Frontier North, the non-disputed amount that it owed to Ohio Edison under Ohio law. ECF No. 36 at 5. Because Frontier North paid in good faith what it believed it owed on the invoice, it did not default on the invoice and Ohio Edison should be required to go through the mandatory dispute resolution process. The Court finds two problems with this argument.

First, Frontier North ignores plain language contained in Article 17 of the Joint Use Agreement that reflects that a disputing party needs to indicate to the invoicing party that it believes the invoice is incorrect. As discussed above, Article 17 requires the disputing party to provide the invoicing party within 60 days with notice that indicates the amount in dispute as well as payment of the non-disputed amount. ECF No. 27 at 24. This allows the invoicing party to see that all amounts are accounted for: the paid non-disputed amount plus the disputed amount indicated by the notice should add up to the amount initially invoiced. There is no indication that Frontier North provided Ohio Edison with an explanation for why only a partial payment had

been made. Frontier North may have intended that the March 20, 2013 payment reflect the non-disputed portion of the invoice, but Ohio Edison had no way to know that Frontier North intended the payment to cover what it believed to be the non-disputed amount. More importantly, the partial payment without the description of the amount in dispute would not have alerted Ohio Edison that Frontier North had availed itself of Article 17.

Second, the Joint Use Agreement contemplates the precise scenario that gave rise to Frontier North's actions. Paragraph 15.12 provides that, "if a Party believes the application of the rate formula adopted in this Agreement produces unfair, unjust, or unreasonable rates," that party may seek "review of the rates or rate formula by a regulatory authority." ECF No. 27 at 24. Ohio law empowers the Public Utilities Commission of Ohio (PUCO) to "prescribe reasonable conditions and compensation for such joint use" when parties cannot agree to fair compensation on their own. *See* R.C. § 4905.51. Frontier North's position is that its payment "reflected the invoiced contract rate for the pre-July 12, 2011 period and the rate Frontier North *estimated* as reasonable under Ohio law for the post-July 12, 2011 period." ECF No. 36 at 2 (emphasis added). There is no evidence that Frontier North has petitioned PUCO to set reasonable rates, however. If Frontier North believed that the Joint Use Agreement set "unreasonable rates," the plain language of ¶ 15.12 provides Frontier North with recourse. Failure to take advantage of that opportunity does not provide Frontier North with a basis for ignoring past financial obligations without explaining itself pursuant to the procedures for disputing invoices in Article 17.

Ohio Edison has pleaded sufficient facts to show that it was not subject to the mandatory dispute resolution procedures of the Joint Use Agreement. Accordingly, the Court denies

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Frontier North's motion to dismiss.

IV. Conclusion

For the foregoing reasons, the Court hereby grants Defendant Frontier Communications' Motion to Dismiss, and denies Defendant Frontier North's Motion to Dismiss. Accordingly, the case will proceed solely on Ohio Edison's breach of contract claim against Frontier North. Frontier Communications is dismissed from the case.

IT IS SO ORDERED.

November 14, 2014
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge