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

NO. 5:13-CV-617-FL

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

This matter comes before the court upon defendant's motion to stay (DE 19), plaintiff's motion for partial judgment on the pleadings (DE 17), and plaintiff's motion for hearing (DE 34). These motions have been fully briefed and are ripe for adjudication. For the reasons that follow, the court grants defendant's motion to stay, denies without prejudice plaintiff's motion for partial judgment on the pleadings, and denies plaintiff's motion for hearing.

BACKGROUND

On August 7, 2013, plaintiff filed a complaint against defendant in state court, which defendant removed to this court on August 26, 2013. Plaintiff is an electric utility that owns utility poles for purposes of distributing electricity to its customers. Defendant is an incumbent local exchange carrier ("ILEC") that owns utility poles for purposes of distributing telephone and other services to its customers.

Plaintiff seeks to recover over $2.97 million that defendant allegedly owes pursuant to two agreements, executed in 1978 and 1981, by the parties' predecessors ("Joint Use Agreements"),

which authorize each party to attach its cables that are used in the transmission of the party's retail services, to poles owned by the other party.[1] Under the terms of the Joint Use Agreements, the parties agreed to pay annual rent to each other, calculated pursuant to a rate methodology contained in the Joint Use Agreements, as consideration for the right to use the other party's poles.

According to the complaint, in 1995 and 1996, the parties unsuccessfully attempted to negotiate a new joint use agreement with a new rate methodology. From 1996 through 2009, plaintiff invoiced defendant by using the Handy-Whitman Index, a widely-used cost index in the utility industry, not the rate methodology in the Joint Use Agreements. From 2010 through 2012, however, plaintiff returned to invoicing defendant using the rate methodology in the Joint Use Agreements.

Plaintiff seeks to recover from defendant for underpayments made on annual rental invoices for the years 2010, 2011, and 2012. In particular, plaintiff seeks to recover on (1) 2010 annual rentals, based upon invoices sent in December 2010 and February 2011; (2) 2011 annual rentals, based upon invoices sent in December 2011; (3) 2011 inventory, based upon invoices sent December 2012 and January 2013; and (4) 2012 annual rentals, based upon invoices sent in December 2012. According to the complaint, on July 8, 2011, defendant provided plaintiff one year's written notice of defendant's intent to terminate the Joint Use Agreements, effective July 8, 2012.

Plaintiff asserts four claims premised upon breach of the Joint Use Agreements. In particular, plaintiff seeks a (1) declaration that the Joint Use Agreements continue to control the methodology by which the annual pole rental payments due to each party is calculated; (2) breach

[1]A copy of the Joint Use Agreement between Western Carolina Telephone Company and Carolina Power & Light Company, dated April 28, 1978, is attached to the complaint as "Exhibit 1"; and a copy of the Joint Use Agreement between General Telephone Company of the Southeast and Carolina Power & Light Company, dated January 1, 1981, is attached thereto as "Exhibit 2."

of contract recovery of over $2.97 million, excluding interest, for failure to pay full amount due for rental for 2010-2012 rental invoices and the 2011 inventory invoices; (3) in the alternative, breach of contract recovery of $816,255.48, excluding interest, using the Handy-Whitman index to measure damages should the court determine the parties mutually agreed to adopt the Handy-Whitman index for 2011-2012 annual rental invoices and 2011 inventory invoices; and (4) in the alternative, recovery in an unspecified amount based upon unjust enrichment should the court determine that no express rental rate existed for 2010 through 2012.

Defendant filed its answer to the complaint on October 9, 2013. Following submission of a joint report and plan pursuant to Federal Rule of Civil Procedure 26(f), the court entered an order on November 25, 2013, noting that plaintiff sought to move forward in discovery while defendant sought a stay of discovery, pending resolution of an anticipated motion to stay on the basis that the Federal Communications Commission ("FCC") has primary jurisdiction over certain aspects of the dispute. The court directed defendant to file a motion to stay on or before December 9, 2013, and stayed discovery pending resolution of the motion.

On December 9, 2013, defendant filed its motion to stay, in which it argues that plaintiff's claims for rentals dated after July 12, 2011, fall within the FCC's primary jurisdiction, based upon an FCC order regarding pole attachments, effective July 12, 2011. See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 26 FCC Rcd. 5240, 5328–33, 2011 WL 1341351 (2011) ("Pole Attachment Order"); id., 76 Fed. Reg. 40817 (2011) (establishing effective date). Defendant attaches to the motion a complaint it filed that same date with the FCC's enforcement bureau (the "FCC complaint"), seeking to have FCC set rates that plaintiff may charge

for all periods in dispute after July 12, 2011. Defendant seeks a stay pending FCC's resolution of its FCC complaint.

Also on December 9, 2013, plaintiff filed a motion for partial judgment on the pleadings, pursuant to Federal Rules of Civil Procedure 12(c) and (h)(2)(B), seeking to strike the following three defenses contained in defendant's answer:

> [FIRST FURTHER DEFENSE:] Under 47 U.S.C. § 224, [defendant] is entitled to just and reasonable rates, terms, and conditions for its attachments on [plaintiff's] poles.[2]
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> [SECOND FURTHER DEFENSE:] The FCC has primary jurisdiction over this matter. The subject matter of this case involves the rates, terms and conditions of agreements for [defendant's] use of [plaintiff's] utility poles, over which the FCC has primary jurisdiction. This Court, accordingly, should defer to the FCC's primary jurisdiction.
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> [THIRD FURTHER DEFENSE:] Given that the subject matter of this case involves the rates, terms and conditions of joint use agreements, a matter which is related to the primary jurisdiction of the FCC, [plaintiff] has failed to state a claim upon which relief can be granted.

DISCUSSION

A. Motion to Stay

The primary jurisdiction doctrine is "specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." Reiter v. Cooper, 507 U.S. 258, 268 (1993) "It requires the court to enable a referral to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling."

[2] 47 U.S.C. § 224, commonly referred to as the Pole Attachments Act ("PAA"), 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," subject to certain provisions regarding state regulatory authority not applicable here. See 42 U.S.C. § 224(b)(1).

Id. (internal quotations omitted). "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956). "Generally speaking, the doctrine is designed to coordinate administrative and judicial decision-making by taking advantage of agency expertise and referring issues of fact not within the conventional experience of judges or cases which require the exercise of administrative discretion." Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 789 (4th Cir. 1996). "Despite what the term primary jurisdiction may imply, it does not speak to the jurisdictional power of the federal courts. It simply structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts." Id. at 789 n.24 (quotation omitted).

"The grant or denial of a request to stay proceedings calls for an exercise of the district court's judgment 'to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket.'" Maryland v. Universal Elections, Inc., 729 F.3d 370, 375 (4th Cir. 2013) (quoting United States v. Ga. Pac. Corp., 562 F.2d 294, 296 (4th Cir.1977)). Although the Fourth Circuit has not articulated specific factors, courts within this circuit have identified four factors that may be considered, albeit not exclusively, in deciding whether to grant a stay due to the doctrine of primary jurisdiction:

> (1) whether the question at issue is within the conventional experience of judges or is within the agency's particular filed of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.

Longo v. Trojan Horse Ltd., 992 F. Supp. 2d 612, 617 (E.D.N.C. 2014) (citing Nat'l Comm. Ass'n,

Inc. v. American Tel. & Tel. Co., 46 F.3d 220, 222 (2d Cir.1995)); see Sprint Commc'ns Co., L.P. v. Ntelos Tel. Inc., 5:11CV00082, 2012 WL 3255592 * 11 (W.D. Va. Aug. 7, 2012) (same); Cent. Tel. Co. of Virginia v. Sprint Commc'ns Co. of Virginia, 759 F. Supp. 2d 772, 786 (E.D. Va. 2011) (same).

Consideration of these factors, as well as other circumstances presented, weigh in favor of granting the motion to stay in this case. As to the first two factors, the parties do not agree on the "question at issue" in this case. Plaintiff contends the question at issue is the extent of contractual rights of the parties, which is undeniably a question suited for judicial determination. Defendant contends that the question at issue is whether the FCC Pole Attachment Order must dictate the rents plaintiff may recover for post-July 12, 2011 rentals. There is some truth to the positions on both sides. As to the parties' contractual rights regarding pre-July 12, 2011, rentals, the FCC Pole Attachment Order is not applicable, and the court must determine the rights of the parties based upon the Joint Use Agreements and other applicable agreements between the parties, to the extent an express rental rate existed for this time period.

As to post-July 12, 2011, rentals, by contrast, the FCC has established a framework for addressing rental rates as between ILECs, such as defendant, and utilities, such as plaintiff. See Pole Attachment Order, 26 FCC Rcd at 5242 ("[T]he Commission's experience during the past 15 years has revealed the need to establish a more detailed framework to govern the rates, terms and conditions for pole attachments."); id. at 5245 ("[W]e allow [ILECs] to file pole attachment complaints if they believe a particular rate, term or condition is unjust or unreasonable, and provide guidance regarding the Commission's approach to evaluating those complaints and what the appropriate rate may be.").

Application of this framework is authorized by the broad mandate of the Pole Attachments Act, 47 U.S.C. § 224(b)(1), which directs the FCC to "adopt procedures necessary and appropriate to hear and resolve complaints concerning" pole attachment rates, terms and conditions. See American Elec. Power Svc. Corp. v. FCC, 708 F.3d 183, 188-190 (D.C. Cir. 2013) (holding that the Pole Attachment Order is a reasonable interpretation of the statute). Through its complaint filed with the FCC, defendant has asked the FCC in the first instance to determine under its regulatory framework the rates, terms, and conditions for pole attachments for the post-July 12, 2011 time period. 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.

While defendant argues that the FCC Pole Attachment Order does not apply to existing contractual arrangements, such as the Joint Use Agreements here, this argument is not determinative of primary jurisdiction. Because the applicability of the FCC Pole Attachment Order is itself a question in dispute, the FCC is in the best position to interpret its own order and regulations to answer this question, in light of its statutorily-mandated duty to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).[3] Furthermore, where defendant terminated the Joint Use Agreements effective July 8, 2012, the contractual basis for plaintiff's claims for rents after that date is even more attenuated.

[3] The Pole Attachment Order does not draw a bright-line rule against consideration of rates, terms, and conditions in existing joint use agreements. Rather the FCC "declined . . . to adopt comprehensive rules governing" the pole attachments of ILECs, opting instead "to proceed on a case-by-case basis" in complaint proceedings brought before the FCC. Pole Attachment Order, 26 FCC Rcd. at 5334. The FCC recognized the existence of agreements between ILECs and utility companies, such as defendant, for joint use of utility poles. Id. In addition, the FCC acknowledged the concern some ILECs expressed about these existing joint use agreements. Id. at 5334-35. Without resolving the issue for purposes of all cases, the FCC stated instead that it "is *unlikely* to find the rates, terms, and conditions in existing joint use agreements unjust or unreasonable." Id. at 5335 (emphasis added).

The third factor, whether there is a substantial danger of inconsistent rulings, also depends on the time period under consideration. As to rents for 2010, there does not appear to be a substantial danger of inconsistent rulings. As to rents for 2011 and 2012, however, there is a risk that a judgment in favor of plaintiff based upon contractual provisions alone could conflict with an order of the FCC regarding post-July 12, 2011, rents. This risk is augmented if the court awards relief to plaintiff pursuant to its fourth claim for relief, unjust enrichment, based on calculation of rates in accordance with what "a reasonable person would expect to pay for the benefit of" pole attachments, (Compl. ¶ 90), and such calculation conflicts with a specialized assessment of the same issue by the FCC. Furthermore, there is a substantial danger of inconsistent rulings concerning plaintiff's claim for declaratory judgment, where plaintiff seeks a declaration regarding applicability of the of rental rates in the Joint Use Agreements "in calendar year 2010 *and thereafter*," without date limitation. (Compl. p. 23).

The fourth factor, whether a prior application to the agency has been made, also weighs in favor of a stay under circumstances of this case. "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) (quotations omitted). Where plaintiff initiated its FCC complaint seeking a limitation of rental rates for periods following the July 12, 2011, effective date of the FCC Pole Attachment Order, (DE 19-1 at ¶¶ 74-75), that issue is already before the agency, and no separate referral to the FCC is required.

Furthermore, as an additional consideration in favor of a stay, a similar contractual dispute regarding applicability of a joint use agreement between defendant and a Duke Energy affiliate for 2012 and 2013 rents on pole attachments in counties in western North Carolina, also has been stayed

pending resolution of an administrative complaint by defendant. The United States District Court for the Western District of North Carolina held that "[i]t would be a waste of judicial resources for this Court to proceed with this case while Defendant's complaint is pending with the FCC," and that a stay "will ultimately allow this Court to resolve this dispute without the cloud of the FCC complaint hanging over this case." Duke Energy Carolinas, LLC v. Frontier Comm's of the Carolinas, LLC, No. 2:13-CV-40, 2014 WL 3854146 *5 (W.D.N.C. August 6, 2014).

Plaintiff argues that the court should not stay this matter because defendant lacks a private right of action under the Pole Attachments Act. This argument, which also is asserted as a basis for judgment on the pleadings as to the First, Second, and Third Further Defenses, is misplaced for several reasons. As an initial matter, case law does not support uniformly barring assertion of a defense based upon a statute where the statute does not provide a private right of action. Rather, barring a defense on this basis depends on the nature of the defense asserted and the context of the claims asserted. Compare, e.g., Wachovia Bank, N.A. v. Lone Pine, Inc., No. 1:09-CV-02983-JOF, 2010 WL 2553880, at *2 (N.D. Ga. June 15, 2010) (granting motion for judgment on the pleadings as to borrower's affirmative defense asserted on the basis that plaintiff bank accepted funds under the Troubled Assets Relief Capital Purchase Program ("TARP") established under the Emergency Stabilization Act of 2008, 12 U.S.C. §§ 5201, et seq.); with Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 82 (1982) (stating that "any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action," in context of anti-trust law) (quotations omitted); Costello v. Grundon, 651 F.3d 614, 624 (7th Cir. 2011) ("No private right of action under a statute is necessary to assert a violation of that statute as an affirmative defense.").

In this case, although the Pole Attachments Act does not provide a private right of action, it does, as noted above, mandate the FCC to "adopt procedures necessary and appropriate to hear and resolve complaints concerning . . . rates, terms and conditions." 47 U.S.C. § 224(b)(1). Thus, although defendant may not be able to bring suit or a counterclaim on the basis of the Pole Attachments Act in this court, it may file an administrative complaint with the FCC, as it has done here. The lack of a private right of action, therefore, does not in itself serve to undermine defendant's asserted defense on the basis of primary jurisdiction. Nor does it serve to restrict the court's discretion to stay this matter pending outcome of the proceedings on the FCC complaint.

Plaintiff also argues that a stay is not warranted because antecedent legal issues may be decided by the court that could aid the FCC in its review of the justness and reasonableness of the post-July 2011 rates. For example, in order to assess the reasonable ness of the rates, plaintiff argues, the FCC must know what rate it is evaluating and the circumstances under which that rate was negotiated, which determinations raise contract interpretation issues exclusively under the jurisdiction of the court. The Pole Attachments Act, however, does not prohibit the FCC from making its own findings regarding the nature of the parties' prior rate arrangements, to the extent those findings may be relevant to its determination of the justness and reasonableness of post-July 2011 rates. Indeed, the Pole Attachment Order suggests that the FCC may find it necessary to inquire into the nature of the prior "negotiating position" of the parties in order to evaluate terms of existing joint use agreements, leaving open the possibility that the FCC may find rates in existing joint use agreements unjust or unreasonable. 26 FCC Rec. 5335. In any event, to the extent the FCC determines it cannot proceed under its own framework without a prior judicial determination of the contractual rights of the parties, the FCC may resolve defendant's FCC complaint accordingly.

Finally, plaintiff suggests that there is no reason to stay claims based upon pre-July 2011 rents, where the FCC has no jurisdiction over rates prior to that date. The court could, for example, allow plaintiff to continue adjudication its claims against defendant based upon underpayment of rents for the 2010 calendar year. It is possible, however, that plaintiff's claims for 2010 rents could turn on plaintiff's alternative theory of unjust enrichment, in the event that no express rental rate existed for 2010. In such instance, plaintiff asks the court to determine what "a reasonable person would expect to pay for the benefit of [pole attachment] services," including an inquiry into the "full value thereof." (Compl. ¶ 90). At this juncture, it is not clear whether any FCC determination regarding reasonable rental rates for the post-July 2011 time period could inform upon the court's analysis of what "a reasonable person" would expect to pay for the pre-July 2011 time period, in the absence of an express rental rate in the Joint Use Agreements.

Conversely, if the FCC declines to make any determination as to whether the rents charged for the post-July 2011 time period are reasonable, this could also impact the court's analysis of rental rates for the pre-July 2011 time period, under an unjust enrichment theory. Accordingly, the court finds it to be a more efficient use of the court's and the parties' resources to address claims related to the pre-July 2011 time period after the FCC has addressed defendant's FCC complaint pertaining to the post-July 2011 time period.

B. Motion for Judgment on the Pleadings

In light of the court's determination that a stay is warranted on the basis of FCC primary jurisdiction regarding rental rates for the post-July 2011 time period, on the basis of 47 U.S.C. § 224 and the Pole Attachment Order, which primary jurisdiction forms the basis of defendant's First, Second, and Third Further Defenses, the court will deny without prejudice plaintiff's motion for

judgment on the pleadings as to these defenses. In doing so, however, the court notes two considerations that may impact future consideration of these defenses. First, as set forth above, the stay based upon FCC primary jurisdiction is based primarily upon the potential impact that an FCC determination as to post-July 2011 rates could have on plaintiff's claims related to such time period. In this manner, the First, Second, and Third Further Defenses may be more properly viewed as partial defenses only to plaintiff's claims. Second, the stay based upon FCC primary jurisdiction does not resolve these defenses in favor of defendant, but rather defers final consideration of the defenses until the FCC has made a determination on the basis of defendant's FCC complaint. It is for this reason that the court will deny the motion for judgment on the pleadings without prejudice.

C. Motion for Hearing

The court denies plaintiff's motion for hearing because the facts and legal contentions are adequately presented in the materials before the court and oral argument would not aid the decisional process.

CONCLUSION

Based on the foregoing, defendant's motion to stay (DE 19) is GRANTED, plaintiff's motion for partial judgment on the pleadings (DE 17) is DENIED WITHOUT PREJUDICE, and plaintiff's motion for hearing (DE 34) is DENIED. This matter is STAYED pending further order of the court. Either party may move to lift the stay either upon a final determination by the FCC on defendant's FCC complaint, or upon other developments that result in dismissal or termination of the proceedings resulting from initiation of the FCC complaint. In any event, the parties shall file a status report with the court, no later than **ninety (90)** days from the date of this order, and

periodically every **ninety (90)** days thereafter until resolution of the FCC complaint, specifying whether the FCC complaint remains pending for decision before the FCC.

SO ORDERED, this the 23rd day of September, 2014.

LOUISE W. FLANAGAN
United States District Court Judge