

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA  
BUSINESS COURT

MONONGAHELA POWER COMPANY,

Plaintiff,

v.

Civil Action No.: 14-C-7

Presiding Judge: Russell M. Clawges, Jr.

Resolution Judge: Thomas C. Evans, III

CITIZENS TELECOMMUNICATIONS  
COMPANY OF WEST VIRGINIA,  
doing business as Frontier Communications  
of West Virginia; and FRONTIER  
COMMUNICATIONS CORPORATION,

Defendants.

AND

CONSOLIDATED WITH:

THE POTOMAC EDISON COMPANY,

Plaintiff,

v.

Civil Action No.: 14-C-28

Berkeley County

CITIZENS TELECOMMUNICATIONS  
COMPANY OF WEST VIRGINIA,  
doing business as Frontier Communications  
of West Virginia; and FRONTIER  
COMMUNICATIONS CORPORATION,

Defendants.

AND

THE POTOMAC EDISON COMPANY,

Plaintiff,

v.

Civil Action No.: 14-C-29

Berkeley County

FRONTIER COMMUNICATIONS OF  
WEST VIRGINIA and FRONTIER  
COMMUNICATIONS CORPORATION,

Defendants.

### **ORDER GRANTING DEFENDANTS' MOTIONS TO STAY**

This matter came before the Court on the 15<sup>th</sup> day of October 2014, on Defendants, Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia's ("Citizens") and Frontier West Virginia, Inc.'s ("Frontier WV") Motions to Stay filed, June 16, 2014, pending a determination by the Federal Communications Commission ("FCC"). Plaintiffs filed a Response on September 9, 2014. Plaintiffs appeared by counsel, Steven M. Recht and Douglas J. Behr. Defendants appeared by counsel, Charles F. Printz, Jr., Joseph J. Starsick, Jr., Jessie F. Reckart.

The Court heard arguments of counsel and took the motion under advisement. The Court has studied the motion, response, and the memoranda of law submitted by the parties; considered the arguments of counsel; and reviewed pertinent legal authorities. As a result of these deliberations, the Court is ready to rule.

### **FACTS and PROCEDURAL HISTORY**

Plaintiffs, Monongahela Power Company ("Mon Power") and The Potomac Edison Company ("Potomac Edison") are electric utility operating companies engaged in the delivery of electricity to individual and business customers. Defendants are incumbent local exchange carriers ("ILEC") providing telephone and other communications services. Plaintiffs and Defendants share the use of each other's utility poles. In each of these three actions, Plaintiffs seek to collect unpaid amounts they allege Defendants owe for the use of Plaintiffs' utility poles. The three actions are summarized as follows:

Civil Action 14-C-7: Mon Power and Citizens are parties to a Joint Use Agreement that was first signed in 1987. Under this Agreement, which was updated December 14, 2009, Mon

Power agreed to pay \$39.83 per attachment to Citizens' telephone poles and Citizens agreed to pay \$30.92 per attachment to Mon Power's poles. Plaintiff invoiced Citizens \$442,644.67 for net 2012 pole attachments. Citizens made a payment of \$92,243.75. Citizens had apparently revised the pole rental amount to \$6.95 for Citizens' attachments to Mon Power's poles and \$13.02 for Mon Power's attachments to Citizens' poles. Plaintiff contends that it is owed an additional \$350,400.92 for 2012 pole rentals.

Civil Action 14-C-28: Potomac Edison and Citizens are parties to a Joint Use Agreement that became effective January 1, 1960. Under this Agreement, which was amended June 29, 1998, Potomac Edison agreed to pay \$25.00 per attachment to Citizens' telephone poles and Citizens agreed to pay \$20.00 per attachment to Potomac Edison's poles. Plaintiff invoiced Citizens a total of \$1,100,225.00 for the period October 2, 2011, through October 1, 2012. Citizens made a payment of \$342,666.12. Citizens had apparently revised the pole rental amount to \$6.24 for Citizens' attachments to Potomac Edison's poles and \$12.16 for Potomac Edison's attachments to Citizens' poles. Plaintiff contends that it is owed an additional \$757,558.88.

Civil Action 14-C-29: Potomac Edison and Frontier WV are parties to a Joint Use Agreement that was first effective January 1, 1960. Under this Agreement, which was adjusted effective January 1, 1997, Potomac Edison agreed to pay \$40.81 per attachment to Citizens' telephone poles and Citizens agreed to pay \$17.35 per attachment to Potomac Edison's poles. Plaintiff invoiced Citizens a total of \$454,552.69 for the period October 2, 2011, through October 1, 2012. Citizens made a payment of \$178,201.27. Citizens had apparently revised the pole rental amount to \$6.49 for Citizens' attachments to Potomac Edison's poles and \$13.15 for Potomac Edison's attachments to Citizens' poles. Plaintiff contends that it is owed an additional \$276,351.42.

Mon Power filed suit in Brooke County on January 16, 2014, claiming breach of contract for Defendant Citizens' failure to compensation Mon Power for use of utility poles. Potomac Edison filed two suits in Berkeley County on January 17, 2014, against Citizens and Frontier WV, also for breach of contract. On July 15, 2014, the above-styled cases were consolidated and transferred to Business Court. By Agreed Order entered November 25, 2014, the parties stipulated to the voluntary dismissal of Defendant, Frontier Communications Corporation.

On June 11, 2014, after having been sued in these cases, Defendants filed a Pole Attachment Complaint with the FCC against the Plaintiffs. In that Complaint the Defendants request that the FCC set just and reasonable rates, terms, and conditions for the attachment of their lines to Plaintiffs' utility poles, among other things.

Defendants filed this Motion arguing that the matter should be stayed until the FCC resolves the pending Pole Attachment Complaint proceeding. Defendants contend that the doctrine of primary jurisdiction applies and that these claims fall squarely within the FCC's special expertise and should not be decided by this Court.

Plaintiffs insist that these actions are straight forward contract disputes that can be fully resolved by this Court and that the doctrine of primary jurisdiction does not apply. Plaintiffs assert that the Defendants are not entitled to adjust the pole rental rates downward from the rates set forth in the Agreements. Plaintiffs further maintain that since the Defendants did not notify Plaintiffs that they were terminating the Joint Use Agreements, their Pole Attachment Complaint with the FCC should be dismissed.

## DISCUSSION

“Where an administrative agency and the courts have concurrent jurisdiction of an issue which requires the agency's special expertise and which extends beyond the conventional experience of judges, the doctrine of primary jurisdiction applies. In such a case, the court should refrain from exercising jurisdiction until after the agency has resolved the issue. The court's decision whether to apply the primary jurisdiction doctrine is reviewed on appeal under an abuse of discretion standard.” Syl. Pt. 1, State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson, 201 W.Va. 402 (1997).

“In determining whether to apply the primary jurisdiction doctrine, courts should consider factors such as whether the question at issue is within the conventional experience of judges; whether the question at issue lies peculiarly within the agency's discretion or requires the exercise of agency expertise; whether there exists a danger of inconsistent rulings; and whether a prior application to the agency has been made.” Syl. Pt. 2, Ranson.

In 1978 Congress passed the Pole Attachment Act, adding it as § 224 of the Communications Act of 1934. Section 224 deals with firms seeking to attach their wires, cable, or other network equipment to utility poles. The Telecommunications Act of 1996 adjusted and expanded the provisions of the 1978 Act. This Act expanded the definition of pole attachments to include attachments by providers of telecommunications service, and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility. On April 7, 2011, the FCC adopted an order revising its pole attachment rules to limit telecommunication pole rental rates in certain circumstances and establishing a formula for determining pole rental rates. See In the Matter of Implementation of Section 224 of the Act, 26 F.C.C.R. 5240, 2011 WL 1341351 (Apr. 7,

2011). The Order became effective July 12, 2011.

The Pole Attachment Act requires the Federal Communications Commission ("FCC") 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." 47 U.S.C. § 224(b)(1).

Defendants contend that the rental rate that Plaintiffs may collect from them cannot be determined in this Court. Rather, only the FCC can set that rate, as the FCC has primary jurisdiction over every claim in Plaintiffs' Complaints. Plaintiffs assert that these are not rate cases, that the FCC cannot resolve contract disputes, and that the FCC cannot enforce the existing Agreements.

In a case directly on point with the facts of these cases, a federal district court in North Carolina granted Defendant's Motion to Stay in a breach of contract action. In Duke Energy Carolinas, LLC v. Frontier Communications of the Carolinas, LLC, 2104 WL 3854146 (W.D.N.C. Aug. 6, 2014), Duke Energy and Frontier were parties to a Joint Use Agreement. Duke Energy is an electric utility provider and Frontier is an ILEC. In November 2012, Frontier notified Duke that it was adjusting its future payments pursuant to the formula set forth by the FCC. Duke then filed an action for breach of contract and unjust enrichment, arguing that Frontier was not entitled to adjust the pole rental rates downward from the rates set in the Agreement. Frontier then filed a Complaint with the FCC challenging the pole rental rates charged by Duke. That Court found the stay to be warranted.

This Court FINDS that this dispute regarding the appropriate pole rental rate is within the FCC's jurisdiction. The FCC is uniquely situated to consider the applicability of its own Pole Attachment Order to the post-July 12, 2011, rentals in this case. More importantly however, the

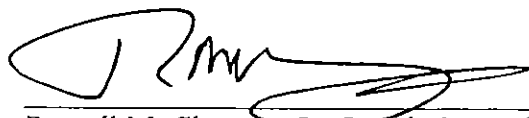
issue of whether the rates charged by the Plaintiffs, pursuant to the terms of the Joint Use Agreements are unreasonable is already before the FCC. It would be a waste of judicial resources for this Court to proceed with the case while the Defendants' Complaint is pending with the FCC.

**ORDER**

ACCORDINGLY, based on the foregoing, it is ORDERED that the Defendants' Motion to Stay, should be, and hereby is, GRANTED, pending a ruling by the FCC or a resolution of the issue by the parties.

The Court further directs the Clerk of the Circuit Court of Brooke County to distribute certified copies of this order to the parties and/or counsel of record; the Presiding Judge, Russell M. Clawges, Jr.; the Resolution Judge, Thomas C. Evans, III; and the Business Court Division Central Office, Berkeley County Judicial Center, 380 W. South Street, Martinsburg, West Virginia 25401.

Enter this 6<sup>th</sup> day of February 2015,



Russell M. Clawges, Jr., Resolution Judge  
Business Court Division

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest Glenda Brooks  
Clerk, Circuit Court

Brooke County, West Virginia

By: *Mary L. Nigal*, Deputy