

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of Lumos Networks, LLC)	File No. EB-15-_____
and Lumos Networks of West Virginia Inc.)	
for a Stay to Prevent the Removal of)	
Telecommunications Facilities)	

PETITION FOR STAY

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April 14, 2015

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SUMMARY

Lumos files this petition for stay to require Frontier to stop removing Lumos' fiber cables from Frontier's poles, and allow Lumos to complete its network deployment in Nicholas County, West Virginia. Lumos is a CLEC providing next-generation fiber networking services to customers in West Virginia. Lumos and Frontier are parties to a Pole Attachment Agreement that allows Lumos to attach its cables to Frontier's poles.

The Nicholas County School system awarded Lumos a contract to provide fiber based services. Lumos submitted pole attachment applications to various utilities, including Frontier, who returned pole surveys and provided make-ready estimates that Lumos paid. Although Lumos paid over \$100,000 to Frontier for make-ready, Frontier never performed the work. Lumos then hired a third-party contractor and notified Frontier that it would perform make-ready and install cable. Hearing nothing from Frontier, Lumos did the work.

Several days later, Frontier cut down Lumos cable on 49 poles. Lumos has tried to resolve this dispute with Frontier but has received no substantive response. Lumos filed a petition for interim relief with the West Virginia Public Service Commission that was granted on April 13, 2015. Despite the West Virginia Commission's action, Frontier continues to deny access to its poles. On the morning of April 14, 2015, Trenton Brown, a Frontier engineer, told Lumos' contractor that if Lumos attempts to resume attaching cable to Frontier poles, Frontier would call the police to have them arrested.

Under the Commission's rules, Lumos is entitled to attach to Frontier's poles. Because Frontier failed to respond to Lumos' submission of payment for make-ready in a reasonable time, the Commission's rules permit Lumos to hire its own contractor to perform the make-ready. Once the make-ready is complete, Lumos was permitted to install its fiber on Frontier's poles.

There is no lawful justification for Frontier's unilateral removal of Lumos' cable. The parties' Agreement does not allow removal of Lumos' cable without providing Lumos notice and allowing Lumos to cure any deficiency, if there is one. Lumos respectfully asks the Commission to order Frontier to cease removing Lumos fiber cables and to allow Lumos to continue its fiber build, including replacing the fiber Frontier removed.

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PETITION FOR STAY

Lumos Networks, LLC and Lumos Networks of West Virginia Inc. (collectively, “Lumos”), pursuant to 47 C.F.R. § 1.1403(d), respectfully submit this Petition for Stay to prevent Frontier West Virginia, Inc. (“Frontier”) from continuing unlawfully to remove Lumos’ cables from Frontier’s poles in Nicholas County, West Virginia, and to compel Frontier to allow Lumos to re-attach cables and complete its network deployment.

I. Background

A. Parties

Lumos Networks, LLC (f/k/a FiberNet, LLC) and Lumos Networks of West Virginia Inc. are facilities-based competitive local exchange carriers (“CLECs”), having been granted a certificate of public convenience and necessity by the West Virginia Public Service Commission (“WV P.S.C.”). Lumos provides a range of high speed data, broadband, voice and IP services over an expanding fiber optic network.

Frontier West Virginia, Inc. (“Frontier”) is an incumbent local exchange carrier (“ILEC”) operating in West Virginia. Among other services, Frontier provides access to poles it owns or controls to competing telecommunications carriers such as Lumos and cable television compa-

nies, pursuant to both state and federal law. Frontier is a utility as defined in section 224(a)(1).¹ Frontier is not a railroad, is not a co-operative, and is not owned by the Federal Government or a State or local government.

Lumos and Frontier executed a Pole Attachment Agreement (“Agreement”) on December 6, 2011. The Agreement requires Frontier to provide Lumos written notice at least 60 days before rearranging or replacing Lumos’ attachments.² Nothing in the Agreement authorizes Frontier to unilaterally remove Lumos attachments without notice to Lumos, absent an immediate physical threat to Frontier’s poles and attachments or the attachments of third parties.³ The Agreement does not even allow Frontier to unilaterally remove unauthorized Lumos attachments, instead requiring Frontier to provide Lumos at least 15 days written notice and providing Lumos the right to submit applications to cure the lack of authorization.⁴

B. Lumos’ Nicholas County Fiber Deployment

Frontier is the incumbent provider to Nicholas County West Virginia’s school system. Recently as part of an RFP process, Nicholas County awarded Lumos a contract to provide high capacity telecommunications services to the schools, replacing the Frontier services.⁵

After designing the facilities required to serve the schools, Lumos submitted pole attachment applications to Frontier, American Electric Power (“AEP”) and First Energy — the utilities that own and control poles on the routes where Lumos will deploy fiber to serve the Nicholas

¹ 47 U.S.C. § 224(a)(1).

² Exhibit 1, Pole Attachment Agreement § 9.9 (“Agreement”).

³ Exhibit 1, Agreement § 5.3. Even when section 5.3 applies, Frontier is required to advise Lumos of the actions taken “as soon as practical thereafter,” which it has not done in this case.

⁴ Exhibit 1, Agreement § 12.1.

⁵ Declaration of Jack L. Wade, Director OSP-West, Lumos Networks, LLC and Lumos Networks of West Virginia, Inc. at ¶ 6. (“Wade Decl.”).

County Schools. Lumos submitted its pole attachment applications to Frontier in May and June, 2014.⁶

On July 24 and July 31, 2014, Frontier provided Lumos completed engineering surveys and an estimate for make-ready work necessary to accommodate Lumos' pole attachments.⁷ Lumos subsequently paid Frontier a total of \$103,647 as advance payment for the make-ready work on all the pole applications for the Nicholas County Schools project.⁸

After Lumos paid Frontier for make-ready, Frontier did not perform the work. The other utilities, AEP and First Energy, completed their make-ready work.⁹

On March 19, 2015, Lumos notified Frontier that it would exercise its right under sections 1.1420 and 1.1422 of the Commission's rules and complete the make-ready itself.¹⁰ Lumos has, at least thirteen times in the last several years, exercised this remedy for Frontier poles when faced with Frontier delays in completing make-ready work.¹¹ On such occasions, Lumos has been unable to hire third-party contractors specifically authorized by Frontier to perform the make-ready because the contractors Frontier has identified refuse to work for competitive fiber providers like Lumos out of fear of jeopardizing their relationship with Frontier.¹² Lumos therefore hired Thayer Power and Communications Construction Company ("Thayer"), a com-

⁶ Wade Decl. ¶ 7; Exhibit 2, Pole Attachment Applications and Licenses.

⁷ Wade Decl. ¶ 8; Exhibit 2.

⁸ Wade Decl. ¶ 8. Copies of Lumos' payment to Frontier for make-ready on the 49 poles where Frontier removed Lumos' cables are contained in Exhibit 2.

⁹ Wade Decl. ¶ 9.

¹⁰ Wade Decl. ¶ 10; Exhibit 3, Email from R. Wallace, Lumos to M. McKenzie Frontier attaching Letter from J. Wade, Lumos to M. McKenzie, March 19, 2015.

¹¹ Wade Decl. ¶ 10.

¹² Wade Decl. ¶ 11; Exhibit 4, Email from J. Wade to S. Anderson, Frontier, August 9, 2013.

pany whose workers possess the same qualifications for performing make-ready work on Frontier's poles as a Frontier utility worker or employee of Frontier's contractors.¹³

Frontier did not respond to Lumos' March 19 letter. Following field meetings with representatives of First Energy and AEP (to which Frontier was invited but elected not to participate). Lumos began the required make-ready work on or about April 2, 2015.¹⁴ Consistent with Frontier's survey, Lumos' contractor rearranged (including lowering) Frontier and other attachers' cables on the designated poles to create sufficient space for Lumos to safely attach its fiber.¹⁵ Consistent with its pole attachment applications, Lumos temporarily placed fiber strands along the designated pole line consistent with the permits from First Energy and AEP. Lumos' placement of fiber on these poles was also consistent with the NESC and the utilities' safety guidelines for pole attachments.¹⁶

On April 7, 2015, Lumos' outside plant crews observed Frontier personnel removing Lumos' fiber from Frontier poles that were part of the Nicholas County build. Frontier also removed Lumos' fiber from AEP and First Energy poles where the utilities expressly authorized Lumos' attachments. To date, Lumos estimates that Frontier removed Lumos' fiber from approximately 49 poles.¹⁷

On that same day, Lumos attempted to contact Frontier to resolve this issue without resort to formal dispute resolution.¹⁸ When Frontier did not respond, Lumos attempted again to reach Frontier on April 8, 2015 without success. On April 9, 2015, after again trying to reach

¹³ Wade Decl. ¶ 12.

¹⁴ Wade Decl. ¶ 14.

¹⁵ Wade Decl. ¶ 14.

¹⁶ Wade Decl. ¶ 15.

¹⁷ Wade Decl. ¶ 16; Exhibit 5, List of 49 Poles Where Frontier Removed Cable.

¹⁸ Exhibit 6, Email from S. Hamula, Lumos to J. Starsick, Frontier, April 7, 2015.

someone at Frontier to resolve the issue,¹⁹ Lumos filed a complaint at the WV P.S.C seeking an emergency order from the WV P.S.C. requiring Frontier to cease and desist removing Lumos' facilities from poles in the state of West Virginia.²⁰ On April 13, 2015 Staff of the WV PSC recommended that the WV PSC grant Lumos' interim relief and the WV PSC issued an order granting the interim relief.²¹ Also on April 13, 2015 Lumos finally received an email response from Frontier's in-house counsel in West Virginia, stating "We had our hearing in the Citynet case on Friday, and as you might imagine, I'm hundreds of email behind. I'll look at this matter ASAP."²² This response does not appear to reflect any urgency on Frontier's part to remedy the situation. Instead of complying with the WV PSC's order, on the morning of April 14, 2015, Frontier's engineer Trenton Brown told Lumos' third party contractor that if anyone attempted to reinstall fiber on the poles where Frontier removed fiber, Frontier would call the police to have the workers arrested.²³

II. Argument

A. Legal Standard

In order to remove an attacher's cables from its poles, a utility must provide the attacher 60 days written notice.²⁴ If the attacher objects, the rule provides that it can seek a stay.²⁵ Section 1.1403(d) of the Commission's rules provides that a request for a stay "shall not be considered

¹⁹ Exhibit 7, Email from S. Hamula, Lumos to J. Starsick, Frontier, April 9, 2015.

²⁰ Exhibit 8, Lumos Networks LLC and Lumos Networks of West Virginia Inc. Frontier West Virginia Inc. Formal Complaint and Request for Immediate Interim Relief ("Lumos Complaint") (Filed April 9, 2015)

²¹ Exhibit 9, West Virginia Public Service Commission Staff Interim Relief Memorandum and Order Granting Interim Relief (April 13, 2015).

²² Exhibit 10, Email from J. Starsick to S. Hamula, April 13, 2015.

²³ Wade Decl. ¶ 19.

²⁴ 47 C.F.R. § 1.1403(c)(1), (3).

²⁵ 47 C.F.R. § 1.1403(d).

unless it includes ... a showing of irreparable harm and likely cessation of cable television service or telecommunication service.”²⁶ The Commission requires “a strict threshold showing where such a claim is asserted.”²⁷

Lumos recognizes that on its face, section 1.1403(d) provides attachers an opportunity to seek relief from the Commission when the utility issues a notice of removal that will harm the attacher. Here, Frontier has bypassed that essential step and proceeded directly to removal without any notice. Lumos should not be deprived of the ability to obtain relief from the Commission simply because Frontier has ignored the Commission’s basic rules regarding communication between utilities and attaching companies.

B. Frontier’s Removal of Lumos’ Fiber Irreparably Harms Lumos and Results in a Cessation of Lumos’ Telecommunications Service

In order to prove irreparable harm Lumos’ alleged injury “must be both certain and great; it must be actual and not theoretical.”²⁸ Further, the injury must be “of such *imminence* that there is a ‘clear and present’ need for equitable relief to prevent irreparable harm.”²⁹ This standard is easily met here.

Lumos’ injury is certain and great: its fiber facilities have been forcibly removed from utility poles. It cannot use the fiber to serve customers when it is placed on a spool on the side of the road. By removing Lumos’ cable, Frontier has made it virtually impossible for Lumos to meet its commitment date for providing service to Nicholas County schools. Frontier’s forcible

²⁶ 47 C.F.R. § 1.1403(d).

²⁷ *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 FCC 2d 1585, 1588 ¶ 8 (1978). Indeed, the Commission established the “strict threshold” for a showing of irreparable harm that must be met along with the requisite procedure for filing a petition for stay to satisfy the twin goals of providing attachers “an expeditious remedy” while “not unfairly burden[ing] the utility.” *Id.*

²⁸ *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

²⁹ *Id.* (emphasis in original) (citations, brackets, and internal quotation marks omitted).

removal of Lumos cables constitutes irreparable harm because it demonstrates Frontier's "general unwillingness to continue providing [access to the] ... communications space on its poles."³⁰ Lumos' injury is aggravated because of the manner in which Frontier removed the fiber. Frontier personnel removed the fiber and loaded it onto spools. But in doing so they permanently damaged the fiber, rendering it useless. Frontier loaded almost 11,000 feet of fiber cable onto a spool that is only designed to hold 5,000 feet.³¹

Further, Lumos' injury is not only imminent; it has already occurred. And Frontier's silence to date indicates that the threat of more removal activity is likely if not inevitable. In short, unless the Bureau issues a stay ordering Frontier to stop removing Lumos' fiber cable from poles, Lumos will continue to suffer great and irreparable injury.

In addition to physical harm from having its fiber cables forcibly removed from the poles, Lumos will suffer significant damage to its business reputation and goodwill. Forcing a company to stop serving customers and soliciting new business, and causing damage to the company's business reputation and goodwill constitutes irreparable harm.³² Lumos' reputation among customers in the West Virginia market will be irrevocably harmed if it is unable to serve customers. Absent a stay -- and thus deprived of the use of its fiber network it was installing on Fron-

³⁰ See *Cablecom-General, Inc. v. Central Power and Light Co.*, 50 RR2d 473 ¶ 15 (1981).

³¹ Wade Decl. ¶ 17; Exhibit 11, Photo of Cable Spool.

³² *Vonage Holding Corp. v. Minn. Pub. Util. Comm.*, 290 F. Supp. 2d 993, 1003 (D. Minn. 2003); see also, *Bellsouth Telecomm., Inc. v. Miss. Public Serv. Comm.*, 368 F. Supp. 2d 557, 566 (S.D. Miss. 2005) (loss of customers is irreparable harm); *Patriot, Inc. v. U.S. Dept. of Housing and Urban Development*, 963 F. Supp. 1, 5 (D.D.C 1997) (irreparable harm where enforcement of order would threaten the "very existence" of plaintiff's business).

tier's poles, Lumos will be unable to serve the Nicholas County schools.³³ Of course, since Frontier is the incumbent provider, that is plainly their objective here.

Lumos plainly meets the standard of irreparable harm and cessation of service required under section 1.1403(d). By removing Lumos' fiber, and being allowed to continue such action, Frontier has irreparably harmed Lumos.

C. Frontier's Removal Action is Unlawful

1. The Commission's Rules Permit Lumos to Perform the Make-Ready and Install Fiber on Frontier's Poles

Lumos plainly had the right to occupy space on Frontier's poles. Lumos and Frontier have a valid, enforceable Pole Attachment Agreement that provides Lumos the right to attach to Frontier's poles. Further, Lumos followed the procedures established under the Agreement and the Commission's rules for applying to obtain space on Frontier's poles for attaching fiber optic cable. Lumos submitted proper pole attachment applications to Frontier, paid Frontier to complete pole surveys, and paid Frontier the amounts set forth on the make-ready invoices that accompanied Frontier's pole survey.³⁴ But Frontier did not follow the Agreement, choosing to ignore Lumos' make-ready request once it received Lumos' payment.

The Commission's rules establish a timeline for a utility to perform make-ready, and provide a remedy for attachers to hire contractors to perform the make-ready work where the utility neglects to perform such work.³⁵ The Commission implemented this rule to avert situations where utilities delay attachments, recognizing that "[t]ime is of the essence for requesting entities,

³³ *Id.* n. 28 citing *Virginia Petroleum Jobbers Assc'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1977).

³⁴ *See* Exhibit 2.

³⁵ 47 C.F.R. § 1.1420(i).

their investors, and their potential consumers.”³⁶ Thus, where a utility fails to perform the make-ready specified in the survey and fails to indicate that it will perform the make-ready, the attach-er “may hire a contractor to complete the make-ready”³⁷ and may begin the work “[i]mmediately.”³⁸ Lumos followed this process.

Lumos was further justified in using a contractor that had not specifically been approved by Frontier. While Frontier has in the past provided Lumos with the names of two acceptable contractors, those contractors refuse to work with Lumos for fear of alienating Frontier.³⁹ It is Frontier’s obligation to maintain “a reasonably sufficient and up to-date list of contractors.”⁴⁰ Lumos advised Frontier in August 2013 that its list of authorized contractors was illusory be-cause “neither of these firms will perform the necessary self-remedy pre-license surveys on Lumos’ behalf.”⁴¹

Maintaining a list of contractors that refuse to work with attaching parties is the equiva-lent of having no list. Where the utility “fails to list approved contractors, attachers may use the ‘same qualifications’ standard that [the FCC has] previously adopted.”⁴² Under this standard, Lumos was entitled to hire Thayer as its workers have “the same qualifications in terms of

³⁶ *Implementation of Section 224 of the Act*, 26 FCC Rcd 5240, 5273 ¶ 69 (2011) *aff’d American Electric Power Service Corporation v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

³⁷ 47 C.F.R. § 1.1420(i).

³⁸ 47 C.F.R. § 1.1420(i) (i)(1).

³⁹ Wade Decl. ¶ 10. Exhibit 4.

⁴⁰ *Implementation of Section 224 of the Act*, 26 FCC Rcd at 5268 ¶ 57.

⁴¹ Exhibit 4.

⁴² *Implementation of Section 224 of the Act*, 26 FCC Rcd at 5267 ¶ 54.

training, as the utility's own workers ... appropriate for ... performing ... make-ready in the communications space."⁴³

Once Lumos performed the make-ready, exercising its right to self-remedy Frontier's failure to comply with its obligation to perform the make-ready Lumos paid for, Lumos had the right to install its fiber on Frontier's poles. Frontier had already authorized installation when it issued the pole survey. And the "Commission has long guaranteed attachers the right to choose the workers they hire to attach their facilities to poles."⁴⁴

Lumos' practice here was consistent with its practices under numerous other pole applications where Frontier has failed either to perform the survey or complete the make-ready for Lumos' pole attachment applications.⁴⁵ In each circumstance, Lumos notified Frontier that it was electing the self-remedy under the Commission's rules; Frontier never objected and never threatened to remove or actually removed Lumos' cable from its poles.⁴⁶

2. Frontier Lacks the Legal Authority to Forcibly Remove Lumos' Fiber from Poles.

Frontier has no right to remove Lumos' fiber from poles that Frontier does not own or control. Frontier does not own many of the poles where Frontier removed Lumos' cable. Frontier has not provided any explanation for this outrageous conduct.

Even on Frontier's poles, there is nothing in the Commission's rules or the Agreement that allows Frontier to forcibly remove Lumos' fiber from Frontier's poles without notice and without consent (except in circumstances that do not apply here, *see* note 3 above) or an order

⁴³ *Id.* *See* Wade Decl. ¶ 12.

⁴⁴ *Implementation of Section 224*, 26 FCC Rcd at 5277 ¶ 79.

⁴⁵ Wade Decl. ¶ 10 (citing thirteen previous instances where Frontier has failed to respond thus requiring Lumos to avail itself of the self-remedy option under the Commission's rules).

⁴⁶ Wade Decl. ¶ 10.

from a court or administrative tribunal. Frontier's actions violate both the Commission's rules and its Agreement with Lumos.

Section 1403(c)(1) of the Commission's rules quite clearly provide that a

“utility shall provide a ... telecommunications carrier no less than 60 days written notice prior to: (1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the ... telecommunications carrier's pole attachment agreement.”⁴⁷

Frontier did not provide any notice.⁴⁸ Frontier did not comply with this rule.

The Agreement is equally clear that Frontier cannot remove Lumos' attachments without notice. Section 6.2, for example, allows Frontier to remove Lumos' attachments if such attachments were to jeopardize Frontier's ability (or that of other attachers) to occupy the property where the pole is located. Even under such drastic circumstances, the Agreement requires Frontier to provide Lumos advance written notice so Lumos (not Frontier) can remove its own attachments.

The Agreement even prohibits Frontier from removing unauthorized attachments without advance written notice.⁴⁹ Further, the Agreement provides that for any unauthorized attachment, Frontier must offer Lumos an opportunity to submit an application within 15 days of the notice as a “cure” to the lack of authorization. Frontier is simply not permitted to unilaterally remove Lumos' facilities.

Even in an emergency, Frontier is required to notify Lumos as soon as practicable that it has rearranged or removed its attachments. To date, Frontier has neither claimed that an emergency existed nor provided such notice, making it plain that Frontier is foreclosed from arguing

⁴⁷ 47 C.F.R. § 1.1403(c)(1).

⁴⁸ Wade Decl. ¶ 16.

⁴⁹ See § 12.1.

that it removed Lumos' cables in response to some unidentified, "immediate threat to the safety of the public or the employees of Frontier."⁵⁰ Lumos is not aware of the occurrence of any emergency or public safety threat in the area of the relevant poles on April 7, 2015. Further, the reasonable interpretation of this provision is that Frontier should take the minimum action necessary to resolve the immediate threat, and it is unlikely that this could justify complete removal of (and damage to) Lumos' cable. There is simply no legal justification for Frontier to remove Lumos' attachments.

III. Requested Relief

For the aforementioned reasons, Lumos has conclusively established that absent a stay it has suffered and will continue to suffer irreparable harm and will have to cease providing telecommunications service as a result of Frontier's forcible removal of Lumos' fiber cables from Frontier's poles and the poles of other utilities. In order to stop this conduct and allow Lumos to continue providing service to its customers, the Commission should issue a stay that:

1. Prohibits Frontier from removing Lumos' Cable from Frontier's poles or poles of other utilities in West Virginia;
2. Allows Lumos to replace the cables removed by Frontier without submitting additional pole applications and without paying additional make-ready or engineering charges or any related fees.
3. Prohibits Frontier from interfering with Lumos' efforts to replace the cables removed by Frontier, or from performing any other make-ready work on the Nicholas County project pursuant to the pole attachment applications submitted to Frontier on May 13, 2014 and June 2, 2014.

⁵⁰ See Exhibit 1, Agreement § 5.3.

Respectfully submitted,

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April 14, 2015

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CERTIFICATE OF SERVICE

I certify that on April 14, 2015 I served a copy of the foregoing Petition for Stay on the parties identified below by means of electronic mail, hand delivery and/or overnight delivery.

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