

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of) DOCKET UT-121994
)
FRONTIER COMMUNICATIONS) CLEC INTERVENORS'
NORTHWEST INC.,) JOINT MOTION TO DISMISS
) FRONTIER'S PETITION TO BE
) REGULATED AS A COMPETITIVE
To be Regulated as a Competitive) TELECOMMUNICATIONS COMPANY
Telecommunications Company Pursuant) PURSUANT TO RCW 80.36.320, OR IN
to RCW 80.36.320) THE ALTERNATIVE TO TREAT
) PETITION AS A REQUEST UNDER
) RCW 80.36.330

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INTRODUCTION

1. Pursuant to the Prehearing Conference Order dated February 15, 2013, and WAC 480-07-380, intervenors Charter Fiberlink WA-CCVII, LLC (“Charter”), tw telecom of washington llc (“tw telecom”), Cbeyond Communications, LLC (“Cbeyond”), Integra Telecom of Washington, Inc. (“Integra”), and Level 3 Communications, LLC (“Level 3”) (collectively the “CLEC Intervenors”) hereby move to dismiss the petition filed by Frontier Communications Northwest Inc. (“Frontier”) to classify Frontier as a competitive telecommunications company pursuant to RCW 80.36.320 and WAC 480-121-061 (the “Petition”). In the alternative, the Commission, pursuant to WAC 480-07-395(4), should treat the Petition as a request for competitive classification of only Frontier’s retail services, but not its wholesale services, under RCW 80.36.330 and WAC 480-121-061.
2. Dismissal of the Petition is appropriate because Frontier (1) fails to address the question of whether there is effective competition for wholesale services, and (2) fails to define the markets for such services. As a result, the Petition asserts no facts that, if proven, would satisfy Frontier’s burden of showing effective competition for all its services, in defined relevant markets, as required by RCW 80.36.320 and WAC 480-121-061. In the alternative, if the Commission declines to dismiss the Petition in full, it should treat the Petition as a request for competitive classification of only Frontier’s retail services because Frontier’s assertions—at most—lay out a claim for reclassification of certain retail services under RCW 80.36.330, which allows reclassification of specific services, in contrast to the more demanding standard set forth by RCW 80.36.320 which applies to all services a company offers.

STATEMENT OF FACTS

3. The only facts material to the requested remedy are facts concerning what Frontier has set forth (and failed to set forth) in its Petition.

STATEMENT OF ISSUES

4. Whether Frontier has failed to allege facts sufficient to state a claim for relief under RCW 80.36.320, including facts that, if proven, would show that Frontier's retail *and wholesale* services are *currently* subject to effective competition *in every relevant market*, as required under RCW 80.36.320 and WAC 480-121-061.
5. In the alternative, whether the Commission should deem the Petition to be a request under RCW 80.36.330 for reclassification of just those retail services that the Petition actually alleges are currently subject to effective competition in relevant markets.

EVIDENCE RELIED UPON

6. The only evidence material to the requested remedy is the evidence of what Frontier has included in (and omitted from) its Petition.

LEGAL STANDARD

7. Pursuant to WAC 480-07-380:

A party may move to dismiss another party's claim or case on the asserted basis that the opposing party's pleading fails to state a claim on which the commission may grant relief. The commission will consider the standards applicable to a motion made under CR 12 (b)(6) and 12(c) of the Washington superior court's civil rules in ruling on a motion made under this subsection.

8. "A CR 12(b)(6) motion is properly granted when it appears from the face of the complaint that the plaintiff would not be entitled to relief even if he proves all the alleged facts supporting the claim." *Citizens for Rational Shoreline Planning v. Whatcom County*, 172

Wash.2d 384, 389, 258 P.3d 36, 39 (2011). In considering a motion to dismiss, the allegations are presumed true. *Tenore v. AT&T Wireless Services*, 136 Wash.2d 322, 330, 962 P.2d 104, 107 (1998). “A trial court should grant a motion to dismiss pursuant to CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery.” *Matsyuk v. State Farm Fire & Cas. Co.* 173 Wash.2d 643, 662, 272 P.3d 802, 811 (2012) (citations and quotation marks omitted). “While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient.” *Gorman v. Garlock, Inc.*, 155 Wash.2d 198, 215, 118 P.3d 311, 320 (2005). “While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, if the court can say that no matter what facts are proven *within the context of the claim*, the plaintiffs would not be entitled to relief, ... the presentation of extraneous evidence [is] immaterial.” *Haberman v. Washington Public Power Supply System*, 109 Wash.2d 107, 121, 744 P.2d 1032, 1046 (1987).

ARGUMENT

I. Petitioners for Competitive Classification as a Company under RCW 80.36.320 Bear a Heavy Burden of Proof, which the Petition Fails to Plead Facts Sufficient to Satisfy

9. Washington's statutes and rules place a heavy burden of proof on a party seeking competitive classification of a company under 80.36.320. Under Washington law petitioners seeking such relief must: (1) identify and define relevant markets; (2) identify alternative providers in such markets who provide the same services, or a functionally equivalent substitute, for *all* of the services offered by the company that may be classified as competitive; and, (3) then prove the existence of “effective competition” in all such markets. To demonstrate “effective

competition” the petitioner must make a showing of both reasonably available alternative services and the absence of significant captive customers.

10. RCW 80.36.320 provides:

(1) The commission shall classify a telecommunications company as a competitive telecommunications company if *the services it offers are subject to effective competition*. Effective competition means that the company's customers have reasonably available alternatives and that the company does not have a significant captive customer base. In determining whether a company is competitive, factors the commission shall consider include but are not limited to:

- (a) The number and sizes of alternative providers of service;
- (b) The extent to which services are available from alternative providers in the *relevant market*;
- (c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions; and
- (d) Other indicators of market power which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

RCW 80.36.320 (emphasis added).

11. First, a petitioner must define the relevant geographic and product markets for its services. It is axiomatic that in order to make a determination as to the existence of competition in any particular market, one must first identify and define the relevant market. As the Washington courts have explained: “[t]he burden lies with the applicant to demonstrate that it faces effective competition in the *relevant market*.” *US West Communications, Inc. v. Washington Utilities and Transp. Comm’n*, 86 Wash.App. 719, 724, 937 P.2d 1326, 1329 (Div. 1, 1997) (emphasis added) (citing *In re Electric Lightwave, Inc.*, 123 Wash.2d 530, 547, 869 P.2d 1045 (1994)).

12. Second, when a company that offers numerous retail and wholesale services seeks competitive classification *as a company* under RCW 80.36.320, it bears the burden of showing that *all* of the services offered by the company are subject to effective competition.

See, e.g., US West, 86 Wash.App at 726, 937 P.2d at 1330 (emphasis added):

In its findings of fact, the Commission found that *all* services offered by ELI and TCG are fully available from alternative providers such as U.S. West and GTE Northwest, that neither ELI nor TCG has a captive customer base, and that the services offered by ELI and TCG are subject to effective competition. Thus, the Commission concluded that ELI and TCG are entitled to competitive classification.

13. As the primary drafter of the statute made clear, a finding of effective competition relies upon a determination that all of the services offered by the petitioner are competitive, explaining that “[t]he guts of the bill are contained in §§ 4 and 5. Section 4 [now RCW 80.36.320] permits the commission to classify a company as competitive if it finds that the services it offers are subject to effective competitions.” *See Sharon L. Nelson Source*, Washington State's new Regulatory Flexibility Act, 117 Public Utilities Fortnightly 1 (Jan. 9, 1986), at 31. In contrast, “[s]ection 5 [now RCW 80.36.330] applies to companies that function as a hybrid; that is, they offer both monopoly and competitive services,” and allows classification of individual services. *Id.* Ms. Nelson’s article shows that the legislature intended that *all* services must be deemed competitive before the Commission can classify a company as “competitive” under RCW 80.36.320, and that a company offering both monopoly wholesale services and competitive retail services, must avail itself of the service-by-service classification under RCW 80.36.330.

14. Further, under WAC 480-121-061(5), the petitioner must plead and prove that it meets two specific criteria in order for the Commission to make a determination of “[e]ffective competition.” First, “customers of the service(s) [must] have reasonably available alternatives,” and second, there must be proof that “the company does not have a significant captive customer base for the service(s).” WAC 480-121-061(5) further requires that “[t]he commission will consider the factors outlined in RCW 80.36.320 (1)(a) through (d) when determining whether a company is competitive.”
15. Finally, 80.36.320 requires a showing of current effective competition which exists when the Petition is filed; potential competition in the future is not sufficient. The language requiring competition in RCW 80.36.320 (and in RCW 80.36.330) is in the present tense. The requirement is not met by the existence of *potential* effective competition. *See In the Matter of the Petition of Qwest Corporation for Competitive Classification of Business Service in Specified Wire Centers*; Seventh Supplemental Order Denying Petition and Accepting Staff’s Proposal, Docket No. UT-000883 (December 18, 2000) (“Qwest Seventh Order”), ¶ 66 (“In our view, we must also have confidence that competitors are offering and will offer competitive services. This determination turns on the presence of competitors, their actual current availability to customers, and a judgment, from their current behavior and the current market structure, that they do, can, and will provide alternative service to end-users.”).
16. In sum, a party seeking competitive classification must allege (and ultimately prove) facts identifying relevant markets and demonstrating effective competition for all services, showing for each service that reasonably available alternatives actually exist *today* and that there is no significant captive customer base.

II. *The Commission Should Dismiss the Petition Because Frontier's Allegations Fail, Even If Proven, to Satisfy the Burden It Must Meet Under RCW 80.36.320*

17. Even if all Frontier's alleged facts are accepted as true, Frontier cannot meet its burden of proving that *all* of the company's services are subject to effective competition under 80.36.320. Nor has Frontier adequately identified or defined the "relevant markets" in which it claims effective competition for its services exists. Frontier's assertions, even if assumed to be true, therefore fail to support reclassification of the company as competitive under RCW 80.36.320 and WAC 480-121-061.
18. The situation contrasts with that in *In re Electric Lightwave, Inc.* ("ELI") 123 Wash.2d 530, 547, 869 P.2d 1045, 1055 (1994), where the Washington Supreme Court held that the Commission properly granted a CLEC's bid for statewide competitive status. There the Commission had found effective competition throughout the state for all the relevant retail services, based on competition from incumbent LECs. *See ELI*, 123 Wash.2d at 535, 547, 869 P.2d at 1048, 1055 (noting that the CLEC provided "services to and from end users," and that Staff presented evidence of "extremely viable" competition for such services statewide). *In re Electric Lightwave, Inc.* 123 Wash.2d at 535, 548 869 P.2d at 1048, 1055 (1994). Here, in contrast, an ILEC seeks competitive classification for *retail and wholesale* services, but has not even alleged that *wholesale* competition exists in its 102 wire centers.

A. Because Frontier Fails to Allege Competition for Wholesale Services It Cannot Meet Its Burden of Proving that All Its services are Subject to Effective Competition under RCW 80.36.320

19. Frontier has failed to allege that its wholesale services are subject to effective competition, and has failed to allege any facts that would, if established, show that there are substitutes, or functional equivalents to the Frontier wholesale services used by competitors today.

Although the company has alleged facts concerning the existence of competition for *retail* services, it has failed to even allege facts that would, if proved, show effective competition for *wholesale* services. Although Frontier’s Petition makes various assertions about competition for “customers,” *e.g.*, Petition at ¶¶ 7, 17, 22, 32, and 35, such allegations fail to delineate wholesale customers from retail, and—in context—obviously only apply to *retail* customers.

20. Indeed, Frontier’s allegations about retail competition are effectively an admission that there are wholesale services that are not subject to effective competition, *See e.g.*, Petition at 31 (“There are currently 50 CLECs purchasing approximately 4,000 resold lines, 15,000 UNE loops and 10,000 UNE-P lines *from Frontier* in Washington.”); Petition at ¶ 33 (“By reselling *Frontier’s* retail services, CLECs have the ability to reach every single business and residential customer that Frontier serves in Washington.”).
21. Frontier’s promise to continue to provide, post-classification, wholesale services to other communications companies, Petition at ¶ 53, is a tacit admission that such services are *not currently* subject to effective competition, and that there are no reasonable alternatives to such wholesale services. But current competition—not merely potential future competition—is what the statutory threshold requires, and is therefore what Frontier must allege. *See Qwest Seventh Order*, at ¶ 66.
22. Frontier makes assertions about resellers’ current *access* to wholesale, *e.g.* Petition at ¶ 33, but there is no allegation that such access is a result of effective competition for wholesale services. Frontier’s assertions about the size of the wholesale discounts and ability of resellers to reach retail customers bear on competition in the *retail*, not *wholesale*, market.

23. Moreover, if competition in the wholesale market existed today, Frontier could obtain relief UNE delisting proceedings under the FCC's Triennial Review Remand Order. *See In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (Rel. Feb. 4, 2005) ("Triennial Review Remand Order"), at ¶ 2 ("[T]his Order imposes unbundling obligations only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition."). But Frontier has not sought such relief, suggesting that Frontier recognizes the current lack of effective competition for wholesale services in its relevant markets.

B. Frontier Fails to Address the Specific Criteria Required for Effective Competition under WAC 480-121-061 and Key Statutory Factors under RCW 80.36.320(1)

1. Frontier fails to identify alternative providers of wholesale services.

24. With respect to the WAC 480-121-061 requirements for effective competition, Frontier's allegations again fail. Specifically, Frontier fails to allege that its wholesale customers have any reasonably available alternative providers, as required by WAC 480-121-061, and RCW 80.36.320(1)(a), (b) and (c).

25. As to the existence of alternative providers, Frontier's Petition devotes only four paragraphs, *see* Frontier Petition ¶¶ 16-20, and focuses entirely on alternative providers of retail services. Specifically, Frontier points to several different categories of alternative providers (CLECs, cable operators, CMRS and VoIP providers) and details all of the competitive *retail* services these entities provide. There is no discussion of any alternative providers of wholesale services in this section of (or anywhere else in) Frontier's Petition. As such, Frontier has

alleged no facts that could satisfy its statutory burden of showing that there are alternative providers of *wholesale* services, as required by RCW 80.36.330(1)(a) and WAC 480-121-061(5).

26. Frontier's evidence of alternative services available to customers, as required by RCW 80.36.330(1)(a), is equally lacking. Although there is an extensive discussion of alternative retail services made available to retail customers Washington, *see* Frontier Petition ¶¶ 21-31, there is no mention of alternative wholesale services available to competitive providers in Washington.

2. Frontier fails to allege the lack of functionally equivalent or substitute services, and the lack of significant captive customers for wholesale services.

27. Frontier also fails to allege any facts that demonstrate the existence of functionally equivalent or substitute wholesale services, or that it lacks significant captive customers. Frontier makes no attempt to allege that wholesale customers have access to any alternatives to the essential facilities Frontier controls by virtue of its status as incumbent telephone company.

28. As this Commission knows, many competitive providers rely upon access to essential facilities and services controlled by Frontier, such as unbundled loops and transport, interconnection, transit to allow indirect interconnection with other carriers, and collocation within central offices, to provision their competitive service offerings. Frontier does not deny this, nor does it deny that all competitive providers require the ability to interconnect with Frontier and obtain related wholesale services to offer competing retail services. Frontier's Petition does not allege that essential facilities and services, namely unbundled loops, collocation and interconnection, are available from other service providers in any of its 102 wire centers. By failing to allege the existence of any alternative provider of these

essential facilities services, Frontier has failed to allege facts necessary to demonstrate a competitive wholesale market for such facilities and services. Frontier has failed to allege that competitive providers operating in its 102 wire centers are anything but captive customers for its wholesale services.

29. Indeed, Frontier's allegations acknowledge that competitors depend on Frontier for the several wholesale services that it currently makes available, such as resale, ¶ 33, and unbundled loops, ¶ 34, which competitors use to provide competing retail services. The remaining portions of Frontier's Petition, ¶¶ 35-48, purporting to demonstrate functionally equivalent or substitute services, address only retail services. *See, e.g.* ¶¶36-39 (describing competing retail cable VoIP services); ¶¶ 40-43 (competing retail "over the top" VoIP services); and ¶¶ 43-46 (competing retail wireless services).
30. Frontier's assertions with respect to captive customers address only *retail* services. *See*, Petition at ¶¶ 7 ("business and residential services"), 12 (same), 49 (same, plus references to "retail access lines" and "business access"). There is, simply, no discussion of functionally equivalent or substitute wholesale services in Frontier's Petition.
31. The only other mention of "captive customers" or "market power," is essentially a legal conclusion, and insofar as it involves factual allegations at all, alleges the loss of *retail* access lines, Petition at ¶ 58. But assertions about access line loss are no substitute for allegations that, if proven, would actually show that the petitioner does not have captive customers in the wholesale market (or any other).
32. The Commission has already rejected attempts – by another ILEC – to equate line loss with competition. *Qwest Seventh Order*, at ¶ 68 ("With a skewed distribution of lines across

customers, competitors could easily achieve an overall 40 percent market share of lines share in an exchange even if it had few or no small business customers. While [lines subject to competition] this may be one indicator of the presence of competition, it is not sufficient in and of itself to show effective competition.”). Here Frontier does not even allege lines subject to competition, but simply line loss. *E.g.*, Petition at ¶ 49 (noting “combined aggregate line loss of 60%”).

33. Frontier’s failure to plead (or decision to ignore) its captive wholesale customers reflects an obvious fact: Frontier is the incumbent service provider and therefore the only entity in its 102 wire centers with: (1) an extensive wireline network reaching all end user locations in its service areas, and (2) a legal duty to provide wholesale services to competitive LECs. No other entity in Frontier’s 102 wire centers has an extensive wireline network reaching all end user locations in its service territory, and the duty to provide wholesale services to competitive LECs.

34. Indeed, the references to Frontier’s discounts, Petition at ¶ 33, and its § 251 and § 252 obligations, Petition at ¶ 53, reflect Frontier’s recognition that competitive carriers must continue to have access to Frontier wholesale services—including unbundling, collocation, and interconnection—to provision their competitive services and compete on a retail basis with Frontier. Those competitive carriers must continue to use Frontier wholesale services precisely because they are captive customers with regard to Frontier’s wholesale services, and have no reasonably available alternative wholesale services or facilities.

A. Frontier Fails to Adequately Identify the “Relevant Markets” for Effective Competition in Wholesale Services

35. The Commission must make necessary findings of competition in specific geographic and product markets in order to reclassify a company under Section 320. *See* Nelson, at 30 (“Thus the commission announced a policy of permitting pricing flexibility under certain conditions and devised a scheme that gave discretion to the commission to reduce regulation when it could make certain findings about the competitive state of relevant markets”).
36. Here, Frontier has not identified or defined the relevant geographic or product markets for the Commission’s analysis. Frontier has: (1) failed to separate markets with respect to specific services and customers of those services, (2) failed to identify the geographic boundaries of the markets for such services, and (3) failed to show effective competition in those (undefined) markets.
37. Frontier’s failure to define markets by service and geography reveals an additional failure. The Petition fails to state whether the geographic boundaries of the market(s) differ for wholesale services as opposed to retail services (or for retail business services as opposed to retail residential services). Even if there were a defined market for, say, residential retail services, throughout Frontier’s wire centers, the market for wholesale services may be different because wholesale markets require access to alternative facilities that may be available only in a few wire centers, if at all. Consistent with Frontier’s failure to define the markets, it has made no showing of wholesale competition in any wire center—or in any wholesale market.
38. Frontier’s lack of allegations on this point leaves the Commission to guess what the market is based on inconsistent clues. At times the Petition implies that the geographic market is

limited to its 102 wire centers, e.g., Petition at ¶ 22, but elsewhere Frontier implicitly asserts that the entire state is the market, e.g., Petition at ¶ 55.

39. Frontier's failure to define markets sufficiently in its allegations means, necessarily, that it cannot possibly show effective competition. That task can only be done relative to "relevant markets," *see* RCW 80.36.320(1)(b), which Frontier fails to define.

40. Although the Commission has the ability to define markets, *see ELI*, 123 Wash.2d at 547, 869 P.2d at 1055, Frontier has not made sufficient allegations to allow the Commission to reasonably determine markets for each, or indeed any, of Frontier's wholesale services.

B. Because Frontier's Petition Fails to Allege Facts Sufficient to Make a Finding of Effective Competition Dismissal is Warranted

41. The absence of sufficient allegations concerning wholesale services, the existence of effective competition today for such services, the relevant markets for such services, and the lack of captive customers in such markets is fatal to Frontier's claim for relief under RCW 80.36.320. Even if the Commission were to find that some *retail* services are subject to effective competition, Frontier's petition provides no basis for such a finding as to *wholesale* services. Accordingly, the Commission cannot conclude that all of the company's services are subject to effective competition (as required by 80.36.320), and should therefore dismiss the petition on the grounds that Frontier fails to state a claim under that provision.

42. Although Frontier's recently-filed testimony includes discussion of wholesale competition, the testimony does not remedy the defects in the Petition. A motion to dismiss concerns what has been pleaded, not the sufficiency of evidence to prove what is pleaded. The question is "whether the allegations in a complaint constitute a short and plain statement of the claim showing that the pleader is entitled to relief." *Haberman v. Washington Public*

Power Supply System, 109 Wash.2d 107, 120, 744 P.2d 1032, 1046 (1987). If proving what has been pleaded would not entitle the petitioner to the relief sought, then submitting evidence does not save the defective pleading, or convert a motion to dismiss into a motion for summary judgment. *Haberman*, 109 Wash.2d at 121, 744 P.2d at 1046 (“While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, if the court can say that no matter what facts are proven *within the context of the claim*, the plaintiffs would not be entitled to relief, the motion remains one under CR 12(b)(6).”) (Emphasis added). Because Frontier’s own allegations make clear that retail competition depends on Frontier to provide UNEs and wholesale services. Thus, Frontier “would not be entitled to relief even if [it] proves all the alleged facts supporting the claim.” *Cf. Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wash.2d 384, 389, 258 P.3d 36, 39 (2011). Indeed, there are no possible facts within the context of Frontier’s claim—consistent with the Petition—that could justify competitive classification of Frontier as a whole.

43. In any case, Frontier’s testimony includes no evidence (or even assertions) that interconnection, UNEs, collocation, resale or any other section 251/252 services or facilities are subject to effective competition. Nor does the testimony include any evidence of (or assertions) switched access is subject to effective competition. Nor does the testimony include evidence (or assertions) that special access is subject to effective competition, merely asserting that Frontier needs pricing flexibility to compete in those “highly competitive markets,” Direct Testimony of Billy Jack Gregg (“Gregg Testimony”), at 8, line 13—an assertion that implies the existence of non-competitive markets. Nor does the testimony

define the relevant markets, making only passing reference to “local telecommunications markets” Gregg Testimony at 3, line 8, and “the special access market” Gregg Testimony at 8, line 19.

III. *Treating the Petition as a Request under RCW 80.36.330 is Appropriate Where the Allegations – at Best – Concern Effective Competition for Specific Retail Services*

44. In the alternative, if the Commission declines to dismiss the Petition altogether, CLEC Intervenor request that the Commission deem the Petition to be a request for competitive classification of Frontier’s retail services pursuant to RCW 80.36.330. RCW 80.36.330 provides for service-level classification based on service-specific competition:

The commission may classify a *telecommunications service* provided by a telecommunications company as a competitive telecommunications service if *the service* is subject to effective competition. Effective competition means that customers of the service have reasonably available alternatives and that the service is not provided to a significant captive customer base.

45. At most, Frontier’s Petition may support a claim that effective competition exists for certain services and the Commission may construe the Petition as a request for a ruling as to only those retail services. WAC 480-07-395(4) provides:

Liberal construction of pleadings and motions. The commission will liberally construe pleadings and motions with a view to effect justice among the parties. The commission, at every stage of any proceeding, will disregard errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties.

46. Applying that standard here, if Commission finds that the Petition states a claim for which relief that could be granted under RCW 80.36.330 (despite failing to set forth a claim on which the commission may grant relief under RCW 80.36.320), then it may be appropriate to

construe the Petition as a request for reclassification of certain retail services, but not wholesale services, under that provision.

CONCLUSION AND RELIEF REQUESTED

47. For the reasons stated herein, the moving parties respectfully move that pursuant to WAC 480-07-380, the Commission dismiss Frontier's Petition for failure to state a claim under RCW 80.36.320, or in the alternative treat the Petition, pursuant to WAC 480-07-395(4), as a request for competitive classification of retail services under RCW 80.36.330 and WAC 480-121-061.

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