FEDERAL COMMUNICATIONS COMMISSION
ENFORCEMENT BUREAU
MARKET DISPUTES RESOLUTION DIVISION
445 12TH, S.W.
WASHINGTON, DC 20554

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By Email and U.S. Mail

David H. Solomon
Wilkinson Barker Knauer, LLP
2300 N St., NW, Suite 700
Washington, DC 20006

Eric B. Langley
Robin F. Bromberg
Balch & Bingham LLP
1901 Sixth Ave. N., Suite 1500
Birmingham, AL 35203

Re: *Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas, LLC*, File No. EB-14-MD-001, Docket No. 14-214

Dear Counsel:

We grant Duke Energy's request that we stay this proceeding until the parties complete arbitration of this dispute.[1] We request that the parties keep us informed of the status of their arbitration.

Background

Predecessors to Frontier and Duke Energy entered into three agreements between 1983 and 1985 for the joint use of each other's utility poles (Agreements). Each Agreement contains an identical arbitration clause (Arbitration Clause):

> Should disputes arise between the parties concerning matters pertaining to this agreement, and such differences cannot be amicably settled by the parties hereto, the matters in dispute shall be submitted to arbitration....[2]

In December, 2012, Duke Energy invoiced Frontier for amounts allegedly due under the Agreements, applying the Agreements' rate formulae. Frontier paid only a portion of the invoices, asserting that the Agreements' rates were unjust and unreasonable in violation of section 224(b)(1) of the Act.

In October, 2013, Duke Energy filed an Arbitration Demand for recovery of the unpaid invoice amounts. In November, Frontier filed an action in United States District Court for the Eastern District of North Carolina (District Court) requesting a declaratory ruling that the Commission has primary jurisdiction over the dispute. In January 2014, Frontier filed its Complaint here, seeking a reduction in the Agreements' rates pursuant to section 224(b)(1) and the Commission's 2011 *Pole Attachment Order*.[3]

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[1] *See* Response to Pole Attachment Complaint, File No. EB-14-MD-001 (filed Feb. 25, 2014) (Response) at 5-11.

[2] Pole Attachment Complaint, File No. EB-14-MD-001 (filed Jan. 17, 2014) (Complaint), Exs. 1-3 (Agreements) at 30, Art. XIX (Arbitration Clause).

[3] *See Implementation of Section 224 of the Act; A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*Pole Attachment Order*) (subsequent history omitted).

In August, 2014, the District Court dismissed Frontier's federal complaint and compelled arbitration of the parties' dispute. The District Court rejected Frontier's assertion that, because the Commission has primary jurisdiction over the Agreements' rates, arbitration should not be compelled until the Commission resolved Frontier's Complaint. The District Court reasoned that "the broad arbitration provision in the Joint Use Agreements renders arbitrable the instant dispute ...," and "does not manifest an intent by the parties to exclude from arbitration issues relating to [the Commission's] primary jurisdiction."[4]

Shortly after the District Court's ruling, the parties commenced arbitration. A scheduling order has been entered, and the matter is set for hearing the week of June 15, 2015.[5]

Discussion

Because the parties have already commenced arbitration, a stay of this proceeding will preserve the time and resources of the Commission and the parties by preventing duplicative proceedings addressing the same issues. Moreover, Frontier's Complaint is governed by the Arbitration Clause, which applies to "disputes aris[ing] between the parties concerning matters pertaining to [the Agreements]."[6] The parties' dispute as to whether the Agreements' rates are unlawful is a dispute "pertaining to" the Agreements.[7]

The Federal Arbitration Act (FAA) states that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[8] The Supreme Court has stressed that, under this section of the FAA, arbitration provisions must be enforced "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command."[9] Further, "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration. For example, the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of those statutes may be subject to compulsory arbitration."[10]

Frontier does not deny that the Arbitration Clause applies to its Complaint. Nor does it argue that there is any justification at law or in equity for revoking the Arbitration Clause.[11] Frontier also does not

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[4] *Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas, LLC*, slip. op., 2014 WL 4055827 at *5 (E.D. N.C. 2014).

[5] *See* Email from Eric Langley to David Solomon and staff, File No. EB-14-MD-001 (sent Feb. 13, 2015) (attaching arbitration scheduling order).

[6] Complaint, Exs. 1-3, at 30.

[7] As the District Court explained, "A broad arbitration provision, as exists here, 'renders arbitrable all disputes having a significant relationship to the [underlying] agreement regardless of whether those claims implicated the terms of the ... agreement.'" *Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas, LLC*, slip op. at *5 (quoting *J.J. Ryan and Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)).

[8] 9 U.S.C. § 2.

[9] *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) (internal quotations and citations omitted). *See Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1652 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA .... '[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'") (internal quotations and citations omitted).

[10] *Gilmer*, 111 S.Ct. at 1653 (citations omitted).

[11] Frontier protests that it "was never given the opportunity to decide whether to forego Commission oversight." Reply of Frontier Communications of the Carolinas LLC, File No. EB-14-MD-001 (filed Mar. 18, 2014) (Reply) at 10 (referring to the fact that, in the *Pole Attachment Order*, the Commission concluded for the first time that it has authority under section 224 to regulate incumbent LEC pole attachment agreements such as the Agreements).

point to – and we are not aware of – any language in the Act constituting a Congressional "command" that the Commission ignore a valid arbitration clause in administering section 224. Indeed, the Commission has encouraged arbitration of section 224 disputes.[12]

Frontier argues that this action should not be stayed because Duke Energy's Arbitration Demand seeks payment of amounts due under the rate formulae in the Agreements, and "does not seek to resolve the ... question of what rate is just and reasonable under federal law ...."[13] Frontier reasons that the arbitration proceeding therefore will not resolve the entire dispute. However, Frontier may assert that the that the Agreements' rates violate section 224(b)(1) in the arbitration proceeding as a defense to Duke Energy's demand for payment of the outstanding invoice amounts. Indeed, it appears that Frontier has already done so.[14]

Frontier makes two additional arguments that probably do not constitute defenses to enforcement of a valid arbitration clause, but which we address in any event. First, Frontier argues that the Commission is better qualified than an arbitrator to determine whether the Agreements' rates are just and reasonable.[15] Yet Frontier provides no evidence that the arbitrators are not capable of applying the Act and Commission rules to the facts at hand, or of following the guidance provided by the *Pole Attachment Order*. Further, Frontier will be able to ensure that the arbitrators are well-qualified, because the Agreements provide Frontier a major role in choosing the arbitration panel.[16]

Finally, Frontier contends that "[t] he Commission did not intend to lock [incumbent local exchange carriers] like Frontier out of the effective oversight regime that it created with the [*Pole Attachment*] *Order* simply because they acquiesced in the inclusion of [an arbitration] provision in a joint use agreement ...."[17] This argument also fails. Frontier did not give up the rights afforded by the Act when it agreed to arbitrate. "'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum.'"[18]

Accordingly, we grant Duke Energy's request that we stay this proceeding pending completion of arbitration.

Frontier's argument is unsuccessful, because an arbitration clause may be invalidated under the FAA only by "generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration, or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1746 (2011). In any event, Frontier does not assert, let alone establish, that it would have rejected the Arbitration Clause had it known, when it executed the Agreements, that disputes arising thirty years later could be brought before the Commission.

[12] *See Pole Attachment Order*, 25 FCC Rcd at 5287, para. 105 ("[W]e believe it is desirable for parties to include dispute resolution procedures in their pole attachment agreements .... [I]t would be reasonable for parties to agree to ... an arbitrator ... to resolve disputes.").

[13] Reply at 8.

[14] *See* Email from David Solomon to Eric Langley, Robin Bromberg and staff, File No. EB-14-MD-001 (sent Feb. 17, 2015).

[15] Reply at 8.

[16] The Agreements provide that Frontier and Duke Energy each chooses one arbitrator, and that the third arbitrator is chosen jointly. Complaint Exs. 1-3 (Agreements) at 30, Art. XIX (Arbitration Clause).

[17] Reply at 10-11.

[18] *Gilmer*, 111 S.Ct. at 1652 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346, 3354 (1985)). Frontier cites *Hawaii Nurses' Ass'n v. Kapiolani Health Care Sys.*, 890 F. Supp. 925 (D. Haw. 1995). Reply at 10. In that case, a district court declined to compel arbitration where a federal agency had already held a hearing on the dispute and taken the matter under consideration; the court reasoned that compelling arbitration would result in duplicative proceedings. Here, however, the District Court has already compelled arbitration, and arbitration has commenced.

This letter-ruling is issued pursuant to sections 4(i), 4(j) and 224 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 224, section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, sections 1.1404-1.1424 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1424, and the authority delegated by sections 0.111, and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311.

Sincerely,

Christopher Killion /LBR

Christopher Killion

cc: Rosemary McEnery
Lia Royle