#### STATE OF WEST VIRGINIA FIRST JUDICIAL CIRCUIT

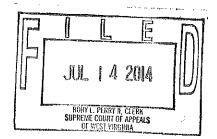
OHIO COUNTY COURTHOUSE WHEELING, WEST VIRGINIA 26003

DAVID J. SIMS JUDGE



July 9, 2014

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Glenda Brooks, Clerk Circuit Court of Brooke County Post Office Box 474 Wellsburg, WV 26070-0474

> Re: Monongahela Power Co. v. Citizens Telecommunications Co., et al. Civil Action No. 14-C-7 Circuit Court of Brooke County

Dear Ms. Brooks:

On June 16, 2014, Defendant Citizens Telecommunications Co. filed with the Clerk of the Circuit Court of Brooke County a Motion to Refer to the Business Court Division, pursuant to Rule 29.06 of the West Virginia Trial Court Rules, in the above styled matter. The time period for a response by other parties has expired and the Court does not intend to file a response.

Pursuant to Rule 29.06(c)(1) of the West Virginia Trial Court Rules, you are directed to transmit to the Clerk of the Supreme Court of Appeals for filing a copy of the motion and all reply memoranda for review by the Chief Justice.

The Court notes that Rule 29.06 of the West Virginia Trial Court Rules has been revised effective July 1, 2014. Defendant Citizens Telecommunications Co. may wish to proceed under requirements of the revised rule.

Thank you for your attention to this matter.

Sincerely yours,

David J. Sims, Judge First Judicial Circuit

DJS/nc

pc:

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Honorable David J. Sims Ohio County Courthouse 1500 Chapline Street, Room 503 Wheeling, West Virginia 26003

Re: Monongahela Power Co. v. Citizens Telecommunications Co., et al.

Civil Action No. 14-C-7

Circuit Court of Brooke County, WV

Dear Judge Sims:

I have enclosed for your review a copy of a Notice of Motion, Motion to Stay or, in the Alternative, to Refer to Business Court Division, and Memorandum of Law in Support of Defendant's Motion to Stay or, in the Alternative, to Refer to Business Court Division for the above-captioned civil action. I have filed the original document with the Court and provided a copy to counsel of record.

Thank you for your consideration.

Very truly yours,

Charles F. Printz, Jr.

CFP/car Enclosure

cc:

Steven M. Recht, Esquire Joseph J. Starsick, Jr., Esquire Ms. Glenda Brooks

# IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA MONONGAHELA POWER COMPANY,

Plaintiff,

v.

CIVIL ACTION NO. 14-C-7 Judge Sims

CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA

and

FRONTIER COMMUNICATIONS CORPORATION,

Defendants.

#### **NOTICE OF MOTION**

Please take notice the undersigned will bring the attached *Motion to Stay or, in the Alternative, to Refer to Business Court Division* for hearing before Judge David J. Sims, at such time and place as the Court shall hereinafter designate.

CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA,

By Counsel

Charles F. Printz, Jr. (WVSB #298

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# IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA MONONGAHELA POWER COMPANY,

Plaintiff,

v.

CIVIL ACTION NO. 14-C-7 Judge Sims

CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA

and

FRONTIER COMMUNICATIONS CORPORATION,

Defendants.

# MOTION TO STAY OR, IN THE ALTERNATIVE, TO REFER TO BUSINESS COURT DIVISION

COMES NOW the Defendant Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia ("Citizens"), by counsel, and respectfully moves this Court to stay this matter until the Federal Communications Commission ("FCC") resolves the pending Pole Attachment Complaint proceeding between Citizens and Plaintiff, Monongahela Power Company ("Mon Power"). Under the doctrine of primary jurisdiction, "where an administrative agency and the courts have concurrent jurisdiction of an issue which requires the agency's special expertise . . . the court should refrain from exercising jurisdiction until after the agency has resolved the issue." *Bell Atlantic-West Virginia v. Ranson*, 497 S.E.2d 755, 764 (W. Va. 1997). Here, Mon Power's claims fall squarely within the FCC's special expertise because these claims turn on the interpretation and application of the FCC's *Pole* 

Attachment Order, which, effective July 12, 2011, limits the rates that an electric company, like Mon Power, may charge an incumbent local exchange company ("ILEC"), like Citizens. The FCC's decision on Citizens' pending Pole Attachment Complaint will determine whether Mon Power may, consistent with federal law, obtain payment from Citizens at the pole attachment rate that it demands in this litigation. The Court should, therefore, defer any action until the FCC has made that potentially case-determinative decision.

Alternatively, Citizens moves the Court to find that this matter qualifies as "Business Litigation," as defined by West Virginia Trial Court Rule 29.04(a), and to file this Motion, and the attached Memorandum of Law, for consideration by the Chief Justice in accordance with West Virginia Trial Court Rule 29.06(a)(2). This case presents a complex dispute over the determination and calculation of pole attachment rates that Mon Power may charge Citizens for the use of its utility poles. This dispute should therefore be referred to the Business Court Division because "the principal claim or claims involve matters of significance to the transactions [and] operations . . . between business entities," the "dispute presents commercial and/or technology issues" that require "specialized knowledge or expertise in the subject matter," and the dispute "may be resolved more expeditiously by referral to the Division." W. Va. Tr. Ct. R. 29.04(a), 29.06(a)(2).

For these and the additional reasons stated in the attached Memorandum of Law, Citizens moves the Court to stay this matter pending a decision by the FCC on Citizens' pending Pole Attachment Complaint or, alternatively, to file this Motion to Refer to Business Court Division for consideration by the Chief Justice.

Report and Order and Order on Reconsideration, In the Matter of Implementation of Section 224 of the Act, 26 FCC Red 5240 (2011), aff'd, Am. Elec. Power Serv. Corp. v. FCC, 708 F.3d 183, 185 (D.C. Cir.), cert denied, 134 S.Ct. 118 (2013) ("Pole Attachment Order").

CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA,

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## IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA MONONGAHELA POWER COMPANY,

Plaintiff,

٧.

CIVIL ACTION NO. 14-C-7 Judge Sims

CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA

and

FRONTIER COMMUNICATIONS CORPORATION,

Defendants.

## MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO STAY OR, IN THE ALTERNATIVE, TO REFER TO BUSINESS COURT DIVISION

Defendant Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia ("Citizens") submits this Memorandum of Law in support of its Motion to Stay or, in the Alternative, to Refer to the Business Court Division.

#### I. INTRODUCTION

Cloaked as a "simple breach of contract action," Plaintiff Monongahela Power Company ("Mon Power") asks this Court to set the rental rate that it may collect from Citizens (or from its parent)<sup>1</sup> for Citizens' use of Mon Power's utility poles. But it is not this Court that should set the

<sup>&</sup>lt;sup>1</sup> Frontier Communications Corporation has filed a Motion to Dismiss because this Court lacks personal jurisdiction over the company and because Mon Power has failed to state a claim against it for breach of contract. Were its Motion to Dismiss denied, Frontier Communications Corporation would join Citizens' request to stay this matter pending FCC review or, alternatively, to refer it to the Business Court Division.

rental rate – it is the Federal Communications Commission ("FCC"), which has primary jurisdiction over every claim in Mon Power's Complaint.

By statute, the FCC "shall regulate the rates, terms, and conditions for pole attachments" in West Virginia "to provide that such rates, terms, and conditions are just and reasonable" and shall "hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1) (emphasis added). These statutory rights to just and reasonable rates – and to FCC review to ensure such rates – apply to the attachments of incumbent local exchange carriers ("ILECs") like Citizens. See, e.g., Pole Attachment Order, 26 FCC Rcd at 5328 (¶ 203).<sup>2</sup>

In its 2011 *Pole Attachment Order*, the FCC interpreted 47 U.S.C. § 224 to require that ILECs receive pole attachment rates that are comparable to the rates charged their competitors (such as cable companies or competitive local exchange companies) if they attach on materially comparable terms. *See id.* at 5336 (¶ 217). The FCC further established a high-end rate formula for pole attachments and concluded that it would determine specific rates on a case-by-case basis. *Id.* at 5334 (¶ 214). The FCC stated that it would regulate the rates that electric utilities may charge ILECs, like Citizens, and allow refunds back to the July 12, 2011 effective date. *Id.* at 5327-28 (¶¶ 202-03, 217); 5333-34 (¶ 214, n.647).

Mon Power and its affiliated companies (collectively "FirstEnergy") have refused to provide Citizens and its affiliated companies (collectively, "Frontier") reasonable rental rates that comply with the *Pole Attachment Order* for attachments in West Virginia, Pennsylvania, and Ohio. For example, Mon Power has demanded a rental rate for Citizens' use of its poles in 2012 that is nearly *8 times* the comparable rate that Mon Power may charge Citizens' competitors

<sup>&</sup>lt;sup>2</sup> Report and Order and Order on Reconsideration, In the Matter of Implementation of Section 224 of the Act, 26 FCC Rcd 5240 (2011), aff'd, Am. Elec. Power Serv. Corp. v. FCC, 708 F.3d 183, 185 (D.C. Cir. 2013), cert. denied, 134 S.Ct. 118 (2013) ("Pole Attachment Order" or "Order").

under federal law, and 3.5 times the highest rate permissible under the *Pole Attachment Order*. See Compl. ¶ 18 (demanding \$30.92 per pole rate); Ex. A ¶¶ 69, 75 (Pole Attachment Complaint, without affidavits and exhibits) (estimating comparable rate charged Citizens' competitors as \$3.88 and high-end rate as \$8.65).

As a result, Citizens and the other affected Frontier subsidiaries filed a Pole Attachment Complaint against FirstEnergy with the FCC to challenge the unjust and unreasonable rates that FirstEnergy demands in this and five other pending cases for time periods since the effective date of the 2011 *Pole Attachment Order*. See Ex. A. The FCC's decision, when issued, will resolve every claim in Mon Power's Complaint. Mon Power's Complaint asserts that Citizens must pay rent for the 2012 rental year using a \$30.92 per pole rental rate. Compl. ¶¶ 18, 25, 33, 39. Citizens' Pole Attachment Complaint seeks a determination that federal law prevents Mon Power from collecting rent from Citizens at a rate higher than \$3.88 or \$8.65, depending on whether the terms and conditions in Citizens' agreement with Mon Power are comparable to those in Mon Power's agreements with Citizens' competitors. See Ex. A ¶ 90.

The FCC will decide which rental rate applies, and its decision will control. See, e.g., Casey v. Public Service Comm'n of W. Va., 457 S.E.2d 543, 549 (W. Va. 1995) (finding that the FCC's decision is preemptive where "the Federal Communications Commission has an on-going procedure for the resolution of such disputes"). This Court should therefore stay Mon Power's

<sup>&</sup>lt;sup>3</sup> The five other pending FirstEnergy lawsuits that will be resolved by a decision on Frontier's Pole Attachment Complaint are *The Potomac Edison Co. v. Citizens TeleCommunications Co. of W. Va. d/b/a Frontier Communications of W. Va. And Frontier Communications Corp.*, No. 14-C-28 (W. Va. Cir. Ct. Berkeley Cnty.); *The Potomac Edison Co. v. Frontier W. Va. Inc. and Frontier Communications Corp.*, No. 14-C-29 (W. Va. Cir. Ct. Berkeley Cnty.); *Metropolitan Edison Co. v. Commonwealth Tel. Co., LLC and Frontier Communications Corp.*, No. 14-732 (Pa. Ct. Com. Pl. Berks Cnty.); *Pa. Electric Co. v. Commonwealth Tel. Co., LLC and Frontier Communications Corp.*, No. 10110-2014 (Pa. Ct. Com. Pl. Erie Cnty.); *West Penn Power Co. d/b/a Allegheny Power v. Frontier Communications of Breezewood, LLC and Frontier Commc'ns Corp.*, No. 97-2014 (Pa. Ct. Com. Pl. Bedford Cnty.).

Complaint until the FCC resolves Citizens' pending Pole Attachment Complaint. Under the doctrine of primary jurisdiction, "where an administrative agency and the courts have concurrent jurisdiction of an issue which requires the agency's special expertise . . . the court should refrain from exercising jurisdiction until after the agency has resolved the issue." *Bell Atlantic-West Virginia v. Ranson*, 497 S.E.2d 755, 764 (W. Va. 1997). The subject matter of this dispute is squarely within the FCC's jurisdiction and "special expertise" – especially since the *Pole Attachment Order* has not yet been interpreted or applied in a Pole Attachment Complaint proceeding. This is, therefore, an ideal case to stay litigation under the primary jurisdiction doctrine so that the FCC can resolve the parties' rate dispute.

Alternatively, should the Court deny Citizens' Motion to Stay, the Court should find that this dispute qualifies as "Business Litigation" under West Virginia Trial Court Rule 29.04(a), and should file this Motion to Refer to Business Court Division for consideration by the Chief Justice pursuant to West Virginia Trial Court Rule 29.06(a)(2). This case presents a complex dispute over the determination and calculation of pole attachment rates that Mon Power may charge Citizens for the use of Mon Power's utility poles. In other words, "the principal claim or claims involve matters of significance to the transactions [and] operations . . . between business entities" and the "dispute presents commercial and/or technology issues" that require "specialized knowledge or expertise in the subject matter," such that the dispute "may be resolved more expeditiously by referral to the Division." W. Va. Tr. Ct. R. 29.04(a), 29.06(a)(2).

#### II. STATEMENT OF THE CASE

This case is one of two pending cases seeking to resolve the same pole attachment rate dispute between Citizens and Mon Power – one case is before this Court and one is before the FCC. It also is part of a larger dispute of seven lawsuits across three states, including three in West Virginia alone, between FirstEnergy electric power companies (including Mon Power) and

Frontier telecommunications companies (including Citizens) over the amount that FirstEnergy can charge Frontier to use FirstEnergy's utility poles.<sup>4</sup>

In the present case, Mon Power claims that a \$30.92 per pole rate applies to Citizens' attachments during the 2012 rental year pursuant to a contract between Mon Power and Citizens. See, e.g., Compl. ¶¶ 18, 37-39. In the Pole Attachment Complaint at the FCC, Citizens asserts that a much lower rate applies to its attachments under federal law, as interpreted by the FCC's Pole Attachment Order. Specifically, Citizens asserts that Mon Power is legally precluded from collecting from Citizens rent for 2012 at a rate higher than \$3.88 per pole if Citizens is comparably situated to its competitors using Mon Power's poles, or higher than \$8.65 per pole if Citizens is materially advantaged vis-à-vis its competitors. See Ex. A ¶¶ 69, 75, 90.

Citizens' Pole Attachment Complaint sets forth in detail why the FCC should agree with Citizens that Mon Power has no right to collect the \$30.92 rate that it demands in this litigation. See Ex. A. The FCC has held that ILECs, like Citizens, are entitled to a rental rate that is comparable to the rate charged their competitors if they attach on comparable terms. Pole Attachment Order, 26 FCC Rcd at 5336-37 (¶¶ 217-18). The FCC further established a high-end rate formula for pole attachments, and concluded that it would determine specific rates on a case-by-case basis. Id. at 5334 (¶ 214). Importantly, the FCC clarified that the Order would take effect in 2011 and then reduce rental rates even where parties are operating under the terms of an

<sup>&</sup>lt;sup>4</sup> In addition to the five cases cited *supra* n.3 and the present case, FirstEnergy filed suit in Ohio state court. *See Ohio Edison Company v. Frontier North Inc.*, No. CV-2014-01-0207. Frontier removed the case to the United States District Court for the Northern District of Ohio, Case No. 5:14-cv-00321, where it was administratively stayed on May 27, 2014. The Ohio lawsuit is not at issue in Frontier's Pole Attachment Complaint because Ohio (unlike West Virginia and Pennsylvania) has reverse-preempted the FCC's jurisdiction over pole attachments by certifying to the FCC that it regulates the rates, terms and conditions for pole attachments in the manner established by 47 U.S.C. § 224. *See* 47 C.F.R. § 1.1404(c); *Pole Attachment Order*, 26 FCC Rcd 5240, App. C; *States That Have Certified That They Regulate Pole Attachments*, 25 FCC Rcd 5541, 5541-42 (May 19, 2010).

existing agreement. Indeed, the FCC explicitly recognized that ILECs (like Citizens) generally have access to poles under joint use agreements and concluded that, "where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable." *Id.* at 5328 (¶ 202), 5334 (¶ 216). Mon Power is, therefore, unable to rely on its existing contract with Citizens to continue to demand unjust and unreasonable rental rates.

Nonetheless, Mon Power will be able to present all of its arguments in favor of the contract rate in the FCC proceeding. And in the end, it is the FCC's decision that will control. *See, e.g., Casey*, 457 S.E.2d at 549 (finding that the FCC's statutory authority preempts state jurisdiction over billing disputes involving interstate telephone companies). Thus, there is no reason for this Court to devote its time and resources to consider Mon Power's arguments as well. As next detailed, the doctrine of primary jurisdiction is designed for this very situation. The Court should stay this litigation pending the FCC's resolution of this rate dispute.

#### III. ARGUMENT

This Court is faced with one main issue: whether to stay this case until the FCC resolves Citizens' pending Pole Attachment Complaint. The Court should do so for several reasons. The FCC is statutorily charged with regulating Citizens' pole attachments and is faced with the highly specialized issues that are raised by the attached 51-page Pole Attachment Complaint (not including affidavits and exhibits) and by the issues that Mon Power can be expected to raise in response. Moreover, those issues include questions of interpretation of the FCC's *Pole Attachment Order*, Mon Power's inability to charge the rate it seeks to impose under the parties' contract, and the calculation of the proper rate under the FCC's rate methodologies. This Court should defer to the FCC's resolution of these issues, especially because the FCC is best equipped to interpret and apply its own *Order* and rate methodologies.

However, if this case is not stayed pending FCC review, these same complexities counsel in favor of referral to the Business Court Division. "[T]he principal claim or claims involve matters of significance to the transactions [and] operations . . . between business entities" and the "dispute presents commercial and/or technology issues" that require "specialized knowledge or expertise in the subject matter." W. Va. Tr. Ct. R. 29.04(a). As a result, this dispute should be referred to the Business Court Division, where it "may be resolved more expeditiously." *Id.* at 29.06(a)(2).

### A. The Court Should Stay This Litigation Pending The FCC's Resolution Of Citizens' Pole Attachment Complaint.

Where, as here, "an administrative agency and the courts have concurrent jurisdiction of an issue which requires the agency's special expertise . . . the court should refrain from exercising jurisdiction until after the agency has resolved the issue." *Ranson*, 497 S.E.2d at 764. Similarly, the doctrine applies where it will protect the "coherence and uniformity of an intricate administrative program." *Id.* (citation omitted). By deferring to the agency in such cases, the doctrine of primary jurisdiction "promot[es] proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Id.* (citation omitted).

In deciding whether to stay under the doctrine of primary jurisdiction, courts consider (1) whether the issue falls within the specialized expertise of the agency, rather than the "conventional experience of judges;" (2) whether the issue is peculiarly within the agency's discretion, (3) whether there exists a danger of inconsistent rulings, and (4) whether a prior application to the agency has been made. *Id.* Where these four factors show that the doctrine applies – as they do here – the Court's "jurisdiction is postponed" until the agency rules. *Id.* 

First, federal law places the regulation of pole attachment rates within the specialized expertise of the FCC. Specifically, federal law provides that the FCC "shall regulate the rates,

terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b) (emphasis added). Pursuant to federal law, the FCC has had authority to examine and set pole attachment rates for more than 35 years, first for cable companies and then for competitive local exchange carriers ("CLECs"). See 47 U.S.C. § 224 (1978) (providing authority to regulate rates charged cable companies); 47 U.S.C. § 224 (1996) (providing authority to regulate rates charged to providers of telecommunications services).

With its 2011 *Pole Attachment Order*, the FCC recognized its authority extended to those attachment rates charged to ILECs, like Citizens. *Pole Attachment Order*, 26 FCC Rcd at 5330 (¶ 208) ("Specifically, we find that the Commission has authority to ensure that incumbent LECs' attachments to other utilities' poles are pursuant to rates, terms and conditions that are just and reasonable."). It did so following an exhaustive inquiry into pole attachment rates charged to ILECs, during which it considered comments from interested entities, held public workshops, and participated in *ex parte* meetings in order to obtain input on the rate issues that are part and parcel of the present dispute between Mon Power and Citizens. *See id.* at 5285 (¶ 96). For example, the FCC concluded that ILECs, like Citizens, are generally in an inferior bargaining position relative to electric companies, which own the vast majority of utility poles, and that FCC rate oversight is necessary because ILECs have been forced to pay rates significantly higher than the rates available to other attachers. *See id.* at 5330-31 (¶ 208) ("In this regard, we note that incumbent LECs estimate that, in aggregate, they annually pay pole attachment rates that are \$320 to \$350 million greater than they would pay at the cable rate.").

The FCC's findings are in line with this case, where Mon Power – which owns about 81 percent of the poles to which Mon Power and Citizens attach – seeks to charge nearly 8 times the rate that Mon Power can charge Citizens' competitors under federal law. *Compare* Compl. ¶ 18 (asserting that the 2012 rental rate is \$30.92), with Ex. A, ¶¶ 69, 75 (showing that the 2012 rate applicable to CLECs is no more than \$3.88). This case, therefore, requires application of the primary jurisdiction doctrine because the subject matter has been squarely "placed within the special competence of an administrative body." *Ranson*, 497 S.E.2d at 763 (citation omitted).

Second, this case in particular "is peculiarly within the agency's discretion." Id. Other courts have recognized that pole attachment disputes require the FCC's particular expertise. See, e.g., Kansas City Power & Light Co. v. Am. Fiber Sys., 2003 WL 22757927, \*4 (D. Kan. 2003) (Pole attachment disputes "require the expertise of the FCC, and . . . their resolution is a part of the regulatory scheme Congress delegated to the FCC under the Pole Attachment Act."); Pub. Serv. Co. of Colorado v. Mile Hi Cable Partners L.P., 995 P.2d 310, 313 (Colo. Ct. App. 1999) (FCC had primary jurisdiction over dispute about penalty fees for cable company's allegedly unauthorized attachment to telephone poles).

The issues presented in this rate case are especially appropriate for FCC resolution because they require the FCC to interpret and apply its own *Pole Attachment Order*. *See Union Elec. Co. v. Cable One, Inc.*, No. 4:11-CV-299 CEJ, 2011 WL 4478923, \*5 (E.D. Mo. 2011) ("The FCC's issuance of new regulations governing pole attachments on April 7, 2011, provides further support for application of the primary jurisdiction doctrine."). In its *Pole Attachment Order*, the FCC held that ILECs like Citizens are statutorily entitled to just and reasonable rates and to FCC oversight of those rates. *See, e.g., Pole Attachment Order*, 26 FCC Rcd at 5298 (¶ 135), 5330 (¶ 208). The FCC further concluded that it would exercise its oversight authority

with respect to ILECs by determining what constitutes a just and reasonable rate on a case-by-case basis in complaint proceedings before its Enforcement Bureau. *Id.* at 5334 (¶214) ("We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis."). The FCC thus intended that it would resolve particular rate disputes, such as the dispute between Mon Power and Citizens, through its Pole Attachment Complaint procedures.

Moreover, this dispute cannot be finally resolved without a decision on certain technical and policy issues. These include, for example, questions over whether Citizens is comparably situated to its competitors, what inputs are proper for the FCC's rate methodologies and the proper calculation of those methodologies, and whether federal law allows Mon Power to continue using its superior bargaining power to charge a higher rate than the rate calculated under the *Pole Attachment Order* after its effective date. The FCC is uniquely suited to resolve these questions.

Third, deferring to the FCC will avoid the danger of inconsistent rulings. Conflicting judicial decisions applying the *Pole Attachment Order* – or, worse, decisions that ignore federal law as interpreted by the *Pole Attachment Order* – would undermine the FCC's efforts to resolve this matter through its administrative mechanisms and would destroy the "coherence and uniformity of an intricate administrative program." *Ranson*, 497 S.E.2d at 764; *see also Sprint Spectrum LP v. AT&T Corp.*, 168 F. Supp. 2d 1095, 1101 (W.D. Mo. 2001) ("[T]hese [rate] issues should be referred to the FCC for determination under the doctrine of primary jurisdiction, as they involve matters within the agency's special expertise and which require a uniform national resolution."). This case also presents the risk of inconsistent rulings between the Court and the FCC should the Court proceed. Because "application to the [FCC] has already been

made, . . . there would be a significant risk of inconsistent rulings if this Court were to exercise jurisdiction over the case now." Sandwich Isles Commc'ns Inc. v. Nat'l Exch. Carrier Ass'n, 799 F. Supp. 2d 44, 55 (D.D.C. 2011). The primary jurisdiction doctrine eliminates this risk by calling upon the Court to defer to the agency charged with regulating the dispute. Id.

Fourth, a stay is particularly appropriate here because the FCC has before it Citizens' Pole Attachment Complaint — and because a decision on that Pole Attachment Complaint will resolve every claim in Mon Power's Complaint. "The advisability of invoking primary jurisdiction is greatest when the issue is already before the agency." CF Indus., Inc. v. Transcon. Gas Pipe Line Corp., 614 F.2d 33, 35 (4th Cir. 1980) (citation omitted). A stay will preserve the time and resources of the parties and this Court by ensuring that resources are not devoted in this action to matters that will be resolved by the FCC. Because the FCC's decision will resolve this rate dispute, there is no valid purpose for this Court to devote any more time to its consideration until that occurs.

### B. Alternatively, The Court Should Recommend A Referral To The Business Court Division.

As detailed above, Mon Power's Complaint presents specialized and complex rate issues that will be resolved by the FCC in the pending Pole Attachment Complaint proceeding. Should the Court decide not to stay this litigation pending the FCC's decision, the very same complexities justify a referral to the Business Court Division pursuant to West Virginia Trial Court Rule 29.

West Virginia's Business Court Division is designed to address the "complex nature of litigation involving highly technical commercial issues" in "actions involving commercial issues and disputes between businesses." W. Va. Code § 51-2-15(a). Any party may seek to refer "Business Litigation" to the Business Court Division within three months after the filing date of

the action, W. Va, Tr. Ct. R. 29.06(a)(1)-(2), and any judge may seek to refer the case "at any time, if it is determined the litigation qualifies as Business Litigation that may be resolved more expeditiously by referral to the Division," *id.* 29.06(a)(2). Because the parties extended the Answer date by consent in hopes that they could reach a negotiated settlement of this dispute, more than three months have passed since the filing date of Mon Power's Complaint. Citizens, accordingly, requests that the Court file this Motion to Refer to Business Court Division for consideration by the Chief Justice, as authorized by Trial Court Rule 29.06(a)(2).

#### 1. This Case Constitutes "Business Litigation."

To qualify for referral to the Business Court Division, a matter must be "Business Litigation," as defined by Trial Court Rule 29.04(a). Business Litigation is litigation in which: (1) "the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities," (2) "the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the needs for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable," and (3) the principal claim or claims are not of the types listed in West Virginia Trial Court Rule 29.04(a)(3). W. Va. Tr. Ct. R. 29.04(a). The claims in Mon Power's Complaint satisfy all three factors.

First, this dispute involves matters of significance to the parties' business operations. See W. Va. Tr. Ct. R. 29.04(a). As providers of telecommunications and electricity services, Citizens and Mon Power depend on a network of utility poles to deliver their respective services to West Virginia customers. Citizens' reliance on Mon Power's network is particularly significant because Mon Power owns 81 percent of the nearly 25,000 poles that the parties jointly use. See Ex. A ¶ 17. Indeed, it is that near monopoly ownership that has allowed Mon Power to extract a

rental rate from Citizens that is nearly 8 times the rate that Mon Power may charge Citizens' competitors. See id. ¶20. This case presents a significant financial dispute that raises serious operational concerns.

Second, this case presents technological and commercial issues that merit special treatment. See W. Va. Tr. Ct. R. 29.04(a). As explained above, the parties' dispute centers on the rate that may be charged under federal law. And resolution of that dispute requires the interpretation and application of the FCC's recent Pole Attachment Order (which has not yet been interpreted or applied in a Pole Attachment Complaint proceeding), a decision regarding Citizens' right to review Mon Power's other pole attachment agreements (which the FCC has determined are relevant to the rates that electric utilities may charge ILECs), and an understanding of the proper rate inputs to and calculations under the FCC rate methodologies.

In particular, and as explained above, the FCC found that the rates that an electric company may charge an ILEC like Citizens must be "just and reasonable." To reduce the number of disputes that would require resolution by the FCC, the FCC identified certain rate methodologies that would apply. The FCC held that "where incumbent LECs are attaching to other utilities' poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator—which generally will be paying a rate equal or similar to the cable rate under our rules—competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator)." *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217). But where the ILEC has a material advantage *vis-à-vis* its competitors, the FCC found that it is "reasonable to look to the pre-existing, high-end telecom rate as a reference point in complaint proceedings

involving a pole owner and an incumbent LEC attacher that is not similarly situated . . . to a cable or telecommunications attacher." *Id.* at 5337 (¶ 218).

The need to determine whether Citizens is comparably situated to its competitors using Mon Power's poles and to properly apply the appropriate rate methodology inserts a complexity into this case that would render it appropriate for the Business Division if the case is not stayed pursuant to primary jurisdiction pending FCC adjudication. For example, the maximum rate that may be charged Citizens' CLEC competitors is the higher of the rate yielded from two different "telecom rate" formulas, which require an understanding of inputs that include space occupied, unusable space, number of attaching entities, pole height, net cost of a bare pole, and carrying charge rate. See 47 C.F.R. § 1.1409(e)(2). Calculation of the "pre-existing, high-end telecom rate" formula also requires an understanding of these inputs. See 47 C.F.R. § 1.1409(e)(2) (2010).

Additionally, the *Pole Attachment Order* set out a number of additional criteria that must be considered in determining whether the pole attachment rate that an electric company (such as Mon Power) seeks to charge is "just and reasonable" under the statute. *See Pole Attachment Order*, 26 FCC Rcd at 5333-38 (¶ 214-20). These factors include, for example, an assessment of the relative bargaining power of the contracting parties, a determination regarding whether an ILEC "genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement," and a comparison of the rates, terms and conditions applicable to competing cable companies and CLECs. *Id.* at 5334-38 (¶ 215-19). The FCC indicated that these factors should be applied "on a case-by-case basis." *Id.* at 5333-34 (¶ 214).

In sum, Mon Power's request that this Court determine the rental rate that applies to Citizens' use of its utility poles requires a familiarity with federal law, including the FCC's *Pole* 

Attachment Order and rate methodologies. These technical and specialized issues strongly support staying this case so that the FCC can resolve these complex issues. They also, at a minimum, support a referral of this case to the Business Court Division because "the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the needs for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable." W. Va. Tr. Ct. R. 29.04(a)(2).

Third, Mon Power has brought a breach of contract claim that is not listed as an exempt cause of action in West Virginia Trial Court Rule 29.04(a)(3). That list includes several types of claims, such as products liability, personal injury, and wrongful death, but not breach of contract.<sup>5</sup>

### 2. Referral Will Result In A More Expeditious Resolution Of This And Two Related Matters.

A judge may seek to refer a case to the Business Division "at any time, if it is determined the litigation qualifies as Business Litigation that may be resolved more expeditiously by referral to the Division." W. Va. Tr. Ct. R. 29.06(2). This case satisfies this standard.

<sup>&</sup>lt;sup>5</sup> W. Va. Tr. Ct. R. 29.04(a)(3) excludes from the definition of "Business Litigation" pending actions where the principal claim or claims involve:

consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

As noted above, this is one of three related cases in West Virginia between FirstEnergy subsidiaries and Frontier subsidiaries.<sup>6</sup> In each case, the FirstEnergy subsidiary uses a breach of contract action to request that the Court determine the rental rate that applies to the use of utility poles in West Virginia. And in each case, the Frontier subsidiary is seeking a stay pending FCC review or, alternatively, a referral to the Business Court Division.

If the three related disputes are referred to the Business Court Division, the Frontier subsidiaries will seek to consolidate the three cases in one Business Litigation Assignment Region. See W. Va. R. Civ. Pro. 42(a). Together, the cases would be well-suited for expeditious resolution through consolidated discovery and motion practice. Additionally, referral of the three cases to the Business Court Division would facilitate mediation, which is an important part of the Business Court Division. See Hon. Christopher C. Wilkes, West Virginia's New Business Court Division: An Overview of the Development and Operation of Trial Court Rule 29, West Virginia Judiciary, http://www.courtswv.gov/lower-courts/business-court-division/overview.html ("The techniques which the judges are being trained in, such as judicially led mediation, provide a method for quicker, less costly, resolution of cases."). Absent a stay pending FCC review, therefore, a referral to the Business Court Division would result in the most streamlined and efficient resolution of this matter.

#### CONCLUSION

WHEREFORE, for the reasons stated above, Citizens moves the Court to stay this matter pending a decision by the FCC on Citizens' pending Pole Attachment Complaint or,

<sup>&</sup>lt;sup>6</sup> See also The Potomac Edison Co. v. Citizens Telecommunications Co. of W. Va. d/b/a Frontier Communications of W. Va. And Frontier Communications Corp., No. 14-C-28 (W. Va. Cir. Ct. Berkeley Cnty.); The Potomac Edison Co. v. Frontier W. Va. Inc. and Frontier Communications Corp., No. 14-C-29 (W. Va. Cir. Ct. Berkeley Cnty.).

alternatively, to find that this matter is Business Litigation appropriate for referral to the Business Court Division and file Citizens' Motion to Refer to Business Court Division.

CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA,

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## IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA MONONGAHELA POWER COMPANY,

Plaintiff,

v.

CIVIL ACTION NO. 14-C-7 Judge Sims

CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA

and

FRONTIER COMMUNICATIONS CORPORATION,

Defendants,

#### **CERTIFICATE OF SERVICE**

I, Charles F. Printz, Jr., do hereby certify that a true and correct copy of the foregoing Notice of Motion, Motion to Stay or, in the Alternative, to Refer to Business Court Division and Memorandum of Law in Support of Defendant's Motion to Stay or, in the Alternative, to Refer to Business Court Division was mailed on this 12<sup>th</sup> day of June 2014 to:

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Charles F. Printz, Jr.

STAMP & RETURN

#### Before the Federal Communications Commission Washington, DC 20554

COMMONWEALTH TELEPHONE COMPANY LLC d/b/a FRONTIER COMMUNICATIONS COMMONWEALTH TELEPHONE COMPANY, FRONTIER COMMUNICATIONS OF BREEZEWOOD, LLC, CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS COMPANY OF WEST VIRGINIA, and FRONTIER WEST VIRGINIA INC.,

Complainants,

٧.

METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, WEST PENN POWER COMPANY d/b/a ALLEGHENY POWER, MONONGAHELA POWER COMPANY, and THE POTOMAC EDISON COMPANY.

Respondents.

Accepted/Filed

JUN 1 1 2014

FGC Office of the Secretary

File No.

#### POLE ATTACHMENT COMPLAINT

COMMONWEALTH TELEPHONE COMPANY LLC d/b/a FRONTIER COMMUNICATIONS COMMONWEALTH TELEPHONE COMPANY, FRONTIER COMMUNICATIONS OF BREEZEWOOD, LLC, CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS COMPANY OF WEST VIRGINIA, and FRONTIER WEST VIRGINIA INC.

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Date: June 11, 2014

EXHIBIT A

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#### Before the Federal Communications Commission Washington, DC 20554

COMMONWEALTH TELEPHONE COMPANY LLC d/b/a FRONTIER COMMUNICATIONS COMMONWEALTH TELEPHONE COMPANY, FRONTIER COMMUNICATIONS OF BREEZEWOOD, LLC, CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS COMPANY OF WEST VIRGINIA, and FRONTIER WEST VIRGINIA INC.,

Complainants.

V.

METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, WEST PENN POWER COMPANY d/b/a ALLEGHENY POWER, MONONGAHELA POWER COMPANY, and THE POTOMAC EDISON COMPANY,

Respondents.

File No.

#### POLE ATTACHMENT COMPLAINT

To: The Commission

Four Pennsylvania and West Virginia operating subsidiaries of Frontier Communications Corporation (collectively, "Frontier") submit this Pole Attachment Complaint pursuant to Section 224 of the Communications Act of 1934, as amended ("Act"), and Sections 1.1401-1.1424 of the Rules of the Federal Communications Commission ("FCC" or "Commission"), against five operating subsidiaries of FirstEnergy Corporation (collectively, "FirstEnergy"). As detailed below, in violation of Section 224(b)(1) of the Act and the Commission's rules, FirstEnergy has refused to offer Frontier pole attachment rates that are just and reasonable.

#### I. SUMMARY

This Complaint involves the pole attachment rates that FirstEnergy demands under six pole attachment agreements – three covering service areas in Pennsylvania and three covering

service areas in West Virginia. For over two years, FirstEnergy all but ignored Frontier's requests to renegotiate these six agreements so Frontier could obtain the just and reasonable pole attachment rates to which it is entitled under the Commission's *Pole Attachment Order*<sup>1</sup> as an incumbent local exchange carrier ("ILEC"). In response to Frontier's requests, FirstEnergy stated that it was "not inclined to renegotiate" the agreements.<sup>2</sup> And despite the Commission's finding in the *Pole Attachment Order* that ILECs generally have access to poles under joint use agreements<sup>3</sup> and its conclusion that "where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable," FirstEnergy maintained that Frontier is not entitled to just and reasonable rates under the *Order* and that this Commission would not grant Frontier relief from the existing agreements.<sup>5</sup> FirstEnergy refused to recognize that the Commission conditioned its statement that it was "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable" on situations where the existing arrangement was "entered into by parties with relatively equivalent bargaining power" – something that is not the case here. When the FirstEnergy agreements were entered or the rates were revised, FirstEnergy had superior bargaining power. And it still does.

<sup>&</sup>lt;sup>1</sup> Report and Order and Order on Reconsideration, In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 26 FCC Rcd 5240 (2011) ("Pole Attachment Order").

<sup>&</sup>lt;sup>2</sup> Ex. 40 (Letter from E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy, to J. Huffine, Section Manager – Network Engineering, Frontier (Feb. 28, 2013)); see also Ex. 37 (Letter from S. Schafer, Manager, Joint Use and Cable Locating, FirstEnergy, to S. Knowles, Director – Engineering, Frontier (June 6, 2012)).

<sup>&</sup>lt;sup>3</sup> Pole Attachment Order at 5334 (¶ 216).

<sup>&</sup>lt;sup>4</sup> *Id.* at 5328 (¶ 202).

<sup>&</sup>lt;sup>5</sup> Ex. 40 (Letter from E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy, to J. Huffine, Section Manager – Network Engineering, Frontier (Feb. 28, 2013)); see also Ex. 37 (Letter from S. Schafer, Manager, Joint Use and Cable Locating, FirstEnergy, to S. Knowles, Director – Engineering, Frontier (June 6, 2012)).

<sup>&</sup>lt;sup>6</sup> Pole Attachment Order at 5334-35 (¶ 216).

Having tried to persuade FirstEnergy to negotiate just and reasonable rental rates for a year and a half without success, Frontier began adjusting invoices to reflect the estimated just and reasonable rental rates that Frontier believed were owed. FirstEnergy still did not negotiate. Finally, in June 2013, FirstEnergy offered to meet with Frontier, but it then failed to respond to Frontier's request for potential dates for the meeting and a list of the representatives that would attend so Frontier could bring the appropriate individuals. As a result, no meeting was

<sup>&</sup>lt;sup>7</sup> See Ex. 41 at 4 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services - Energy Delivery, FirstEnergy (May 7, 2013)) (attaching estimated rate calculations and adjusted invoices for each FirstEnergy company and explaining that, "[b]ecause FirstEnergy has failed to provide the information necessary to calculate just and reasonable pole attachment rates and has continued to invoice Frontier using unreasonable rates, Frontier has been unable to definitively process FirstEnergy's 2012 and 2013 invoices"); see also, e.g., Exs. 28 at 1 (Letter from J. Huffine, Section Manager - Network Engineering, Frontier, to R. DePree, Met-Ed (Sept. 13, 2011)) (notifying Met-Ed that Frontier "seeks to immediately engage in discussions to renegotiate the pole attachment rates, terms, and conditions" and requesting copies of Met-Ed's "rate calculations for the FCC's pre-existing telecommunications rate and the new telecommunications rate under the new Order" and copies of Met-Ed's "representative, existing agreements with cable and telecommunications attaching entities"); 29 at 1 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Penelec (Sept. 13, 2011)) (notifying Penelec of same); 30 at 1 (Letter from J. Huffine, Section Manager - Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)) (notifying Mon Power of same); 31 at 1 (Letter from J. Huffine, Section Manager - Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)) (notifying Potomac Edison of same with respect to the Potomac Edison-Citizens Agreement); 32 at 1 (Letter from J. Huffine, Section Manager -Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)) (notifying Potomac Edison of same with respect to the Potomac Edison-Frontier WV Agreement); 39 at 1 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to K. Lind, Manager, Distribution Lines Maintenance, Allegheny Power (Feb. 14, 2013)) (notifying West Penn Power of same).

<sup>&</sup>lt;sup>8</sup> See Ex. 42 at 4 (Letter from E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy, to S. Knowles, Director – Engineering, Frontier, and C. Cormany, Senior Manager – Engineering, Frontier (June 5, 2013)).

<sup>&</sup>lt;sup>9</sup> See Ex. 43 at 2 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (July 11, 2013)).

scheduled.<sup>10</sup> In December 2013, Frontier sent a certified letter outlining the allegations in this Complaint and requesting that the parties' executives engage in face-to-face negotiations.<sup>11</sup> FirstEnergy's only response came about a month later when it filed seven lawsuits against Frontier, six of which relate to the facts at issue in this Complaint.<sup>12</sup> The seventh involves pole attachments in Ohio, which is a certified State. The parties have since engaged in face-to-face negotiations, but the parties have failed to resolve this dispute.

For ease of reference, the pole attachment agreements and lawsuits are referred to in this Pole Attachment Complaint using the name of the associated FirstEnergy operating company. The Pennsylvania agreements and lawsuits involve FirstEnergy companies Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), and West Penn Power Company d/b/a Allegheny Power ("West Penn Power"). The West Virginia agreements and lawsuits involve FirstEnergy companies Monongahela Power Company ("Mon Power") and The Potomac Edison Company ("Potomac Edison"). Because Potomac Edison is a party to two agreements and two lawsuits, they are referred to as the "Potomac Edison-Citizens" Agreement

<sup>&</sup>lt;sup>10</sup> See Ex. 45 at 2 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (Dec. 4, 2013)).

<sup>11</sup> See id.

<sup>12</sup> Exs. 46 (Complaint, Metropolitan Edison Co. v. Commonwealth Tel. Co., LLC and Frontier Commc'ns Corp., No. 14-732 (Pa. Ct. Com. Pl. Berks Cnty. Jan. 16, 2014)) ("Met-Ed Complaint"); 47 (Complaint, Pa. Electric Co. v. Commonwealth Tel. Co., LLC and Frontier Commc'ns Corp., No. 10110-2014 (Pa. Ct. Com. Pl. Erie Cnty. Jan. 16, 2014)) ("Penelec Complaint"); 48 (Complaint, West Penn Power Co. d/b/a Allegheny Power v. Frontier Commc'ns of Breezewood, LLC and Frontier Commc'ns Corp., No. 97-2014 (Pa. Ct. Com. Pl. Bedford Cnty. Jan. 16, 2014)) ("West Penn Power Complaint"); 49 (Complaint, Monongahela Power Co. v. Citizens Telecomm. Co. of W. Va. d/b/a Frontier Commc'ns of W. Va. and Frontier Commc'ns Corp., No. 14-C-7 (W. Va. Cir. Ct. Brooke Cnty. Jan. 16, 2014)) ("Mon Power Complaint"); 50 (Complaint, The Potomac Edison Co. v. Citizens Telecomm. Co. of W. Va. d/b/a Frontier Commc'ns of W. Va. and Frontier Commc'ns Corp., No. 14-C-28 (W. Va. Cir. Ct. Berkeley Cnty. Jan. 16, 2014)) ("Potomac Edison-Citizens Complaint"); 51 (Complaint, The Potomac Edison Co. v. Frontier W. Va. Inc. and Frontier Commc'ns Corp., No. 14-C-29 (W. Va. Cir. Ct. Berkeley Cnty. Jan. 16, 2014)) ("Potomac Edison-Frontier WV Complaint").

or Complaint and the "Potomac Edison-Frontier WV" Agreement or Complaint since one agreement was entered by General Telephone Company of the Southeast, now known as Citizens Telecommunications Company of West Virginia ("Citizens"), and the other by The Chesapeake and Potomac Telephone Company of West Virginia, now known as Frontier West Virginia Inc. ("Frontier WV").

The Commission should prevent FirstEnergy from using its superior bargaining power to extract unreasonably high rates from Frontier. The Commission should establish, without further delay, the just and reasonable rates that Frontier may be charged by FirstEnergy for Frontier's use of FirstEnergy's poles. To this end, Frontier respectfully requests that the Commission (1) order FirstEnergy to file a copy of all of its existing pole attachment agreements with telecommunications carriers and cable operators so that Frontier can determine whether it is comparably situated or seeks similar terms, and (2) compel FirstEnergy to provide Frontier just and reasonable rates based on the type of arrangement that Frontier currently has or seeks going forward.<sup>13</sup>

Should Frontier find that it has, or that it seeks, terms and conditions comparable to those of FirstEnergy's other attachers, the Commission should, at most, allow FirstEnergy to charge a rate calculated pursuant to the Commission's new telecommunications formula. Should Frontier instead find that it has, or that it seeks, terms and conditions that materially advantage Frontier

<sup>&</sup>lt;sup>13</sup> In the *Pole Attachment Order*, the FCC identified the rate methodologies that are pertinent. *First*, "where incumbent LECs are attaching to other utilities' poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator--which generally will be paying a rate equal or similar to the cable rate under our rules--competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator)." *Id.* at 5336 (¶ 217). *Second*, it is "reasonable to look to the pre-existing, high-end telecom rate as a reference point in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated . . . to a cable or telecommunications attacher." *Id.* at 5337 (¶ 218).

vis-à-vis telecommunications carriers or cable operators, the Commission should, at most, allow FirstEnergy to charge a rate calculated pursuant to the Commission's pre-existing telecommunications formula.

Frontier has calculated the rates that should apply for its use of FirstEnergy's poles for the 2011 through 2013 rental years.<sup>14</sup> The rates that result from the new telecom formula, using the best data available to Frontier, are:<sup>15</sup>

	Met-Ed	Penelec	West Penn Power	Mon Power	Potomac Edison
2011	\$6.56	\$5.45	\$4.18	\$5.20	\$5.37
2012	\$8.57	\$5.29	\$4.82	\$3.88	\$5.45
2013	\$8.78	\$5.35	\$4.34	\$4.15	\$5.58

The rates that result from the pre-existing telecom formula, using the best data available to Frontier, are: 16

:	Met-Ed	Penelec	West Penn Power	Mon Power	Potomac Edison
2011	\$14.90	\$12.39	\$9.51	\$9.54	\$12.20
2012	\$17.51	\$12.03	\$10.68	\$8.65	\$12.39
2013	\$17.80	\$12,17	\$9.86	\$8.79	\$12.69

<sup>&</sup>lt;sup>14</sup> The *Pole Attachment Order*'s protections for ILECs, like Frontier, took effect on July 12, 2011. See Final Rule, In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 76 Fed. Reg. 40817 (2011).

<sup>&</sup>lt;sup>15</sup> Exs. A ¶ 17 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information. The Met-Ed 2012 and 2013 rates, West Penn Power 2012 rate, and Mon Power 2011, 2012, and 2013 rates are calculated using the "lower bound" new telecom rate methodology, which produces a higher rate than the new telecom rate methodology for those entities during those years. See 47 C.F.R. § 1.1409(e)(2) ("With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section.").

 $<sup>^{16}</sup>$  Exs. A ¶ 23 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information.

#### II. JURISDICTION AND PARTIES

- 1. This Commission has jurisdiction over this action under the provisions of the Communications Act of 1934, as amended, including, but not limited to, Section 224.<sup>17</sup>
- 2. This Complaint has been filed by four Complainants, all of which are operating subsidiaries of Frontier Communications Corporation. For ease of reference, all four Complainants are referred to individually or collectively as "Frontier."
- 3. Two of the Complainants provide communications and other services within the Commonwealth of Pennsylvania. They are Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company and Frontier Communications of Breezewood, LLC. Both are Pennsylvania limited liability companies and have business offices located at 100 CTE Drive, Dallas, Pennsylvania 18612.
- 4. The remaining two Complainants provide communications and other services within the State of West Virginia. <sup>19</sup> They are Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications Company of West Virginia and Frontier West Virginia Inc. Both are West Virginia corporations and have business offices located at 1500 MacCorkle Avenue, SE, Charleston, West Virginia 25396.
- 5. There are five Respondents to this Complaint, each of which is a subsidiary of FirstEnergy Corporation, an Ohio corporation headquartered at 76 South Main Street, Akron, Ohio 44308.<sup>20</sup> FirstEnergy is "one of the nation's largest investor-owned electric systems, based

<sup>&</sup>lt;sup>17</sup> 47 U.S.C. § 224; *Pole Attachment Order*, 26 FCC Red at 5328, 5330, 5332 (¶¶ 202-03, 208, 211).

<sup>&</sup>lt;sup>18</sup> Ex. A ¶ 2 (Knowles Aff.).

<sup>&</sup>lt;sup>19</sup> *Id.* at ¶ 3.

<sup>&</sup>lt;sup>20</sup> FirstEnergy 2013 Form 10-K at 1 (Feb. 27, 2014), *available at* http://investors. firstenergycorp.com/Cache/22258660.pdf?IID=4056944&FID=22258660&O=3&OSID=9.

on serving 6 million customers in the Midwest and Mid-Atlantic regions."<sup>21</sup> For ease of reference, the five Respondents are referred to collectively as "FirstEnergy."

- 6. Three Respondents are parties to pole attachment agreements with Frontier that relate to service areas in the Commonwealth of Pennsylvania. They are Met-Ed, Penelec, and West Penn Power. The remaining two Respondents are parties to pole attachment agreements with Frontier that relate to service areas in the State of West Virginia. They are Mon Power and Potomac Edison.
- 7. Met-Ed is a Pennsylvania corporation located at 2800 Pottsville Pike, Reading, Pennsylvania 19612.<sup>22</sup> Met-Ed is an electric utility that owns and controls facilities used to distribute electricity and that serves retail customers in the Commonwealth of Pennsylvania.<sup>23</sup> Met-Ed is, therefore, a "utility" within the meaning of Section 224(a)(1) of the Act. Frontier is a party to a 1975 pole attachment agreement with Met-Ed,<sup>24</sup> which was amended in 2005.<sup>25</sup>
- 8. Penelec is a Pennsylvania corporation located at 5404 Evans Road, Erie, Pennsylvania 16509.<sup>26</sup> Penelec is an electric utility that owns and controls facilities used to

About Us, available at https://www.firstenergycorp.com/about.html; FirstEnergy, 2012 Annual Report at 7.

<sup>&</sup>lt;sup>22</sup> Ex. 46 ¶ 1 (Met-Ed Complaint).

<sup>&</sup>lt;sup>23</sup> *Id.*; see also FirstEnergy 2013 Annual Report at 7, 10 (Mar. 19, 2014), available at http://investors.firstenergycorp.com/Cache/1001177004.PDF?Y=&O=PDF&D=&fid=10011770 04&T=&iid=4056944 ("FirstEnergy 2013 Annual Report").

<sup>&</sup>lt;sup>24</sup> Ex. 1 (Agreement Between Metropolitan Edison Company and Commonwealth Telephone Company Covering Joint Use of Poles (Jan. 1, 1975)) ("Met-Ed Agreement").

<sup>&</sup>lt;sup>25</sup> Ex. 2 (Assignment of Rights and Amendment of the Joint Use Agreement between Met-Ed and Commonwealth Telephone Company and the former Lewisberry Telephone Company (Sept. 1, 2005) ("Met-Ed Amendment")). The 2005 Amendment acknowledges that the Lewisberry Telephone Company was acquired by Commonwealth and merged into the Met-Ed Agreement. See id. at 1.

<sup>&</sup>lt;sup>26</sup> Ex. 47 ¶ 1 (Penelec Complaint).

distribute electricity and that serves retail customers in the Commonwealth of Pennsylvania.<sup>27</sup> Penelec is, therefore, a "utility" within the meaning of Section 224(a)(1) of the Act. Frontier is a party to a 1958 pole attachment agreement with Penelec,<sup>28</sup> which was amended in 2005.<sup>29</sup>

- 9. West Penn Power is a Pennsylvania corporation located at 800 Cabin Hill Drive, Greensburg, Pennsylvania 15601. West Penn Power is an electric utility that owns and controls facilities used to distribute electricity and that serves retail customers in the Commonwealth of Pennsylvania. West Penn Power is, therefore, a "utility" within the meaning of Section 224(a)(1) of the Act. Frontier is a party to a 2006 pole attachment agreement with West Penn Power. Power.
- 10. Mon Power is an Ohio corporation located at 5001 Nasa Boulevard, Fairmont, West Virginia 26554. Mon Power is an electric utility that owns and controls facilities used to distribute electricity and that serves retail customers in the State of West Virginia. Mon Power is, therefore, a "utility" within the meaning of Section 224(a)(1) of the Act. Frontier became a party to a 1987 pole attachment agreement with Mon Power, which was assigned in a 1993 assignment agreement.

<sup>&</sup>lt;sup>27</sup> Id.; see also FirstEnergy 2013 Annual Report at 7, 10.

<sup>&</sup>lt;sup>28</sup> Ex. 3 (Agreement Between Pennsylvania Electric Company and Commonwealth Telephone Company Covering Joint Use of Poles (Sept. 1, 1958)) ("Penelec Agreement").

<sup>&</sup>lt;sup>29</sup> Ex. 4 (Amendment to the Penelec Agreement (Sept. 1, 2005)).

<sup>&</sup>lt;sup>30</sup> Id.; see also FirstEnergy 2013 Annual Report at 7, 10.

Ex. 5 (Telecommunication Pole and Anchor Joint Rental Attachment License Agreement Between West Penn Power Company dba Allegheny Power and Frontier Communications of Breezewood Inc. (June 1, 2006)) ("West Penn Power Agreement").

<sup>&</sup>lt;sup>32</sup> Id.; see also FirstEnergy 2013 Annual Report at 7, 10.

<sup>&</sup>lt;sup>33</sup> Ex. 6 (Agreement for the Joint Use of Poles and Anchors Between Monongahela Power Company and Continental Telephone Company of West Virginia (Apr. 1, 1987)) ("Mon Power Agreement"); see also Ex. 7 (Administrative and Operating Practices Between Monongahela

11. Potomac Edison is a Maryland corporation located at 800 Cabin Hill Drive, Greensburg, Pennsylvania 15601. Potomac Edison is an electric utility that owns and controls facilities used to distribute electricity and that serves retail customers in the State of West Virginia.<sup>35</sup> Potomac Edison is, therefore, a "utility" within the meaning of Section 224(a)(1) of the Act. Frontier became a party to two 1960 pole attachment agreements with Potomac Edison.<sup>36</sup> One agreement was entered by GTE,<sup>37</sup> and was amended in 1967, 1971, 1985, 1998, and 2007.<sup>38</sup> The other agreement was entered by C&P,<sup>39</sup> and was amended in 1966, 1971, 1989, and 1998.<sup>40</sup>

Power Company and Continental Telephone Company of West Virginia Covering the Joint Use of Poles (Apr. 1, 1987)).

<sup>&</sup>lt;sup>34</sup> Ex. 8 (Assignment Agreement Between Continental Telephone Company of West Virginia, Citizens Utilities Company d/b/a Citizens Telecommunication Company of West Virginia and Monongahela Power Company (Dec. 31, 1993)).

<sup>35</sup> Id.; see also FirstEnergy 2013 Annual Report at 7, 10.

<sup>&</sup>lt;sup>36</sup> Exs. 11 (Agreement Between Potomac Light and Power Company and General Telephone Company of the Southeast (Jan. 1, 1960)) ("Potomac Edison-Citizens Agreement"); 17 (Agreement Between The Potomac Light and Power Company and The Chesapeake and Potomac Telephone Company of West Virginia (Jan. 1, 1960)) ("Potomac Edison-Frontier WV Agreement").

<sup>&</sup>lt;sup>37</sup> Ex. 11 (Potomac Edison-Citizens Agreement).

<sup>&</sup>lt;sup>38</sup> Exs. 12 (Supplement to the Potomac Edison-Citizens Agreement (June 5, 1967)); 13 (Second Supplement to the Potomac Edison-Citizens Agreement (May 25, 1971)); 14 (Third Supplement to the Potomac Edison-Citizens Agreement (Mar. 22, 1985)); 15 (Supplement Four to the Potomac Edison-Citizens Agreement (July 1, 1998)); 16 (Supplement Five to the Potomac Edison-Citizens Agreement (Feb. 9, 2007)).

<sup>&</sup>lt;sup>39</sup> Ex. 17 (Potomac Edison-Frontier WV Agreement).

<sup>&</sup>lt;sup>40</sup> Exs. 18 (Supplemental Agreement to the Potomac Edison-Frontier WV Agreement (May 1, 1966)); 19 (Second Supplement to the Potomac Edison-Frontier WV Agreement (Apr. 27, 1971)); 20 (Third Supplement to the Potomac Edison-Frontier WV Agreement (June 19, 1989)); 21 (Letter Agreement Between Allegheny Power and Bell Atlantic-West Virginia, Inc. (Sept. 21, 1998)).

- 12. Each of the five Respondents to this Complaint "uses or controls poles . . . used or designated, in whole or in part, for wire communication; and [Frontier] currently has attachments on the poles."<sup>41</sup>
- 13. Each of the five Respondents to this Complaint is not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.<sup>42</sup>
- 14. The Commonwealth of Pennsylvania and the State of West Virginia, including their political subdivisions, agencies and instrumentalities, have not certified to the Commission that they regulate the rates, terms and conditions for pole attachments in the manner established by Section 224, which would preempt the jurisdiction of this Commission over pole attachments in Pennsylvania and West Virginia.<sup>43</sup>
- 15. Frontier has, in good faith, engaged in executive-level discussions with FirstEnergy in an attempt to resolve this pole attachment dispute.<sup>44</sup> Prior to filing this complaint, Frontier mailed FirstEnergy a certified letter that outlined the allegations that form the basis of this Pole Attachment Complaint, invited a response within a reasonable period of time, and offered to hold in-person executive-level discussions to resolve the dispute.<sup>45</sup> Executives from both companies' met in FirstEnergy's offices in Akron, Ohio on May 14, 2014, and also engaged in follow-up

<sup>&</sup>lt;sup>41</sup> 47 C.F.R. § 1.1404(d).

<sup>&</sup>lt;sup>42</sup> See 47 C.F.R. § 1.1404(c).

<sup>&</sup>lt;sup>43</sup> 47 C.F.R. § 1.1404(c); Pole Attachment Order, 26 FCC Rcd 5240, App. C; States That Have Certified That They Regulate Pole Attachments, 25 FCC Rcd 5541, 5541-42 (May 19, 2010).

<sup>&</sup>lt;sup>44</sup> 47 C.F.R. § 1.1404(k); see Ex. A ¶ 12 (Knowles Aff.).

Ex. 45 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (Dec. 4, 2013)).

negotiations. Despite these efforts, the parties failed to resolve the dispute and require the FCC's intervention.<sup>46</sup>

#### III. BACKGROUND

#### A. Overview

16. At issue in this Complaint are the rates that FirstEnergy has imposed under six pole attachment agreements, three applicable to the parties' overlapping service areas in Pennsylvania, and three applicable to the parties' overlapping service areas in West Virginia:

#### Pennsylvania Agreements:

- (1) Met-Ed Agreement, entered in 1975<sup>47</sup> and amended in 2005<sup>48</sup> renegotiation requested by Frontier on September 13, 2011<sup>49</sup>
- (2) Penelec Agreement, entered in 1958<sup>50</sup> and amended in 2005<sup>51</sup> renegotiation requested by Frontier on September 13, 2011<sup>52</sup>
- (3) West Penn Power Agreement, entered in 2006<sup>53</sup> renegotiation requested by Frontier on February 14, 2013<sup>54</sup>

## West Virginia Agreements:

(4) Mon Power Agreement, entered in 1987<sup>55</sup> and assigned in 1993<sup>56</sup> – renegotiation requested by Frontier on October 10, 2011<sup>57</sup>

<sup>&</sup>lt;sup>46</sup> Ex. A ¶ 12 (Knowles Aff.).

<sup>&</sup>lt;sup>47</sup> Ex. 1 (Met-Ed Agreement).

<sup>&</sup>lt;sup>48</sup> Ex. 2 (Met-Ed Agreement Amendment).

<sup>&</sup>lt;sup>49</sup> Ex. 28 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Met-Ed (Sept. 13, 2011)).

<sup>&</sup>lt;sup>50</sup> Ex. 3 (Penelec Agreement).

<sup>&</sup>lt;sup>51</sup> Ex. 4 (Amendment to the Penelec Agreement (Sept. 1, 2005)).

<sup>&</sup>lt;sup>52</sup> Ex. 29 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Penelec (Sept. 13, 2011)).

<sup>&</sup>lt;sup>53</sup> Ex. 5 (West Penn Power Agreement).

<sup>&</sup>lt;sup>54</sup> Ex. 39 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to K. Lind, Manager, Distribution Lines Maintenance, Allegheny Power (Feb. 14, 2013)).

- (5) Potomac Edison Agreement with General Telephone Company of the Southeast ("Potomac Edison-Citizens"), entered in 1960<sup>58</sup> and amended in 1967, 1971, 1985, 1998, and 2007<sup>59</sup> renegotiation requested by Frontier on October 10, 2011<sup>60</sup>
- (6) Potomac Edison Agreement with The Chesapeake and Potomac Telephone Company of West Virginia ("Potomac Edison-Frontier WV"), entered in 1960<sup>61</sup> and amended in 1966, 1971, 1989, and 1998<sup>62</sup> renegotiation requested by Frontier on October 10, 2011<sup>63</sup>
- 17. FirstEnergy has long owned the vast majority of joint use poles for each of the overlapping service areas covered by the six pole attachment agreements. The following table reflects the pole numbers (1) from invoices when the FirstEnergy agreements were entered or when rates were revised,<sup>64</sup> and (2) from FirstEnergy's recent invoices:<sup>65</sup>

<sup>&</sup>lt;sup>55</sup> Ex. 6 (Mon Power Agreement).

<sup>&</sup>lt;sup>56</sup> Ex. 8 (Assignment Agreement Between Continental Telephone Company of West Virginia, Citizens Utilities Company d/b/a Citizens Telecommunication Company of West Virginia and Monongahela Power Company (Dec. 31, 1993)).

<sup>&</sup>lt;sup>57</sup> Ex. 30 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)).

<sup>&</sup>lt;sup>58</sup> Ex. 11 (Potomac Edison-Citizens Agreement).

<sup>&</sup>lt;sup>59</sup> Exs. 12 (Supplement to the Potomac Edison-Citizens Agreement (June 5, 1967)); 13 (Second Supplement to the Potomac Edison-Citizens Agreement (May 25, 1971)); 14 (Third Supplement to the Potomac Edison-Citizens Agreement (Mar. 22, 1985)); 15 (Supplement Four to the Potomac Edison-Citizens Agreement (July 1, 1998)); 16 (Supplement Five to the Potomac Edison-Citizens Agreement (Feb. 9, 2007)).

<sup>&</sup>lt;sup>60</sup> Ex. 31 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)).

<sup>&</sup>lt;sup>61</sup> Ex. 17 (Potomac Edison-Frontier WV Agreement).

<sup>&</sup>lt;sup>62</sup> Exs. 18 (Supplemental Agreement to the Potomac Edison-Frontier WV Agreement (May 1, 1966)); 19 (Second Supplement to the Potomac Edison-Frontier WV Agreement (Apr. 27, 1971)); 20 (Third Supplement to the Potomac Edison-Frontier WV Agreement (June 19, 1989)); 21 (Letter Agreement Between Allegheny Power and Bell Atlantic-West Virginia, Inc. (Sept. 21, 1998)).

<sup>&</sup>lt;sup>63</sup> Ex. 32 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)).

<sup>&</sup>lt;sup>64</sup> See Exs. A ¶ 7 (Knowles Aff.); 22 (Mon Power Invoice No. MP-2351284 (Jan. 20, 1998)); 23 (Potomac Edison Invoice No. PE-3318470 (Nov. 24, 1998)); 24 (Potomac Edison Invoice Nos.

Electric Company	Rental Year	Poles Owned by Frontier	Poles Owned by FirstEnergy	Frontier's Ownership Percentage	FirstEnergy's Ownership Percentage
Met-Ed	2005	3,218	29,763	10%	90%
(rate revised 2005)	2012	3,237	29,805	10%	90%
Penelec	2005	9,515	28,050	25%	75%
(rate revised 2005)	2013	9,625	28,532	25%	75%
West Penn Power	2006	281	3,363	8%	92%
(2006 Agreement)	2013	413	3,871	10%	90%
Mon Power	1997	3,633	13,930	21%	79%
(rate revised 1997)	2012	4,625	20,255	19%	81%
Potomac Edison- Citizens	1998	1,122	36,021	3%	97%
(rate revised 1998)	2012	2,500	57,388	4%	96%
Potomac Edison- Frontier WV	2000	3,526	34,274	9%	91%
(rate revised 1998)	2012	3,381	34,058	9%	91%

18. When the pole numbers from FirstEnergy's recent invoices are combined, FirstEnergy's significant market power over Frontier is evident:

<sup>3-</sup>INV035197 & 3-INV035196 (Oct. 11, 2000)); 25 (Penelec Invoice No. 90119880 (Dec. 9, 2005)); 26 (Met-Ed Invoice No. 90124434 (Jan. 13, 2006)); 27 (West Penn Power Invoice No. WP001-174745 (Sept. 21, 2006)). Pole ownership numbers were taken from invoices provided by FirstEnergy and are used for comparison only.

For recent pole numbers, Frontier used pole counts from the FirstEnergy invoices that apparently form the basis of FirstEnergy's lawsuits: invoices for the 2012 rental year for Met-Ed, Mon Power, and Potomac Edison, and invoices for the 2013 rental year for Penelec and West Penn Power (both lawsuits incorrectly identified as 2012 rental year). FirstEnergy's recent invoices appear as attachments to Ex. 41 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)). Pole ownership numbers were taken from invoices provided by FirstEnergy and are used for comparison only.

	Poles Owned	% Owned
FirstEnergy	173,909	88%
Frontier	23,781	12%

- 19. In June 2012, FirstEnergy stated that it "believe[d] that when our joint use agreements were negotiated, the pole ownership percentages were much different than they are today." FirstEnergy further claimed that it was "researching that issue and will get back to [Frontier] with [FirstEnergy's] findings," so that "[o]nce the parties better understand the relative pole ownership percentages, we can determine how best to move forward." FirstEnergy has not provided any pole ownership information to Frontier to refute Frontier's position that FirstEnergy has long owned significantly more utility poles. As the information in paragraph 17 above shows, FirstEnergy owned the vast majority of joint use poles when the pole attachment rates were established or revised, and the significant pole ownership disparity continues.
- 20. FirstEnergy's recent invoices also show that FirstEnergy has taken advantage of its superior bargaining power by extracting rates from Frontier that are *far higher* than both the new telecom rates it may charge Frontier's competitors and the pre-existing telecom rates:

<sup>&</sup>lt;sup>66</sup> Ex. 37 (Letter from S. Schafer, Manager, Joint Use and Cable Locating, FirstEnergy, to S. Knowles, Director – Engineering, Frontier (June 6, 2012)).

<sup>&</sup>lt;sup>67</sup> Id.

Electric Company	Rental Year	Invoiced Rate <sup>68</sup>	New Telecom Rate <sup>69</sup>	Pre-Existing Telecom Rate <sup>70</sup>
Met-Ed	2012	\$34.38	\$8.57	\$17.51
Penelec	2013	\$27.61	\$5.35	\$12.17
West Penn Power	2013	\$20.00	\$4.34	\$9.86
Mon Power	2012	\$30.92	\$3.88	\$8.65
Potomac Edison-Citizens	2012	\$20.00	\$5.45	\$12.39
Potomac Edison-Frontier WV	2012	\$17.35	\$5.45	\$12.39

21. FirstEnergy has refused to renegotiate the rate provisions in the six pole attachment agreements at issue in this proceeding to give effect to Frontier's right to just and reasonable rental rates. FirstEnergy also has refused to produce existing agreements with Frontier's competitors so Frontier can determine whether the terms and conditions in Frontier's pole attachment agreements are comparable to those in its competitors' agreements or whether comparable terms and conditions would be workable for Frontier. The FCC should clarify that, under the *Pole Attachment Order*, Frontier is entitled to just and reasonable rental rates for its attachments to FirstEnergy's poles and order FirstEnergy to produce its agreements with telecommunication carriers and cable providers to help establish just and reasonable rates.

<sup>&</sup>lt;sup>68</sup> See Attachments to Ex. 41 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>&</sup>lt;sup>69</sup> See Exs. A ¶ 17 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information. The Met-Ed 2012 and 2013 rates, West Penn Power 2012 rate, and Mon Power 2011, 2012, and 2013 rates are calculated using the "lower bound" new telecom rate methodology, which produces a higher rate than the new telecom rate methodology for those entities during those years. See 47 C.F.R. § 1.1409(e)(2).

 $<sup>^{70}</sup>$  See Exs. A ¶ 23 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information.

## B. The Parties' Pole Attachment Agreements

#### 1. Met-Ed

- 22. The rental rate under the Met-Ed Agreement, which took effect on January 1, 1975, 71 was based on a formula that allocated 45% of the annual cost to Frontier and 55% to Met-Ed. 72 The Agreement does not allocate any particular amount of space on a joint use pole to either party. 73 It may be terminated by either party upon sixty days' written notice, but "notwithstanding such termination this agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."
- 23. The Met-Ed Agreement was amended on September 1, 2005.<sup>75</sup> The Amendment converted the rental rate provision into a reciprocal rate provision, meaning that each party would pay the other party the same rental amount irrespective of how much space its occupies on the other's poles. The Amendment also imposed an annual escalator on the rate. In particular, the Amendment provided that the rental rate for the 2004 calendar year for both parties would be \$25.54, and that the rate for each subsequent year would "be adjusted based upon the Handy-Whitman Index (HWI) multiplier (North Atlantic Region) by applying the percentage change from the previous year to the current billing year." The Met-Ed Agreement otherwise remained "in full force and effect."

<sup>&</sup>lt;sup>71</sup> Ex. 1 at Art. XVIII (Met-Ed Agreement).

<sup>&</sup>lt;sup>72</sup> *Id.* at Art. X(a)(2)-(3).

<sup>&</sup>lt;sup>73</sup> See, e.g., id. at Art. II.

<sup>&</sup>lt;sup>74</sup> *Id.* at Art. XVIII.

<sup>&</sup>lt;sup>75</sup> Ex. 1 (Met-Ed Agreement Amendment).

<sup>&</sup>lt;sup>76</sup> *Id.* at (1).

<sup>&</sup>lt;sup>77</sup> *Id.* at (2).

24. At the time of the 2005 Amendment, Met-Ed owned the vast majority of the joint use poles. The 2005 invoice shows that Met-Ed owned 29,763 poles (90%) to Frontier's 3,218 (10%). By 2012, the parties' pole ownership percentages had not changed. 79

#### 2. Penelec

- 25. The rental rate under the Penelec Agreement, which took effect on September 1, 1958, 80 was \$2.00 per pole. 81 The Agreement allocated 3 feet of space to Frontier and 4 feet, 8 inches to Penelec in addition to 3 feet, 4 inches of neutral space (for a total of 8 feet). 82 The Agreement may be terminated by either party upon sixty days' written notice, but "notwithstanding such termination this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination." 83
- 26. The Penelec Agreement was amended on September 1, 2005,<sup>84</sup> to impose a significant rental rate increase from "the current annual rental rate (\$7.00) to . . . the 2005 rental rate of \$21.24." Also, like the Met-Ed Amendment of the same date, the Penelec Amendment imposed an annual escalator on the rental rate, providing that the rate for each subsequent year would "be adjusted based upon the Handy-Whitman Index (HWI) multiplier (North Atlantic

<sup>&</sup>lt;sup>78</sup> Exs. A ¶ 7 (Knowles Aff.); 26 (Met-Ed Invoice No. 90124434 (Jan. 13, 2006)).

<sup>&</sup>lt;sup>79</sup> See Ex. 41 at 6 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>&</sup>lt;sup>80</sup> Ex. 3 at Art. XIX (Penelec Agreement).

<sup>&</sup>lt;sup>81</sup> *Id.* at Art. X(a).

<sup>&</sup>lt;sup>82</sup> Id. at Art. II and Ex. A.

<sup>83</sup> Id. at Art. XIX.

<sup>&</sup>lt;sup>84</sup> Ex. 4 (Amendment to the Penelec Agreement (Sept. 1, 2005)).

<sup>85</sup> *Id.* at 1.

Region) by applying the percentage change from the previous year to the current billing year."<sup>86</sup> The Penelec Agreement otherwise remained "in full force and effect."<sup>87</sup>

27. At the time of the 2005 Amendment, Penelec owned a significant majority of the joint use poles. The 2005 invoice shows that Penelec owned 28,050 poles (75%) to Frontier's 9,515 (25%). By 2013, the parties' pole ownership percentages had not changed. 89

#### 3. West Penn Power

28. The rental rate under the West Penn Power Agreement, which took effect on June 1, 2006, 90 was \$15.00 per pole for Frontier in 2007 and \$20.00 per pole for Frontier in 2008. The Agreement allocated 4 feet, 6 inches of space to Frontier on any joint use pole that is taller than 40 feet. The West Penn Power Agreement may be terminated by either party upon one year's written notice, 93 with all attachments to be removed by the effective date of the termination. 94

29. At the time of the 2006 West Penn Power Agreement, West Penn Power owned the vast majority of the joint use poles. The 2006 invoice shows that West Penn Power owned

<sup>&</sup>lt;sup>86</sup> *Id.* at § 5.

<sup>&</sup>lt;sup>87</sup> *Id.* at § 6.

<sup>&</sup>lt;sup>88</sup> Exs. A ¶ 7 (Knowles Aff.); 25 (Penelec Invoice No. 90119880 (Dec. 9, 2005)).

<sup>&</sup>lt;sup>89</sup> See Ex. 41 at 8 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>&</sup>lt;sup>90</sup> Ex. 5 (West Penn Power Agreement).

<sup>&</sup>lt;sup>91</sup> *Id.* at § 13(a).

<sup>&</sup>lt;sup>92</sup> Id. at § 7(a). The West Penn Power Agreement is silent with respect to the allocation of space on poles of 40 feet or shorter.

<sup>&</sup>lt;sup>93</sup> *Id.* at § 23.

<sup>&</sup>lt;sup>94</sup> *Id.* at § 25.

3,363 poles (92%) to Frontier's 281 (8%). By 2013, Frontier's ownership percentage had slightly increased by 2%, to only 10%.

#### 4. Mon Power

- 30. The rental rate under the Mon Power Agreement, which took effect on April 1, 1987, 97 was set using a formula that allocates 43.7% of the annual pole cost to Frontier and 56.3% of the annual pole cost to Mon Power. 98 The Agreement allocates 2 feet of space to Frontier and 7 feet of space to Mon Power. 99 The Agreement may be terminated by either party upon one year's written notice. 100 The Agreement further provides that "[a]ll attachments of the Licensee shall be removed by no later than the effective date of any termination hereof." 101
- 31. In 1997, Mon Power calculated the rate that Frontier paid as \$30.92 and the rate that Mon Power paid as \$39.83. 102 In a letter dated July 12, 2000, Mon Power represented that the "current pole attachment rates, electric pays \$39.83 per attachment to telephone poles and telephone pays \$30.92 per attachment to electric poles, should be continued through year 2000 and until modified due to significant changes in pole and carrying charge costs." The rates

 $<sup>^{95}</sup>$  Exs. A  $\P$  7 (Knowles Aff.); 27 (West Penn Power Invoice No. WP001-174745 (Sept. 21, 2006)).

<sup>&</sup>lt;sup>96</sup> See Ex. 41 at 10 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>&</sup>lt;sup>97</sup> Ex. 6 (Mon Power Agreement).

<sup>&</sup>lt;sup>98</sup> *Id.* at § 7(f).

<sup>99</sup> Id. at § 1(h) (Mon Power Agreement).

<sup>100</sup> Id. at § 10(a).

<sup>&</sup>lt;sup>101</sup> *Id.* at § 10(b).

<sup>&</sup>lt;sup>102</sup> See Attachments to Ex. 9 (Letter from R. Duncil, Allegheny Power, to J. Moore, Citizens Telecom (May 13, 1998)).

<sup>&</sup>lt;sup>103</sup> Ex. 10 (Letter from G. DeVine, Real Estate Manager, Allegheny Power, to Citizens Communications (July 12, 2000)).

have not changed. At the time Mon Power calculated the rates in 1997, Mon Power owned the vast majority of the joint use poles. The 1997 invoice shows that Mon Power owned 13,930 poles (79%) to Frontier's 3,633 (21%). This disparity continued in spite of language in the Agreement that "the party owning the lesser number of poles shall be given the opportunity by the party owning the larger number of poles to set new poles, replace poles or purchase poles . . . to establish an equal balance for pole ownership." By 2012, Frontier's ownership percentage had decreased by another 2%, to only 19%. 106

#### 5. Potomac Edison-Citizens

32. The rental rate provision in the Potomac Edison-Citizens Agreement, which took effect on January 1, 1960,<sup>107</sup> provided that "the party owning the lesser number of joint poles" must pay "the party owning the greater number of joint poles" a \$3.50 per pole annual rate "for each pole of the difference in the number of joint poles owned." The Agreement allocated 3 feet of space to Frontier and 8 feet to Potomac Edison. The Agreement may be terminated by either party upon one year's written notice, but "notwithstanding such termination this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."

<sup>&</sup>lt;sup>104</sup> Exs. A ¶ 7 (Knowles Aff.); 22 (Mon Power Invoice No. MP-2351284 (Jan. 20, 1998)).

<sup>105</sup> Ex. 6 at § 7(j) (Mon Power Agreement).

<sup>&</sup>lt;sup>106</sup> See Ex. 41 at 12-14 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>&</sup>lt;sup>107</sup> Ex. 11 (Potomac Edison-Citizens Agreement).

<sup>108</sup> Id. at Art. XI(a).

<sup>&</sup>lt;sup>109</sup> *Id.* at Art. II.

<sup>110</sup> Id. at Art. XXI.

33. The Potomac Edison-Citizens Agreement was amended in 1967, 1971, 1985, 1998, and 2007. The 1967 Amendment increased the annual rental rate to \$4.50 per excess pole. The 1998 Amendment eliminated the excess pole rental rate provision and increased Frontier's rate to \$20 per pole, stating:

Effective January 1, 1997 through December 31, 1997, the rentals will be \$12 per pole per year for [Potomac Edison]'s attachments to [Frontier]'s poles and \$10 for [Frontier]'s attachments to [Potomac Edison]'s poles. Effective January 1, 1998 and every year thereafter or until mutually agreed as provided under Article XII, the rentals will be \$25 per pole per year for [Potomac Edison]'s attachments to [Frontier]'s poles and \$20 for [Frontier]'s attachments to [Potomac Edison]'s poles.

The 2007 Amendment replaced the space allocations of the original agreement, such that Potomac Edison is allocated "the uppermost usable space" and Frontier is allocated "the usable space at such distance below the Electric Company space as to provide at all times the minimum clearances and separations required."

34. At the time of the 1998 Amendment, Potomac Edison owned the vast majority of the joint use poles. The 1998 invoice shows that Potomac Edison owned 36,021 poles (97%) to Frontier's 1,122 (3%). This disparity continued in spite of language in the Agreement that, where "the party proposing to construct the new pole facilities already owns more than its proportionate share of joint poles, the parties shall take into consideration the desirability of

Exs. 12 (Supplement to the Potomac Edison-Citizens Agreement (June 5, 1967)); 13 (Second Supplement to the Potomac Edison-Citizens Agreement (May 25, 1971)); 14 (Third Supplement to the Potomac Edison-Citizens Agreement (Mar. 22, 1985)); 15 (Supplement Four to the Potomac Edison-Citizens Agreement (July 1, 1998)); 16 (Supplement Five to the Potomac Edison-Citizens Agreement (Feb. 9, 2007)). The 1971 and 1985 amendments are not relevant to this dispute.

<sup>&</sup>lt;sup>112</sup> Ex. 12 (Supplement to the Potomac Edison-Citizens Agreement (June 5, 1967)).

<sup>113</sup> Ex. 15 at § 2 (Supplement Four to the Potomac Edison-Citizens Agreement (July 1, 1998)).

<sup>114</sup> Ex. 16 at § 2 (Supplement Five to the Potomac Edison-Citizens Agreement (Feb. 9, 2007)).

<sup>115</sup> Exs. A ¶ 7 (Knowles Aff.); 23 (Potomac Edison Invoice No. PE-3318470 (Nov. 24, 1998)).

having the new pole facilities owned by the party owning less than its proportionate share of joint poles."<sup>116</sup> By 2012, Frontier's ownership percentage had slightly increased by 1%, to only 4%. <sup>117</sup>

#### 6. Potomac Edison-Frontier WV

- 35. The rental rate provision in the Potomac Edison-Frontier WV Agreement, which took effect on January 1, 1960, 118 provided that "[i]n the event that the TELEPHONE COMPANY is occupying or reserving the greater number of jointly used poles as Licensee hereunder, then it shall pay to the ELECTRIC COMPANY rent upon the excess at the rate of \$3.50 per annum per excess pole." The Potomac Edison-Frontier WV Agreement allocates 3 feet of space to Frontier and 8 feet to Potomac Edison. The Potomac Edison-Frontier WV Agreement may be terminated by either party upon one year's written notice, but "notwithstanding such termination, this agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination." 121
- 36. The Potomac Edison-Frontier WV Agreement was amended in 1966, 1971, 1989 and 1998. The 1966 Amendment increased the annual rental rate to \$4.50 per excess pole. 123

<sup>116</sup> Ex. 11 at Art. V(b) (Potomac Edison-Citizens Agreement).

<sup>&</sup>lt;sup>117</sup> See Ex. 41 at 16-17 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>118</sup> Ex. 17 (Potomac Edison-Frontier WV Agreement).

<sup>&</sup>lt;sup>119</sup> *Id.* at Art. XI(c).

<sup>&</sup>lt;sup>120</sup> *Id.* at Art. II.

<sup>&</sup>lt;sup>121</sup> Id. at Art. XXI.

Exs. 18 (Supplemental Agreement to the Potomac Edison-Frontier WV Agreement (May 1, 1966)); 19 (Second Supplement to the Potomac Edison-Frontier WV Agreement (Apr. 27, 1971)); 20 (Third Supplement to the Potomac Edison-Frontier WV Agreement (June 19, 1989)); 21 (Letter Agreement Between Allegheny Power and Bell Atlantic-West Virginia, Inc. (Sept. 21, 1998)). The 1971 and 1989 amendments are not relevant to this dispute.

The 1998 Amendment eliminated the excess pole rental rate provision and increased Frontier's rate to \$17.35 per pole. 124 It further provided that the rental rate "shall remain in effect until such time that rates are again reviewed and updated as provided for under Article XII of [the Potomac Edison-Frontier WV Agreement]." 125

At the time of the 1998 Amendment, available evidence indicates that Potomac Edison owned the vast majority of the joint use poles. The 2000 invoice shows that, Potomac Edison owned 34,274 poles (91%) to Frontier's 3,526 (9%). This disparity continued in spite of language in the Agreement that, where "the party proposing to construct the new pole facilities already owns more than its proportionate share of joint poles, the parties shall take into consideration the desirability of having the new pole facilities owned by the party owning less than its proportionate share of joint poles." By 2012, the parties' pole ownership percentages had not changed. 128

## C. Frontier Seeks New Rates From FirstEnergy Within The Parameters Of The *Pole Attachment Order*.

38. On April 7, 2011, the Commission issued its *Pole Attachment Order*, which held that ILECs are entitled to just and reasonable attachment rates. <sup>129</sup> Applying the FCC's guidance

<sup>&</sup>lt;sup>123</sup> Ex. 18 Supplemental Agreement to the Potomac Edison-Frontier WV Agreement (May 1, 1966)).

<sup>&</sup>lt;sup>124</sup> Ex. 21 (Letter Agreement Between Allegheny Power and Bell Atlantic-West Virginia, Inc. (Sept. 21, 1998)).

<sup>&</sup>lt;sup>125</sup> *Id*.

 $<sup>^{126}</sup>$  Exs. A  $\P$  7 (Knowles Aff.); 24 (Potomac Edison Invoice Nos. 3-INV035197 & 3-INV035196 (Oct. 11, 2000)).

<sup>127</sup> Ex. 17 at Art. V(b) (Potomac Edison-Frontier WV Agreement).

<sup>&</sup>lt;sup>128</sup> See Ex. 41 at 19 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>&</sup>lt;sup>129</sup> Pole Attachment Order, 26 FCC Rcd at 5327-38 (¶¶ 199-220).

in the *Pole Attachment Order* produces rates that are significantly lower than the rates FirstEnergy invoiced for 2012 and 2013 rental years under the six agreements at issue here, <sup>130</sup> ranging from \$17.35 to \$34.38 per pole. <sup>131</sup> The protections for ILECs, like Frontier, in the *Pole Attachment Order* took effect on July 12, 2011. <sup>132</sup>

39. On September 13, 2011, Frontier asked Met-Ed and Penelec to "immediately engage in discussions to renegotiate the pole attachment rates, terms, and conditions." To "assist in making [the] negotiations more efficient," Frontier asked FirstEnergy to provide "rate calculations for the FCC's pre-existing telecommunications rate and the new telecommunications rate under the new Order" and to send copies of "representative, existing agreements with cable and telecommunications attaching entities" so that it could determine whether it is, or wishes to be, similarly situated to FirstEnergy's other attachers. Frontier sent essentially identical letters

<sup>&</sup>lt;sup>130</sup> Met-Ed, Mon Power, and Potomac Edison invoiced for the 2012 rental year, whereas Penelec and West Penn Power invoiced for the 2013 rental year.

<sup>&</sup>lt;sup>131</sup> See Attachments to Ex. 41 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>&</sup>lt;sup>132</sup> Final Rule, In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 76 Fed. Reg. 40817 (2011).

<sup>133</sup> Exs. 28 at 1 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Met-Ed (Sept. 13, 2011)); 29 at 1 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Penelec (Sept. 13, 2011)). Frontier also sent follow-up letters to Met-Ed and Penelec on October 28, 2011. See Exs. 34 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Met-Ed (Oct. 28, 2011)); 35 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Penelec (Oct. 28, 2011)).

<sup>&</sup>lt;sup>134</sup> Exs. 28 at 1 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Met-Ed (Sept. 13, 2011)); 29 at 1 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Penelec (Sept. 13, 2011)).

to Mon Power and Potomac Edison on October 10, 2011, and to West Penn Power on February 14, 2013.

- 40. On October 27, 2011, FirstEnergy acknowledged receipt of Frontier's letters and asked Frontier to "explain why Frontier believes it was in an inferior bargaining position when these agreements were negotiated in 1958, 1960, 1975, and 1987." <sup>137</sup>
- 41. Frontier responded by letter dated May 9, 2012.<sup>138</sup> Frontier provided a table that showed the pole ownership disparities between the companies for the earliest year readily available to Frontier and for 2010 and 2011, as applicable.<sup>139</sup> Frontier also stated its understanding "that these pole ratios have not changed much over time and most likely reflect the pole disparities in place when each of these agreements was negotiated."<sup>140</sup> Frontier renewed its request for "FirstEnergy's rate calculations for the Commission's pre-existing telecommunications rate and the new telecommunications rate under the Order as well as FirstEnergy's representative, existing agreements with CATVs and CLECs."<sup>141</sup>

<sup>135</sup> Exs. 30 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)); 31 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)); 32 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)).

<sup>&</sup>lt;sup>136</sup> Ex. 39 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to K. Lind, Manager, Distribution Lines Maintenance, Allegheny Power (Feb. 14, 2013)).

<sup>&</sup>lt;sup>137</sup> Ex. 33 at 2 (Letter from S. Schafer, Manager, Joint Use and Cable Locating, FirstEnergy, to J. Huffine, Section Manager – Network Engineering, Frontier (Oct. 27, 2011)).

<sup>&</sup>lt;sup>138</sup> Ex. 36 (Letter from S. Knowles, Director – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, FirstEnergy (May 9, 2012)).

<sup>&</sup>lt;sup>139</sup> Id. at Attachment 1.

<sup>&</sup>lt;sup>140</sup> *Id.* at 1.

<sup>&</sup>lt;sup>141</sup> *Id.* at 3.

- 42. FirstEnergy responded on June 6, 2012 that it would research whether the pole ownership percentages were different when the agreements were negotiated in 1958, 1960, 1975 and 1987 than they are today. FirstEnergy stated that it would report its findings to Frontier, and then "[o]nce the parties better understand the relative pole ownership percentages, we can determine how best to move forward." FirstEnergy also noted its position that "existing joint use agreements negotiated by parties are unlikely to be considered unjust and unreasonable." FirstEnergy stated this same position in February 2013 with respect to the West Penn Power agreement, which it also stated that it was "not inclined to renegotiate." FirstEnergy has failed to provide any information on pole ownership percentages to Frontier.
- 43. In late 2012 and early 2013, FirstEnergy sent invoices to Frontier for the 2012 or 2013 rental year, depending on the agreement (Met-Ed, Mon Power, and Potomac Edison invoiced for 2012 rentals; Penelec and West Penn Power invoiced for 2013 rentals). In response, Frontier noted that it had been "almost 20 months since Frontier sent its first notices of renegotiation, and FirstEnergy still has not provided any of the rate information or the agreements repeatedly requested by Frontier to enable the parties to begin good-faith

<sup>&</sup>lt;sup>142</sup> Ex. 37 (Letter from S. Schafer, Manager, Joint Use and Cable Locating, FirstEnergy, to S. Knowles, Director – Engineering, Frontier (June 6, 2012)).

<sup>&</sup>lt;sup>143</sup> *Id*.

<sup>&</sup>lt;sup>144</sup> *Id*.

<sup>&</sup>lt;sup>145</sup> Ex. 40 (Letter from E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy, to J. Huffine, Section Manager – Network Engineering, Frontier (Feb. 28, 2013)).

<sup>&</sup>lt;sup>146</sup> See Ex. 41 at Attachments (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)); see also Ex. 38 (Letter from D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy, to J. Blake, Frontier (Jan. 9, 2013)).

negotiations for just and reasonable rates, terms, and conditions." As a result, Frontier adjusted the invoices to reflect rates it then estimated as due under the Commission's new telecom formula, based on the best available information. Frontier then made good-faith payments of these estimated rental amounts for its use of FirstEnergy's poles. Frontier's May 7, 2013 letter again renewed its request for "rate calculations for the FCC's pre-existing telecommunications rates and the new telecommunications rates under the Order" and for "representative, existing agreements with cable and telecommunications attaching entities."

- 44. On June 5, 2013, FirstEnergy sent Frontier a letter stating that Frontier was in default of its obligations under seven pole attachment agreements, including the six agreements discussed above. FirstEnergy invited Frontier to its offices in Akron, Ohio "to discuss resolution of these defaults."
- 45. On July 11, 2013, Frontier accepted FirstEnergy's invitation to discuss resolution of the parties' rate dispute, and requested that it "provide a list of dates that would be convenient

<sup>&</sup>lt;sup>147</sup> Ex. 41 at 3 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>&</sup>lt;sup>148</sup> *Id.* at Attachments. Frontier's good-faith payments differ from the rates proposed in this Complaint because they were based on the best information available to Frontier at that time. Frontier's proposed rates incorporate some additional information provided by FirstEnergy after Frontier made its good-faith payments.

<sup>&</sup>lt;sup>149</sup> *Id.* at 4.

Ex. 42 (Letter from E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy, to S. Knowles, Director – Engineering, Frontier, and C. Cormany, Senior Manager – Engineering, Frontier (June 5, 2013)). The remaining agreement is with Ohio Edison, which is not at issue in this case because Ohio has certified to the Commission that it regulates the rates, terms and conditions for pole attachments in the manner established by Section 224. 47 C.F.R. § 1.1404(c); *Pole Attachment Order*, 26 FCC Rcd 5240, App. C; *States That Have Certified That They Regulate Pole Attachments*, 25 FCC Rcd 5541, 5541-42 (May 19, 2010).

<sup>&</sup>lt;sup>151</sup> Ex. 42 at 4 (Letter from E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy, to S. Knowles, Director – Engineering, Frontier, and C. Cormany, Senior Manager – Engineering, Frontier (June 5, 2013)).

for FirstEnergy so we can schedule a meeting."<sup>152</sup> Rather than provide a list of available dates, FirstEnergy responded in October 2013 with a letter to correct deficiencies in its Notices of Default. FirstEnergy made no mention of the agreed upon meeting.

46. On December 4, 2013, Frontier followed up on its longstanding request for a meeting, this time asking that the parties engage in good-faith, executive-level discussions to resolve the dispute pursuant to the terms of the *Pole Attachment Order*. Frontier's certified letter outlined the allegations that form the basis of this Complaint and invited a response within a reasonable period of time. FirstEnergy did not respond to Frontier's certified letter. 155

## D. FirstEnergy Files Breach-of-Contract Lawsuits Against Frontier

- 47. On January 16, 2014, a little over a month after Frontier sent its request for an executive-level meeting, FirstEnergy responded by filing seven breach-of-contract lawsuits against Frontier in Pennsylvania, West Virginia, and Ohio state courts. 156
- 48. FirstEnergy then agreed to Frontier's invitation for executive-level discussions at FirstEnergy's offices in Akron, Ohio. The March 17, 2014 meeting was cancelled when bad weather prevented FirstEnergy's counsel from traveling to Ohio. FirstEnergy then required that Frontier provide its pole "cost information necessary to calculate Frontier's attachment rates"

<sup>&</sup>lt;sup>152</sup> Ex. 43 at 2 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (July 11, 2013)).

<sup>&</sup>lt;sup>153</sup> See Ex. 44 (Letter from E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy, to C. Cormany, Senior Manager – Engineering, Frontier (Oct. 10, 2013)).

<sup>&</sup>lt;sup>154</sup> Ex. 45 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (Dec. 4, 2013)).

<sup>&</sup>lt;sup>155</sup> Ex. A at ¶ 11 (Knowles Aff.).

<sup>&</sup>lt;sup>156</sup> Exs. 46 (Met-Ed Complaint); 47 (Penelec Complaint); 48 (West Penn Power Complaint); 49 (Mon Power Complaint); 50 (Potomac Edison-Citizens Complaint); 51 (Potomac Edison-Frontier WV Complaint). The seventh Complaint was filed in the Ohio Edison dispute, which is not at issue here because Ohio has certified that it regulates pole attachments.

before rescheduling the meeting. While Frontier disagrees that its pole cost information is relevant, it agreed to provide the information if FirstEnergy would provide the rate inputs and calculations that Frontier had repeatedly requested *for over two years*. The parties exchanged 2012 cost data on March 28, 2014.

49. On May 14, 2014, executives from each company met at FirstEnergy's offices in Akron, Ohio. They then continued negotiations by telephone. Despite these efforts, the parties failed to resolve the dispute and require the FCC's intervention. 157

#### IV. DISCUSSION

- A. The *Pole Attachment Order* Was Issued To Ensure That ILECs, Such As Frontier, Receive A Just And Reasonable Rate In This Precise Situation.
- 50. FirstEnergy, which owns 88% of the joint use poles at issue in this Complaint, charges Frontier rates that are *more than three to almost eight times higher* than the rates that FirstEnergy can charge Frontier's competitors under the FCC's new telecom and cable formulas. When Frontier asked to renegotiate its rates, FirstEnergy essentially ignored Frontier's request, stated that existing agreements were not affected by the *Pole Attachment Order*, denied the pole ownership disparity that existed at the time rates under those agreements were established or revised, and filed seven lawsuits against Frontier. FirstEnergy has thus tried to use its bargaining power and the cost of litigation to strong-arm Frontier into continuing to pay unjust and unreasonable rental rates. This is the precise conduct that the Commission sought to prevent by providing detailed guidance about its approach to just and reasonable rates in its *Pole Attachment Order* intending that electric utilities would follow that guidance and provide ILECs with the just and reasonable rate to which they are entitled. FirstEnergy has refused to do so. The

<sup>&</sup>lt;sup>157</sup> Ex. A ¶ 12 (Knowles Aff.).

<sup>&</sup>lt;sup>158</sup> Pole Attachment Order, 26 FCC Rcd at 5327-28, 5330-31 (¶¶ 199, 202, 208).

Commission should prevent FirstEnergy from continuing to increase its profits by standing in the way of the FCC's goal to "promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation." <sup>159</sup>

- The *Pole Attachment Order* resulted from the Commission's inquiry into "whether pole attachment rates paid by incumbent LECs could affect the vitality of competition to deliver telecommunications, video services, and broadband Internet access service." Rightly "recogni[zing] the importance of pole attachments to the deployment of communications networks," the FCC concluded "that widely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband, contrary to the policy goals of the [Telecommunications] Act." 162
- 52. The FCC received complaints "that electric utilities [were] leverag[ing] the growing imbalance in pole ownership to engage in unjust and unreasonable practices" and to "refus[e] to renegotiate outdated joint-use arrangements." The record showed that ILECs generally stand in "an inferior bargaining position to other utilities" and are not able to achieve just and reasonable rates, terms and conditions for attachments through private negotiations. The record also showed that ILECs were often "forced to pay rates for pole attachments that are

<sup>&</sup>lt;sup>159</sup> *Id.* at 5241 (¶ 1).

<sup>&</sup>lt;sup>160</sup> Notice of Proposed Rulemaking, In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, 22 FCC Rcd 20195, 20201-02 (¶ 15) (2007) ("Pole Attachment NPRM").

<sup>&</sup>lt;sup>161</sup> Pole Attachment Order, 26 FCC Rcd at 5247 (¶ 13).

<sup>&</sup>lt;sup>162</sup> Id. at 5243 (¶ 6).

<sup>&</sup>lt;sup>163</sup> Pole Attachment NPRM, 22 FCC Rcd at 20201-02 (¶ 15).

<sup>&</sup>lt;sup>164</sup> Pole Attachment Order, 26 FCC Rcd at 5327 (¶ 199).

unreasonably higher than those available to other attachers."<sup>165</sup> For example, "incumbent LECs estimate that, in aggregate, they annually pay pole attachment rates that are \$320 to \$350 million greater than they would pay at the cable rate."<sup>166</sup>

- 53. "[P]ersuaded by evidence in the record that widely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband, contrary to the policy goals of the Act," the Commission granted rate relief to ILECs and offered Commission oversight to ensure that ILECs receive just and reasonable rates. "Obtaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services;" access to poles, therefore, cannot be "more burdensome or expensive than necessary." 168
- 54. In order to "promote competition and advanced telecommunications capability," the Commission cabined the range of rates that may be charged for attachments. The Commission intended for the lowered rates to quickly take effect as electric utilities, like FirstEnergy, applied the guidance contained in its *Order*: "We find it prudent to identify a specific rate to be used as a reference point in these circumstances because it will enable better informed pole attachment negotiations between incumbent ILECs and electric utilities" and "will

Order and Further Notice of Proposed Rulemaking, In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 25 FCC Red 11864, 11925-26 (¶¶ 145, 147) (2010).

<sup>&</sup>lt;sup>166</sup> Pole Attachment Order, 26 FCC Rcd at 5330-31 (¶ 208).

<sup>&</sup>lt;sup>167</sup> *Id.* at 5243 (¶ 6).

<sup>&</sup>lt;sup>168</sup> *Id*.

<sup>&</sup>lt;sup>169</sup> Id. at 5298-99 (¶ 136) (quotation marks omitted).

reduce the number of disputes for which Commission resolution is required by providing parties clearer expectations regarding the potential outcomes of formal complaints."<sup>170</sup>

- 55. The Commission's *Pole Attachment Order* will serve as a major step forward for innovation, investment, and competition, <sup>171</sup> but only if ILECs are, in fact, charged the much lower just and reasonable rates that it promises. Here, where FirstEnergy has refused to do so, Frontier respectfully requests that the Commission order FirstEnergy to immediately provide Frontier the just and reasonable rates to which it is entitled.
  - B. Frontier Is Entitled To Rate Relief Because The Rates In The FirstEnergy Agreements Are Not Reasonable.
- 56. FirstEnergy has argued that Frontier is not entitled to renegotiate its rental rates because the *Pole Attachment Order* does not provide any rate relief to ILECs under agreements that existed when the *Order* was issued. FirstEnergy's argument flatly contradicts the *Pole Attachment Order*, which broadly extends rate reform to ILECs in this very situation.
- 57. FirstEnergy's argument relies on a discussion in the *Pole Attachment Order* that compares the FCC's approach to new and existing joint use agreements, stating that the Commission "is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable." But the Commission explicitly limited this statement to those existing agreements that were "entered into by parties with relatively equivalent bargaining power." Here, that is *not* the case. The relevant pole ownership percentages show that FirstEnergy has owned the vast majority of poles for many years, and that FirstEnergy was able

<sup>&</sup>lt;sup>170</sup> *Id.* at 5337 (¶ 218).

<sup>&</sup>lt;sup>171</sup> *Id.* at 5243 (¶ 6).

<sup>&</sup>lt;sup>172</sup> Id. at 5335 (¶ 216).

<sup>&</sup>lt;sup>173</sup> *Id*.

to use that leverage to extract higher rentals when the Agreements were amended.<sup>174</sup> Certainly, FirstEnergy's superior bargaining power is demonstrated by the very fact that FirstEnergy is extracting rates *far above* the rates under either the new telecom or pre-existing telecom methodologies for determining just and reasonable rates.<sup>175</sup>

The Commission's approach to new and existing joint use agreements was also 58. premised on the observation that ILECs "have the ability to terminate existing agreements and seek new arrangements." 176 Where instead the ILEC "genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement," the Commission clarified that it would consider that fact in a Complaint proceeding. 177 Here, that is the case – Frontier genuinely lacks the ability to terminate its existing agreements. Frontier could not terminate the West Penn Power and Mon Power agreements without risking significant harm to its ability to provide reliable service to its customers in Pennsylvania and West Virginia because termination would have required Frontier to remove all of its attachments, lines, and appurtenances from over 24,000 FirstEnergy poles by the effective dates of termination.<sup>178</sup> And Frontier had no practical ability to terminate the agreements with Met-Ed, Penelec, and Potomac Edison due to the risk termination posed to Frontier's carrier-of-last resort and universal service obligations and ability to satisfy operational requirements imposed by the West Virginia Public Service Commission to improve service quality and increase broadband availability. <sup>179</sup> The Order makes clear that the Commission's broad rate reform extends to this situation. It is not limited to new agreements

 $<sup>^{174}</sup>$  See infra  $\P$  17.

<sup>&</sup>lt;sup>175</sup> See infra  $\P$  20.

<sup>&</sup>lt;sup>176</sup> Pole Attachment Order at 5335 (¶ 216).

<sup>&</sup>lt;sup>177</sup> *Id*.

<sup>&</sup>lt;sup>178</sup> See Ex. A ¶ 9 (Knowles Aff.).

<sup>&</sup>lt;sup>179</sup> *Id*.

and ILECs are *not* to be denied the right to just and reasonable rates simply because they lacked the bargaining leverage needed to terminate an existing agreement and negotiate new just and reasonable rates.

- 59. Indeed, the Commission expressed its expectation that the existing, higher rates will be replaced with new, lower rates. Specifically, the Commission recognized that ILECs generally have access to poles under joint use agreements<sup>180</sup> and concluded that "where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable.'" Also, the Commission confirmed that ILECs must be afforded an opportunity to "obtain a new arrangement" that follows principles of "competitive neutrality." <sup>182</sup>
- 60. The rates that FirstEnergy demands from Frontier are not just and reasonable or competitively neutral. As noted above, this becomes immediately apparent when the rates that FirstEnergy demanded in its recent invoices are compared to the rates that result from the new telecom and pre-existing telecom formulas:

 $<sup>^{180}</sup>$  Pole Attachment Order at 5334 (§ 216).

<sup>&</sup>lt;sup>181</sup> Id. at 5328 (¶ 202).

<sup>&</sup>lt;sup>182</sup> *Id.* at 5336 (¶ 217).

Electric Company	Rental Year	Invoiced Rate <sup>183</sup>	New Telecom Rate <sup>184</sup>	Pre-Existing Telecom Rate <sup>185</sup>
Met-Ed	2012	\$34.38	\$8.57	\$17.51
Penelec	2013	\$27.61	\$5.35	\$12.17
West Penn Power	2013	\$20.00	\$4.34	\$9.86
Mon Power	2012	\$30.92	\$3.88	\$8.65
Potomac Edison-Citizens	2012	\$20.00	\$5.45	\$12.39
Potomac Edison-Frontier WV	2012	\$17.35	\$5.45	\$12.39

61. FirstEnergy obtained these rates through its exercise of superior bargaining power. As noted above, <sup>186</sup> based on the invoices from when agreements were entered or when rates were revised and FirstEnergy's recent invoices, (1) FirstEnergy owned the vast majority of joint use poles when the rates that Frontier seeks to renegotiate were set and (2) this pole ownership disparity still exists:

Electric Company	Rental Year	Poles Owned by Frontier	Poles Owned by FirstEnergy	Frontier's Ownership Percentage	FirstEnergy's Ownership Percentage
Met-Ed	2005	3,218	29,763	10%	90%
(rate revised 2005)	2012	3,237	29,805	10%	90%
Penelec	2005	9,515	28,050	25%	75%

<sup>&</sup>lt;sup>183</sup> See Attachments to Ex. 41 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

<sup>&</sup>lt;sup>184</sup> See Exs. A ¶ 17 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information. The Met-Ed 2012 and 2013 rates, West Penn Power 2012 rate, and Mon Power 2011, 2012, and 2013 rates are calculated using the "lower bound" new telecom rate methodology, which produces a higher rate than the new telecom rate methodology for those entities during those years. See 47 C.F.R. § 1.1409(e)(2).

<sup>&</sup>lt;sup>185</sup> See Exs. A ¶ 23 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information.

 $<sup>^{186}</sup>$  See supra  $\P$  17.

(rate revised 2005)	2013	9,625	28,532	25%	75%
West Penn Power	2006	281	3,363	8%	92%
(2006 Agreement)	2013	413	3,871	10%	92%
Mon Power	1997	3,633	13,930	21%	79%
(rate revised 1997)	2012	4,625	20,255	19%	81%
Potomac Edison- Citizens	1998	1,122	36,021	3%	97%
(rate revised 1998)	2012	2,500	57,388	4%	96%
Potomac Edison- Frontier WV	2000	3,526	34,274	9%	91%
(rate revised 1998)	2012	3,381	34,058	9%	91%

62. When the pole numbers from FirstEnergy's recent invoices are combined, FirstEnergy's significant market power over Frontier is evident: 187

	Poles Owned	% Owned
FirstEnergy	173,909	88%
Frontier	23,781	12%

63. The Commission should declare unlawful the unjust and unreasonable rates that have resulted from this pole ownership disparity, and order FirstEnergy to charge just and reasonable rates for Frontier's use of FirstEnergy's poles as of the July 12, 2011 effective date of the *Pole Attachment Order*.

<sup>&</sup>lt;sup>187</sup> See Attachments to Ex. 41 (Letter from C. Cormany, Senior Manager – Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services – Energy Delivery, FirstEnergy (May 7, 2013)).

- C. FirstEnergy Must Produce Its Existing Agreements To Ensure That Frontier's New Rates Turn On Principles Of Competitive Neutrality.
- 64. Under the *Pole Attachment Order*, an ILEC's rate must adhere to the principle of "competitive neutrality." Accordingly, if an ILEC uses a utility's poles "on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator," the ILEC receives the new telecom rate or the cable rate, and if an ILEC uses a utility's poles through an agreement that "includes provisions that materially advantage the incumbent LEC *vis-à-vis* a telecommunications carrier or cable operator," the ILEC may pay slightly more than the new telecom or cable rate—but not more than the "pre-existing, high-end telecom rate."
- 65. This means that if Frontier uses FirstEnergy's poles "on terms and conditions that are comparable to those that apply to a telecommunications carrier," Frontier must be charged the new telecom rate. <sup>191</sup> If Frontier instead has an arrangement that provides Frontier net material advantages as compared to other telecommunications carriers and cable operators, then Frontier may be charged slightly more, though not more than "the pre-existing, high-end telecom rate." <sup>192</sup>
- 66. To date and despite Frontier's repeated requests, FirstEnergy has not sent Frontier any existing agreement with a cable or telecommunications company. <sup>193</sup> Frontier, accordingly,

<sup>&</sup>lt;sup>188</sup> Id. at 5336-37 (¶¶ 217-18).

<sup>&</sup>lt;sup>189</sup> Id. at 5336 (¶ 217).

<sup>&</sup>lt;sup>190</sup> Id. at 5336-37 (¶ 218).

<sup>&</sup>lt;sup>191</sup> *Id.* at 5336 (¶ 217).

<sup>&</sup>lt;sup>192</sup> Id. at 5336-37 (¶ 218).

<sup>&</sup>lt;sup>193</sup> See Exs. 28 at 1 (Letter from J. Huffine, Section Manager – Network Engineering, Frontier, to R. DePree, Met-Ed (Sept. 13, 2011)) ("[P]lease also send representative, existing agreements with cable and telecommunications attaching entities"); 29 at 1 (Letter from J. Huffine, Section

cannot determine whether it is comparably situated to FirstEnergy's other attachers or whether it has a net material advantage.

67. In the *Pole Attachment Order*, the Commission stated that ILECs should provide, "in a complaint proceeding, any agreements between the defendant utility and a third party attacher with whom the incumbent LEC claims it is similarly situated (or that the other utility do so if necessary)."<sup>194</sup> Under Rule 1.1424, if a utility, like FirstEnergy, "declines or refuses to provide a complainant with access to agreements or other information upon reasonable request,

Manager - Network Engineering, Frontier, to R. DePree, Penelec (Sept. 13, 2011)) ("[P]lease also send representative, existing agreements with cable and telecommunications attaching entities"); 30 at 1 (Letter from J. Huffine, Section Manager - Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)) ("[P]lease also send representative, existing agreements with cable and telecommunications attaching entities"); 31 (Letter from J. Huffine, Section Manager - Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)) ("[P]lease also send representative, existing agreements with cable and telecommunications attaching entities"); 32 (Letter from J. Huffine, Section Manager - Network Engineering, Frontier, to D. Hawk, Advanced Distribution Specialist, Joint Use, FirstEnergy (Oct. 10, 2011)) ("[P]lease also send representative, existing agreements with cable and telecommunications attaching entities"); 34 (Letter from J. Huffine, Section Manager - Network Engineering, Frontier, to R. DePree, Met-Ed (Oct. 28, 2011)) ("In addition, we asked for Met-Ed's representative, existing agreements with cable and telecommunications attaching entities."); 35 (Letter from J. Huffine, Section Manager - Network Engineering, Frontier, to R. DePree, Penelec (Oct. 28, 2011)) ("In addition, we asked for Penelec's representative, existing agreements with cable and telecommunications attaching entities."); 36 at 3 (Letter from S. Knowles, Director - Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, FirstEnergy (May 9, 2012)) (requesting "FirstEnergy's representative, existing agreements with cable and telecommunications attaching entities."); 39 at 1 (Letter from J. Huffine, Section Manager - Network Engineering, Frontier, to K. Lind, Manager, Distribution Lines Maintenance, Allegheny Power (Feb. 14, 2013)) ("[P]lease also send representative, existing agreements with cable and telecommunications attaching entities"); 41 at 4 (Letter from C. Cormany, Senior Manager - Engineering, Frontier, to S. Schafer, Manager, Joint Use and Cable Locating, and E. Dickson, Director of Operations Services - Energy Delivery, FirstEnergy (May 7, 2013)) ("Frontier again requests that FirstEnergy send representative, existing agreements with cable and telecommunications attaching entities"); 45 at 4 (Letter from C. Cormany, Senior Manager - Engineering, Frontier, to E. Dickson, Director of Operations Services - Energy Delivery, FirstEnergy (Dec. 4, 2013)) ("Frontier requests that FirstEnergy provide the previously requested rate and agreement information").

<sup>&</sup>lt;sup>194</sup> Pole Attachment Order, 26 FCC Rcd at 5337-38 (¶ 217).

the complainant may seek to obtain such access through discovery." Here, where FirstEnergy has failed to provide Frontier with access to its existing agreements, Frontier respectfully requests that the Commission order FirstEnergy to file a copy of all of its existing pole attachment agreements with telecommunications carriers and cable operators.

# D. The *Pole Attachment Order* Entitles Frontier To Attach To FirstEnergy's Poles At The New Telecom Rate Or The Pre-Existing Telecom Rate.

68. Based on the above, a review of FirstEnergy's existing agreements will impact the rates that should apply to Frontier's use of FirstEnergy's poles. Frontier is, therefore, proposing rates that result from both the new telecom and pre-existing telecom formulas until it has an opportunity to review the agreements. Frontier reserves the right to amend these rates should FirstEnergy provide updated information.

#### 1. New Telecom Calculations

69. Should Frontier's terms be materially comparable to FirstEnergy's other attachers for the disputed periods following the July 12, 2011 effective date of the *Pole Attachment Order*, the Commission should limit FirstEnergy's rates so that they do not exceed, a rate properly calculated under the new telecom formula. As next detailed, the rates that result from the new telecom formula, using the best data available to Frontier, are: 196

	Met-Ed	Penelec	West Penn Power	Mon Power	Potomac Edison
2011	\$6.56	\$5.45	\$4.18	\$5.20	\$5.37
2012	\$8.57	\$5,29	\$4.82	\$3.88	\$5.45
2013	\$8.78	\$5.35	\$4.34	\$4.15	\$5.58

<sup>&</sup>lt;sup>195</sup> 47 C.F.R. § 1.1424.

Exs. A ¶ 17 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information. The Met-Ed 2012 and 2013 rates, West Penn Power 2012 rate, and Mon Power 2011, 2012, and 2013 rates are calculated using the "lower bound" new telecom rate methodology, which produces a higher rate than the new telecom rate methodology for those entities during those years. See 47 C.F.R. § 1.1409(e)(2).

- 70. For Met-Ed, the new telecom rates are \$6.56 for 2011, \$8.57 for 2012, and \$8.78 for 2013. The 2011 rate was calculated using the Commission's new telecom formula, FirstEnergy's 2010 FERC data, a rate of return of 7.53%, <sup>197</sup> and a depreciation rate for poles of 1.36%. The 2012 and 2013 rates were calculated using the Commission's "lower bound" new telecom formula because it results in a higher rate than the new telecom rate formula, <sup>198</sup> and FirstEnergy's 2011 and 2012 FERC data, respectively. The 2011, 2012, and 2013 rates were calculated using the FCC's rebuttable presumptions of 3 attaching entities and 24 feet of unusable space. <sup>199</sup>
- 71. For Penelec, the new telecom rates are \$5.45 for 2011, \$5.29 for 2012, and \$5.35 for 2013. Each rate was calculated using the Commission's new telecom formula, a rate of return of 7.92%, 200 and the FCC's rebuttable presumptions of 3 attaching entities and 24 feet of unusable space. 201 The 2011 rate was calculated using FirstEnergy's 2009 FERC data and a depreciation rate for poles of 1.72%. The 2012 rate was calculated using FirstEnergy's 2010 FERC data and a depreciation rate for poles of 1.69%. The 2013 rate was calculated using FirstEnergy's 2011 FERC data and a depreciation rate for poles of 1.52%.

<sup>&</sup>lt;sup>197</sup> See Ex. 53 at 137 (Opinion and Order, Docket Nos. R-00061366 et al. (Pa. Pub. Util. Comm'n Jan. 11, 2007)).

See 47 C.F.R. § 1.1409(e)(2) ("With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section."). The "lower bound" new telecom rate is higher than the new telecom rate when the new telecom rate is calculated using a rate of return of 7.53% and a depreciation rate for poles of 1.30%. Exs. A ¶ 18 (Knowles Aff.); 53 at 137 (Opinion and Order, Docket Nos. R-00061366 et al. (Pa. Pub. Util. Comm'n Jan. 11, 2007)).

<sup>&</sup>lt;sup>199</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

<sup>&</sup>lt;sup>200</sup> See Ex. 53 at 137 (Opinion and Order, Docket Nos. R-00061366 et al. (Pa. Pub. Util. Comm'n Jan. 11, 2007)).

<sup>&</sup>lt;sup>201</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

- 72. For West Penn Power, the new telecom rates are \$4.18 for 2011, \$4.82 for 2012, and \$4.34 for 2013. The 2011 rate was calculated using the Commission's new telecom formula, FirstEnergy's 2009 FERC data, a rate of return of 9.15%, 202 and a depreciation rate for poles of 2.41%. The 2012 rate was calculated using the Commission's "lower bound" new telecom formula because it results in a higher rate than the new telecom rate formula, 204 and FirstEnergy's 2010 FERC data. The 2013 rate was calculated using the Commission's new telecom formula, FirstEnergy's 2011 FERC data, a rate of return of 9.15%, 205 and a depreciation rate for poles of 2.41%. The 2011, 2012, and 2013 rates were calculated using the FCC's rebuttable presumptions of 3 attaching entities and 24 feet of unusable space. 206
- 73. For Mon Power, the new telecom rates are \$5.20 for 2011, \$3.88 for 2012, and \$4.15 for 2013. Each rate was calculated using the Commission's "lower bound" new telecom formula because it results in a higher rate than the new telecom rate formula, <sup>207</sup> and the FCC's

<sup>&</sup>lt;sup>202</sup> See Ex. 52 at \*195 (Opinion and Order, Docket Nos. R-00949286 et al., 1994 Pa. PUC LEXIS 144 (Pa. Pub. Util. Comm'n Dec. 29, 1994)).

<sup>&</sup>lt;sup>203</sup> The depreciation rate for poles was taken from FirstEnergy's 2011 FERC Form 1 because FirstEnergy's 2009 FERC Form 1 did not report a depreciation rate for poles.

See 47 C.F.R. § 1.1409(e)(2) ("With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section."). The "lower bound" new telecom rate is higher than the new telecom rate when the new telecom rate is calculated using a rate of return of 9.15% and a depreciation rate for poles of 2.41%. Exs. A ¶ 20 (Knowles Aff.); 52 at \*195 (Opinion and Order, Docket Nos. R-00949286 et al., 1994 Pa. PUC LEXIS 144 (Pa. Pub. Util. Comm'n Dec. 29, 1994)). (The depreciation rate for poles was taken from FirstEnergy's 2011 FERC Form 1 because FirstEnergy's 2010 FERC Form 1 did not report a depreciation rate for poles.)

<sup>&</sup>lt;sup>205</sup> See Ex. 52 at \*195 (Opinion and Order, Docket Nos. R-00949286 et al., 1994 Pa. PUC LEXIS 144 (Pa. Pub. Util. Comm'n Dec. 29, 1994)).

<sup>&</sup>lt;sup>206</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

See 47 C.F.R. § 1.1409(e)(2) ("With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i)

rebuttable presumptions of 3 attaching entities and 24 feet of unusable space.<sup>208</sup> The 2011, 2012, and 2013 rates were calculated using FirstEnergy's 2009, 2010, and 2011 FERC data, respectively.

74. For Potomac Edison, the new telecom rates are \$5.37 for 2011, \$5.45 for 2012, and \$5.58 for 2013. Each rate was calculated using the Commission's new telecom formula, a rate of return of 8.44%, <sup>209</sup> a depreciation rate for poles of 2.38%, <sup>210</sup> and the FCC's rebuttable presumptions of 3 attaching entities and 24 feet of unusable space. <sup>211</sup> The 2011, 2012, and 2013 rates were calculated using FirstEnergy's 2010, 2011, and 2012 FERC data, respectively.

## 2. Pre-Existing Telecom Calculations

75. Alternatively, if Frontier is materially advantaged *vis-à-vis* FirstEnergy's telecommunications-carrier and cable-operator attaching entities for the disputed periods following the July 12, 2011 effective date of the *Pole Attachment Order*, the Commission should limit FirstEnergy's rates so that they do not exceed a rate properly calculated under the pre-

or (e)(2)(ii) of this section."). The "lower bound" new telecom rate is higher than the new telecom rate when the new telecom rate is calculated using a rate of return of 8.44% and a depreciation rate for poles of 2.19%. Exs. A ¶ 21 (Knowles Aff.); 54 at 4, 48, 59, App. B (Commission Order, Case Nos. 06-0960-E-42T et al. (Pub. Serv. Comm'n of W. Va. May 22, 2007)). (The depreciation rate for poles in FirstEnergy's 2011 FERC Form 1 was used to calculate the rate for each rental year because FirstEnergy's 2009 FERC Form 1 and 2010 FERC Form 1 did not report a depreciation rate for poles.)

<sup>&</sup>lt;sup>208</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

<sup>&</sup>lt;sup>209</sup> See Ex, 54 at 4, 48, 59, App. B (Commission Order, Case Nos. 06-0960-E-42T et al. (Pub. Serv. Comm'n of W. Va. May 22, 2007)).

<sup>&</sup>lt;sup>210</sup> The depreciation rate for poles in FirstEnergy's 2011 FERC Form 1 was used to calculate the rate for each rental year because FirstEnergy's 2010 FERC Form 1 and 2012 FERC Form 1 did not report a depreciation rate for poles.

<sup>&</sup>lt;sup>211</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

existing telecom formula. As next detailed, the rates that result from the pre-existing telecom formula, using the best data available to Frontier, are:<sup>212</sup>

	Met-Ed	Penelec	West Penn Power	Mon Power	Potomac Edison
2011	\$14.90	\$12.39	\$9.51	\$9.54	\$12.20
2012	\$17.51	\$12.03	\$10.68	\$8.65	\$12.39
2013	\$17.80	\$12.17	\$9.86	\$8.79	\$12.69

76. For Met-Ed, the pre-existing telecom rates are \$14.90 for 2011, \$17.51 for 2012, and \$17.80 for 2013. The rates were calculated using FirstEnergy's 2010, 2011, and 2012 FERC data, respectively, a rate of return of 7.53%, <sup>213</sup> and the FCC's rebuttable presumptions of 3 attaching entities and 24 feet of unusable space. <sup>214</sup> The 2011 rate was calculated using a depreciation rate for poles of 1.36%. The 2012 and 2013 rates were calculated using a depreciation rate for poles of 1.30%.

77. For Penelec, the pre-existing telecom rates are \$12.39 for 2011, \$12.03 for 2012, and \$12.17 for 2013. The rates were calculated using FirstEnergy's 2009, 2010, and 2011 FERC data, respectively, a rate of return of 7.92%, <sup>215</sup> and the FCC's rebuttable presumptions of 3 attaching entities and 24 feet of unusable space. <sup>216</sup> The 2011 rate was calculated using a depreciation rate for poles of 1.72%. The 2012 rate was calculated using a depreciation rate for poles of 1.52%.

<sup>&</sup>lt;sup>212</sup> Exs. A ¶ 23 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information.

<sup>&</sup>lt;sup>213</sup> See Ex. 53 at 137 (Opinion and Order, Docket Nos. R-00061366 et al. (Pa. Pub. Util. Comm'n Jan. 11, 2007)).

<sup>&</sup>lt;sup>214</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

<sup>&</sup>lt;sup>215</sup> See Ex. 53 at 137 (Opinion and Order, Docket Nos. R-00061366 et al. (Pa. Pub. Util. Comm'n Jan. 11, 2007)).

<sup>&</sup>lt;sup>216</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

- 78. For West Penn Power, the pre-existing telecom rates are \$9.51 for 2011, \$10.68 for 2012, and \$9.86 for 2013. The rates were calculated FirstEnergy's 2009, 2010, and 2011 FERC data, respectively, a rate of return of 9.15%, <sup>217</sup> a depreciation rate for poles of 2.41%, <sup>218</sup> and the FCC's rebuttable presumptions of 3 attaching entities and 24 feet of unusable space. <sup>219</sup>
- 79. For Mon Power, the pre-existing telecom rates are \$9.54 for 2011, \$8.65 for 2012, and \$8.79 for 2013. Each rate was calculated using the FirstEnergy's 2009, 2010, and 2011 FERC data, respectively, a rate of return of 8.44%, <sup>220</sup> a depreciation rate for poles of 2.19%, <sup>221</sup> and the FCC's rebuttable presumptions of 3 attaching entities and 24 feet of unusable space. <sup>222</sup>
- 80. For Potomac Edison, the pre-existing telecom rates are \$12.20 for 2011, \$12.39 for 2012, and \$12.69 for 2013. Each rate was calculated using FirstEnergy's 2010, 2011, and 2012 FERC data, respectively, a rate of return of 8.44%, 223 a depreciation rate for poles of

<sup>&</sup>lt;sup>217</sup> See Ex. 52 at \*195 (Opinion and Order, Docket Nos. R-00949286 et al., 1994 Pa. PUC LEXIS 144 (Pa. Pub. Util. Comm'n Dec. 29, 1994)).

<sup>&</sup>lt;sup>218</sup> The depreciation rate for poles in FirstEnergy's 2011 FERC Form 1 was used to calculate the rate for each rental year because FirstEnergy's 2009 FERC Form 1 and 2010 FERC Form 1 did not report a depreciation rate for poles.

<sup>&</sup>lt;sup>219</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

<sup>&</sup>lt;sup>220</sup> See Ex. 54 at 4, 48, 59, App. B (Commission Order, Case Nos. 06-0960-E-42T et al. (Pub. Serv. Comm'n of W. Va. May 22, 2007)).

<sup>&</sup>lt;sup>221</sup> The depreciation rate for poles in FirstEnergy's 2011 FERC Form 1 was used to calculate the rate for each rental year because FirstEnergy's 2009 FERC Form 1 and 2010 FERC Form 1 did not report a depreciation rate for poles.

<sup>&</sup>lt;sup>222</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

<sup>&</sup>lt;sup>223</sup> See Ex. 54 at 4, 48, 59, App. B (Commission Order, Case Nos. 06-0960-E-42T et al. (Pub. Serv. Comm'n of W. Va. May 22, 2007)).

2.38%, <sup>224</sup> and the FCC's rebuttable presumptions of 3 attaching entities and 24 feet of unusable space. <sup>225</sup>

## V. COUNT I – UNJUST AND UNREASONABLE POLE ATTACHMENT RATES, TERMS, AND CONDITIONS

- 81. Frontier incorporates by reference as if fully set forth herein paragraphs 1 through 77 of this Complaint.
- 82. The Commission has the statutory duty and authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."
- 83. A just and reasonable rate for an ILEC under 42 U.S.C. § 224(b) depends on whether the ILEC is using "other utilities' poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator." Frontier, accordingly, has the right to review "any agreements between the defendant utility and a third party attacher" in order to determine whether it is similarly situated or would like to "opt in" to conditions that render it similarly situated.<sup>228</sup>
- 84. FirstEnergy's refusal to provide Frontier with its existing agreements has denied Frontier the ability to determine just and reasonable terms and conditions for attachment.

<sup>&</sup>lt;sup>224</sup> The depreciation rate for poles in FirstEnergy's 2011 FERC Form 1 was used to calculate the rate for each rental year because FirstEnergy's 2010 FERC Form 1 and 2012 FERC Form 1 did not report a depreciation rate for poles.

<sup>&</sup>lt;sup>225</sup> 47 C.F.R. §§ 1.1417(c), 1.1418.

<sup>&</sup>lt;sup>226</sup> 47 U.S.C. § 224(b)(1).

<sup>&</sup>lt;sup>227</sup> Pole Attachment Order at 5336 (¶ 217).

<sup>&</sup>lt;sup>228</sup> See id.

- 85. FirstEnergy's refusal to provide Frontier with its existing agreements has denied Frontier the ability to determine whether its terms and conditions are comparable to those of FirstEnergy's third-party attachers or materially advantage Frontier *vis-à-vis* FirstEnergy's third-party attachers.
- 86. If Frontier is comparably situated to FirstEnergy's other attachers, Frontier should be charged attachment rates of no more than the properly calculated new telecom rate. The rates that result from the new telecom formula, using the best data available to Frontier, are:<sup>229</sup>

	Met-Ed	Penelec	West Penn Power	Mon Power	Potomac Edison
2011	\$6.56	\$5.45	\$4.18	\$5.20	\$5.37
2012	\$8.57	\$5.29	\$4.82	\$3.88	\$5.45
2013	\$8.78	\$5.35	\$4.34	\$4.15	\$5.58

FirstEnergy's refusal to provide these rates has denied Frontier a just and reasonable rate in violation of 47 U.S.C. § 224.

87. Alternatively, if Frontier is materially advantaged *vis-à-vis* FirstEnergy's other attachers, Frontier should be charged attachment rates of no more than the properly calculated pre-existing telecom rate. The rates that result from the pre-existing telecom formula, using the best data available to Frontier, are:<sup>230</sup>

	Met-Ed	Penelec	West Penn Power	Mon Power	Potomac Edison
2011	\$14.90	\$12.39	\$9.51	\$9.54	\$12.20
2012	\$17.51	\$12.03	\$10.68	\$8.65	\$12.39

Exs. A ¶ 17 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information. The Met-Ed 2012 and 2013 rates, West Penn Power 2012 rate, and Mon Power 2011, 2012, and 2013 rates are calculated using the "lower bound" new telecom rate methodology, which produces a higher rate than the new telecom rate methodology for those entities during those years. See 47 C.F.R. § 1.1409(e)(2).

 $<sup>^{230}</sup>$  Exs. A ¶ 23 (Knowles Aff.), B ¶ 11 (Tardiff Aff.). Frontier reserves the right to revise these calculations should it receive more accurate input information.

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2013	\$17.80	\$12.17	\$9.86	\$8.79	\$12.69	ĺ

FirstEnergy's refusal to provide these rates has denied Frontier a just and reasonable rate in violation of 47 U.S.C. § 224.

## VI. RELIEF REQUESTED

- 88. Frontier respectfully requests that the Commission require FirstEnergy to file a copy of all of its existing pole attachment agreements with telecommunications carriers and cable operators;
- 89. Frontier further respectfully requests that the Commission declare unlawful FirstEnergy's demanded rates for Frontier's use of FirstEnergy's poles following the July 12, 2011 effective date of the *Pole Attachment Order*;
- 90. Frontier further respectfully requests that the Commission set just and reasonable rates, terms, and conditions of attachment for Frontier by ordering FirstEnergy to charge Frontier rates depending on whether it has or seeks terms and conditions materially comparable to FirstEnergy's other attaching entities. This means:
  - a. if Frontier is comparably situated to FirstEnergy's other attachers, FirstEnergy should be ordered to provide Frontier a just and reasonable rate properly calculated under the Commission's new telecom formula. These rates are:<sup>231</sup>

	Met-Ed	Penelec	West Penn Power	Mon Power	Potomac Edison
2011	\$6.56	\$5.45	\$4.18	\$5.20	\$5.37
2012	\$8.57	\$5.29	\$4.82	\$3.88	\$5.45
2013	\$8.78	\$5.35	\$4.34	\$4.15	\$5.58

Frontier reserves the right to revise these calculations should it receive more accurate input information. The Met-Ed 2012 and 2013 rates, West Penn Power 2012 rate, and Mon Power 2011, 2012, and 2013 rates are calculated using the "lower bound" new telecom rate methodology, which produces a higher rate than the new telecom rate methodology for those entities during those years. See 47 C.F.R. § 1.1409(e)(2).

b. alternatively, if Frontier is materially advantaged *vis-à-vis* FirstEnergy's other attachers, FirstEnergy should be ordered to provide Frontier a just and reasonable rate that is no higher than the rate properly calculated under the Commission's pre-existing telecom formula. These rates are:<sup>232</sup>

	Met-Ed	Penelec	West Penn Power	Mon Power	Potomac Edison
2011	\$14.90	\$12.39	\$9.51	\$9.54	\$12.20
2012	\$17.51	\$12.03	\$10.68	\$8.65	\$12.39
2013	\$17.80	\$12.17	\$9.86	\$8.79	\$12.69

- 91. Frontier further respectfully requests that the Commission order FirstEnergy to refund to Frontier any amounts paid in excess of the proper just and reasonable rate; and
- 92. Frontier further respectfully requests that the Commission grant Frontier such other relief as the Commission deems just, reasonable, and proper.

Respectfully submitted,

COMMONWEALTH TELEPHONE COMPANY LLC d/b/a FRONTIER COMMUNICATIONS COMMONWEALTH TELEPHONE COMPANY, FRONTIER COMMUNICATIONS OF BREEZEWOOD, LLC, CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA d/b/a FRONTIER COMMUNICATIONS COMPANY OF WEST VIRGINIA, and FRONTIER WEST VIRGINIA INC.

By:

Joseph J. Starsick, Jr.
Associate General Counsel
Frontier Communications
1500 MacCorkle Avenue, S.E.
Charleston, West Virginia 25314
(304) 344-7644

<sup>&</sup>lt;sup>232</sup> Frontier reserves the right to revise these calculations should it receive more accurate input information.

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David H. Solomon WILKINSON BARKER KNAUER, LLP 2300 N Street, NW, Suite 700 Washington, DC 10037 (202) 783-4141

Dated: June 11, 2014

#### CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2014, I caused a copy of the foregoing Complaint, exhibits and affidavits in support thereof, to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554
(original and three copies of confidential and public versions by hand delivery)

Kimberly D. Bose, Secretary Nathaniel J. Davis, Sr., Deputy Secretary Federal Energy Regulatory Commission 888 First Street, N.E. Washington, DC 20426 (public version by overnight mail)

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street
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