BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Frontier Communications Northwest Inc.'s Petition to be Regulated as a Competitive Telecommunications Company Pursuant to RCW 80.26.320	))))))	Docket No. UT- 121994 FRONTIER'S RESPONSE TO CLEC INTERVENORS' JOINT MOTION TO DISMISS

INTRODUCTION

1. The pending Motion[1] should be summarily denied. The CLEC Intervenors (as defined in Paragraph 1 of the Motion) mischaracterize the uses and standards applicable to a motion to dismiss. They improperly conflate the burden of pleading with the ultimate burden of proof. In its operative Petition,[2] in the direct testimony Frontier[3] has filed, or in this Response to the Motion – under controlling legal standards, all appropriate sources for consideration in response to the Motion – Frontier has adequately identified facts showing that all its operations are now competitive, including wholesale services. Whether the Commission ultimately so concludes is a question to be resolved after a hearing, not on disputed interpretations of the facts identified at this stage of the proceeding. Because the Motion should be denied no "conversion" of this proceeding to RCW 80.36.330 is necessary.

[1] CLEC Intervenors' Joint Motion to Dismiss Frontier's Petition to be Regulated as a Competitive Telecommunications Company Pursuant to RCW 80.36.320 or in the Alternative to Treat Petition as a Request Under RCW 80.36.330 (hereinafter the "Motion").

[2] Frontier Communications Northwest Inc.'s Replacement Amended Petition for Approval of Minimal Regulation in Accordance with RCW 80.36.330, filed January 24, 2013 (the "Petition").

[3] Frontier Communications Northwest Inc.

STATEMENT OF FACTS

2. In the Petition, Frontier identified the geographic area for which it requested a competitive classification as "all of its serving areas (102 wire centers) in the state of Washington." Petition, ¶ 2. In the Petition, Frontier sought competitive classification for the Company as a whole pursuant to RCW 80.36.320 as opposed to individual services as may be appropriate pursuant to RCW 80.36.330.

3. Frontier's Petition further explained that "[a]lternative service provider competitors offer equivalent or substitute services are comparable to Frontier's service offerings on the basis of product design, price and availability." Petition, ¶ 8. In the Petition and in its testimony Frontier has identified alternative service providers that have constructed their own networks and no longer rely on Frontier's facilities to offer service and alternative service providers offering wholesale services. Petition, ¶ 32[4]; Testimony of Jack D. Phillips, filed February 28, 2013, at 27-28, 38-39. In the testimony witness Phillips explained: "Several providers in Washington offer fiber and other wholesale services and solutions which are available to other communications companies to enable them to provide service to residential consumers, small businesses and large enterprise customers. Integra for example offers a variety of wholesale products and solutions to other providers, including CLECs, resellers and wireless providers." Testimony of Jack D. Phillips, filed February 28, 2013, at 38, lines 9-13. In addition, Mr. Phillip's testimony identified several companies such as Integra, World Communications Inc., Level 3,

[4] In the Petition, Frontier alleged: "Alternative providers have a variety of methods available to offer services to customers. Companies such as Comcast, Charter, Verizon Wireless and AT&T Mobility have built their own cable, wireless and other facilities in Washington." Petition, ¶ 32. This list was certainly not exclusive as indicated by the statement "such as" as there are other providers offering services that substitute for and compete with Frontier with respect to wholesale services.

Comcast and Charter that offer and target the provision of wholesale services. *Id.*, pp. 38-39 and Phillips Testimony Exhibit No. ___ (JP-14). Frontier has additionally identified public utility districts as municipal corporations specifically authorized to provide wholesale telecommunications services, and actively doing so throughout its serving territory. *Id.*, p. 28.

4. Indeed, even a cursory review of publicly available information demonstrates that the Motion is without merit. Virtually all of the CLEC Intervenors hold themselves out to the public as offering the wholesale services that they claim are not adequately put at issue in this proceeding:

- Intervenor Integra identifies on its website "Wholesale Products and Services" as one of the main categories of services it offers. Declaration of Timothy J. O'Connell, Ex. A., p. 1. Integra boasts that it provides services "to LECs/CLECs, wireless providers, resellers" and others, *id.*, p. 2, including dark fiber, *id.*, p. 3, private line services, *id.*, p. 4, and colocation. *Id.* p. 5.

- Intervenor Level 3 similarly hosts an entire page on its website devoted to "Wholesale/Carrier Voice." O'Connell Dec., Ex. B, p. 1. Level 3's website is specifically targeted at any "reseller, hoster, or voice service provider." *Id.* Level 3 boasts that it "serves 18 of the world's top 20 Telecom Carriers." *Id.* Level 3 also provides private line services, *id.*, p. 3, and dark fiber. *Id.*, p. 5.

- Intervenor tw telecom lists "wholesale" as one of the primary areas of its services. O'Connell Dec., Ex. C.

- Intervenor Charter offers "Business Carrier Solutions." O'Connell Dec., Ex. D, including "customized solutions for carriers." *Id.*, p. 2.

5. Frontier has promulgated discovery to all the CLEC Intervenors inquiring into their provision of these wholesale services and others, as well as their utilization of wholesale services from providers other than Frontier. O'Connell Dec., Ex. E. Additionally,

Frontier anticipates seeking leave to serve discovery on various third parties not currently involved in this docket as to their provision of wholesale telecommunications throughout the state of Washington. O'Connell Dec., ¶ 5.

STATEMENT OF ISSUES

6. Under controlling legal standards, defined to be the principles applicable to a motion under CR 12(b)(6) of the Washington superior court civil rules, may the moving party base a motion to dismiss on its construction of the factual statements made in an opening pleading, without regard for other facts identified by the non-moving party?

7. Given the facts in support of its Petition identified by Frontier, must the Motion be denied?

EVIDENCE RELIED UPON

8. In the Motion, the CLEC Intervenors claim to rely solely on the Petition. Motion, ¶ 6. In responding to the Motion, as is appropriate in consideration under the standards enunciated for a CR 12(b)(6) motion, Frontier relies upon its Petition, the Direct Testimony of Jack D. Phillips, and the Declaration of Timothy J. O'Connell.

LEGAL STANDARD

9. The Motion is brought as a motion to dismiss.[5] Motion, ¶ 1. In considering such a motion, the Commission is required to consider the standards applicable to a motion under CR 12(b)(6). WAC 480-07-380(1)(a). Thus, the Commission must presume Frontier's allegations to be true. *Dilley v. S & R Holdings, LLC,* 137 Wn. App. 774, 154 P.3d 955 (2007). A motion to dismiss may be granted only if it appears beyond

[5] Under the express provisions of WAC 480-07-380(1)(a), the non-moving party (Frontier) may submit material outside the pleadings without converting the motion into a motion for summary for summary determination. As will be discussed above in light of the standards applicable to a motion under CR 12(b)(6) such a distinction is wholly appropriate.

reasonable doubt that no facts exist that would support the claimed relief. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

10. The law is clear that motions under CR 12(b)(6) should be granted only "sparingly and with care." *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147, 153 (1995). In considering a motion under CR 12(b)(6), not only are the non-moving party's allegations taken as true, such a motion may only be granted "if it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Matsyuk v. State Farm Fire & Casualty Co.*, 173 Wn.2d 643, 662, 272 P.3d 802, 811 (2012) (overturning grant of CR 12(b)(6) motion when facts are disputed). Thus, it should not be surprising that CR 12(b)(6) motions should only be granted "in the unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Cutler*, 124 Wn.2d at 755.

11. Therefore, in considering CR 12 (b)(6) motions, it is plainly well established law that the reviewing agency may even consider "hypothetical facts"; if any such facts would give grounds for relief, a CR 12(b)(6) motion is improper. *Id.* The breadth of factual allegations that will defeat a CR 12(b)(6) motion was emphasized by the Supreme Court in *Bravo* which even allowed consideration of hypothetical facts "*alleged for the first time on appellate review.*" 125 Wn.2d at 750 (emphasis in original). There is nothing unfair in such proposition, since the question on a CR 12(b)(6) motion is whether any facts supporting a claim for relief "can be conceived." *Id.*

12. Given this framework, it should be unsurprising that a CR 12(b)(6) motion is one that raises a question of law. *Paradise, Inc. v. Pierce Co.*, 124 Wn. App. 759, 767, 102 P.3d 173, 177 (2004). All of the cases relied upon by CLEC Intervenors thus involved solely

questions of law. *Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 172 Wn.2d 384, 258 P.2d 36 (2011) (whether certain county actions were "local regulations"); *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 962 P.2d 104 (1988) (questions of law concerning federal preemption, the filed rate/filed tariff doctrine, and the primary jurisdiction doctrine); *Matsyuk*, 173 Wn.2d at 662 (grant of CR 12(b)(6) motion overturned, because it depended upon disputed facts); *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 118 P.3d 311 (2005) (coverage barred by statutory exclusion); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1046 (1987) (questions of *res judicata* and policy interpretation). Not one of the cases relied upon by CLEC Intervenors involve the issue of whether the allegations in the initial pleading in a case, by itself, satisfied the ultimate evidentiary burden in the proceeding.

13. Thus, the question on a motion under CR 12(b)(6) is not whether Frontier will "ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325, 327 (7th Cir. 1999). Frontier need only "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (citations omitted).

ARGUMENT

I. *The Movants Confuse the Burden of Proof and the Burden of Pleading, and Misapprehend the Nature of a Motion to Dismiss*

14. The Commission's rules do not precisely define the requirements for a petition to classify a company as a competitive telecommunications company pursuant to RCW 80.36.320. The company must file a petition, which must state the effective date of the requested classification. WAC 480-121-061(1). In contrast, the Commission's rules establish specific requirements for the petition seeking to classify a specific telecommunications

service as competitive pursuant to RCW 80.36.330. *See* WAC 480-121-062. Frontier filed under RCW 80.36.320, not RCW 80.36.330.

15. In the absence of any specific requirement for a petition for classification as a competitive telecommunications company, the Petition is evaluated by the Commission's general standards for such pleadings, WAC 480-07-370(1)(b). A petition must "clearly and concisely set for the ground(s) for the petition and the relief requested." WAC 480-07-370(1)(b)(ii). As a pleading, the Petition is subject to liberal construction:

> 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.

WAC 480-07-395(4); see also RCW 4.36.240.

16. In contrast with the lack of specificity for the contents petition initiating a competitive classification proceeding, the Commission's rules are clear as to the ultimate burden of proof. It is the telecommunication company's "burden of demonstrating that the company" is subject to effective competition. WAC 480-121-061(4).[6] One of, if not the fundamental error in the Motion is thus the Joint Intervenors' repeated attempt to conflate what must be ultimately proven at the end of this proceeding with what must be initially alleged. *E.g.,* Motion at ¶ 14 ("Further, under WAC 480-12-061(5), the petitioner must plead and prove…."). That claim is precisely wrong. WAC 1480-07-380(4), not subsection (5), discusses the burden of proof; neither subsection addresses at all the burden of what must be pleaded. Subsection (5) identifies the factors "the commission

[6] Because it is irrelevant, Frontier does not reply herein to the CLEC Intervenors' claim that Frontier faces a "heavy burden." Motion at ¶ 9. Respectfully, if the Commission determines that the services offered by a company are subject to effective competition, the Commission "**shall** classify a telecommunications company as a competitive telecommunications company." RCW 80.36.320(1)(emphasis added).

will consider" – a consideration it can only make at the conclusion of the proceeding after hearing all the evidence.

17. The CLEC Intervenors' error in this regard can be found in the very authorities upon which they rely. In *US West Communications Inc. v. WUTC*, 86 Wn. App. 719, 937 P.2d 1326 (1977), the Court noted that the applicant faces the burden to "demonstrate that it faces effective competition in the relevant market." *Id.* at 86 Wn. App. at 724, 937 P.2d at 329. The Commission resolved that issue making findings of fact after a hearing which the court reviewed. *Id.* at 725-26, 937 P.2d at 1330. The Court made no suggestion that it was the applicant's burden to make such proof in its initial filing, rather than as a result of a hearing.

18. The same conclusion is compelled by consideration of the Commission's prior decisions under related statutes, again, upon which the Joint CLECs rely. The Commission has made clear that its determination of effective competition "is not based upon a precise recipe." *In the Matter of the Petition of Qwest Corp. for Classification of Business Service in Specified Wire Centers,* Docket No. UT-000883, Seventh Supplemental Order, December 18, 2000, ¶73. The Commission has made clear that its determination "is based on our consideration of the totality of the evidence presented." *Id.* There is no suggestion therein, nor have Joint CLECs cited a single example, that the determination is to be made solely on the facts identified in the initial petition filed in such a proceeding.

19. Particularly when considering the appropriate standards for motion under CR 12(b)(6), Frontier has alleged and identified more than sufficient facts to support the proceeding going forward. Any number of hypothetical facts dictates that the motion be denied.

Contrary to the assertion in paragraph 28 of the Motion, some of the CLEC Intervenors or other comparably situated alternative service providers have built or deployed extensive networks in Washington and do not rely on Frontier to provide service to end user customers. These providers self-provision loops, transport and/or interconnection or their functional equivalents, or other wholesale services to provide service. These hypothetical facts, by themselves, would be sufficient to deny the motion. In fact, however, these facts are not hypothetical facts. As the testimony filed in this case shows, many alternative service providers, including some of the Joint CLEC Intervenors, PUDs and others, in fact, provide those very services. Testimony of Jack D. Phillips, filed February 28, 2013, at 27-28, 38-39. On that basis alone, the motion should be denied.

20. Moreover, it is important to recognize that RCW 80.36.320(1) does not require that the exact same service be available from alternative service providers. Instead the statute provides that effective competition exists if "customers have reasonably available alternatives." Frontier's Petition, the direct testimony filed thus far, and these materials submitted in response to the Motion establish that customers have "functionally equivalent or substitute services readily available" as required by RCW 80.36.320(1). *E.g.,* O'Connell Dec. Ex.s A-D.

21. Even though Frontier has not yet received responses to its data requests issued to the Joint CLECs, Frontier does not request the continuance to which it might be entitled.[7] Again, the mere existence of the facts sought in those discovery requests demonstrate that

[7] *Cf.* Motion, ¶ 28 ("As this Commission knows...."). Pursuant to WAC 480-07-380(2)(a), consideration of "matters of which official notice may be taken" renders the motion one for summary determination, evaluated under the standards of CR 56. One such provision is CR 56(f), which permits denial or continuance of a motion under CR 56 for the non-moving party to conduct discovery.

facts could "exist" that would show that Frontier's petition should be granted. The existence of those facts mandates that the Motion must be denied.

II. *The Motion Attempts to Confuse the Interplay Between Federal Law and Frontier's Petition*

22. Repeatedly, the CLEC Intervenors seek to draw some inference from Frontier's recognition that its obligations under federal law, including Sections 251 and 252 of the Telecommunications Act, are not affected by the Petition. Respectfully, this analysis is wrong for at least three reasons

23. First, the CLEC Intervenors are wrong because their intimations are contrary to the appropriate standards for a motion to dismiss. For purposes of a CR 12(b)(6) motion, the facts identified by Frontier are presumed true. A motion to dismiss under CR 12(b)(6) does not invite the judge to weigh the facts.

24. Second, the CLEC Intervenors' arguments are wrong as a matter of logic. Contrary to the suggestion of the Motion, ¶¶ 20-22, the ability of Frontier to specify what services and products CLECs obtain from Frontier simply says nothing as to the existence or nonexistence of competitive service alternatives including what wholesale services CLECs self-provision, sell to others, or obtain from others. Frontier has alleged in its Petition that all services are subject to competition. For example, Frontier's Petition explained that "[a]lternative service provider competitors offer equivalent or substitute services that are comparable to Frontier's service offerings on the basis of product design, price and availability." Petition, ¶ 8. The Petition also stated: "The variety and expanding market share of alternative service providers providing voice and other substitute services today, combined with loss of more than sixty percent of its access lines in Washington since 2000, demonstrates that Frontier no longer has the market

power or captive customer base . . . ." Petition, ¶ 58. Frontier has also alleged that wireless providers, cable companies, PUDs and other third party and VoIP providers have entered the market and deployed their own facilities which can be used to provide services. E.g., Petition, ¶¶ 55-57. These allegations, which must be presumed to be true, are sufficient to satisfy the "notice" pleading standard applicable in this proceeding. Moreover, Frontier will undoubtedly obtain additional information regarding the level of competition for wholesale services based on discovery in this case and there is no a reason to stop this proceeding before that information can be gathered.

25. Third, Frontier's recognition that it will continue to have obligations under Sections 251 and 252 has nothing to do with Frontier's perception of the extent of wholesale competition or represent some type of "tacit admission that such service are ***not currently*** subject to effective competition." Motion at 21 (bold and italics in original).[8] Rather, it has solely to do with the simple fact that no ruling from this Commission reclassifying Frontier as a competitive service provider can override obligations imposed by federal law. Const. of the United States, Art. VI, ¶ 2. Specifically the 1996 Telecommunications Act, ("1996 Act") and rules implemented by the Federal Communications Commission impose federal requirements on Frontier as an incumbent local exchange carrier[9] that this

[8] The CLEC Intervenors' complaint that Frontier has not accessed the relief that may be available under the TRRO, Motion, ¶ 23, is particularly instructive as the Joint Intervenors' failure to grasp the standards it faces on this motion applying CR 12(b)(6) principles. Whether or not Frontier has sought some other relief, before some other agency, simply says nothing as to whether Frontier has identified facts that, if true, would authorize the relief it seeks in this claim. Plainly Frontier has identified such facts.

[9] The term 'incumbent local exchange carrier' is defined in federal law and means, with respect to an area, the local exchange carrier that-- (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i). 47 U.S.C. 251(h). Frontier is and will

Commission cannot eliminate, reduce or change by classifying Frontier as a competitive carrier. As Frontier explained, the Company will continue to comply with all federal requirements applicable to an ILEC such as Section 251 and 252 interconnection and wholesale obligations under the 1996 Act

III. *Frontier Has Identified the Relevant Markets; the Ultimate Determination Is for the Commission, After Hearing All the Evidence*

26. Joint CLEC Intervenors complain that Frontier has not identified the relevant market. Respectfully, that is plainly incorrect. In the Petition Frontier alleged: "The geographic area for which Frontier requests competitive classification includes all of its serving areas (102 wire centers) in the state of Washington." Petition, ¶ 2. The facial error is further apparent from the Pre-Hearing Conference Order in this case. The Administrative Law Judge was readily able to ascertain the market for which Frontier sought reclassification: the petition seeks "classification as a competitive telecommunications company throughout its current service territory." Pre-Hearing Conference Order, ¶ 1.

27. Moreover, again the very authorities upon which the Joint CLECs rely prove that their contention is in error. The Supreme Court could not have been more clear: a party is a competitive telecommunications company in a relevant market "as the *Commission* defines the relevant market." *In re ELI*, 123 Wn.2d at 547, 869 P.2d at 1054-55 (emphasis in original). The Commission there defined the relevant market after taking evidence in a hearing. The same course should be followed in this proceeding.

28. Fundamentally, the Motion faults Frontier for not sufficiently distinguishing between the wholesale and retail aspects of the telecommunications business. However, as noted

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remain an incumbent local exchange carrier subject to the obligations in Section 251/252 notwithstanding any action by the Commission to classify Frontier as a competitive telecommunications service provider.

above, Frontier's Petition satisfies the Commission's pleading standard applicable in this proceeding by "clearly and concisely set[ting] forth the ... facts that constitute the basis of the petition." 480-07-380(1)(b)(ii)(B). Frontier's Petition explained that "[a]lternative service provider competitors offer equivalent or substitute services that are comparable to Frontier's service offerings on the basis of product design, price and availability." Petition, ¶ 2. The fact that the Petition does not distinguish between the wholesale and retail markets is irrelevant in that the Petition alleges that *all* services, which would include wholesale services, are subject to effective competition. Frontier's Petition, the direct testimony filed so far and the information submitted in response to this Motion show that the wholesale market is competitive and telecommunications providers have constructed their own networks and have the option to purchase wholesale services from providers other than Frontier. Given these facts, Frontier's allegation that *all* telecommunications services are competitive is certainly "plausible" *Ashcroft,* 556 U.S. at ___, 129 S. Ct. at 1949. Frontier should be afforded the opportunity to demonstrate the existence of competition and even if the failure to distinguish between the wholesale and retail markets is a defect in the pleading, the Commission's rules specifically provide that such defects are not dispositive, WAC 480-07-395(4), and the Petition is not thereby subject to dismissal. Even if the Commission were to find, which it should not, that the Petition was somehow insufficient, Frontier should instead be allowed to correct to amend the Petition in accordance with WAC 480-07-395(5) – and that amendment would need do nothing other than add to the Petition the facts identified in Frontier's testimony, or in the materials submitted in response to this Motion.

IV. Recharacterizing the Petition as a Request under RCW 80.36.330 Is Unnecessary

29. For all the reasons identified above, the Motion should be denied. Therefore, the Petitioner's fallback theory of recharacterizing the Petition as one for the classification of Frontier's retail services as competitive is wholly unnecessary.

30. Moreover, such recharacterization is unnecessary at this juncture. The standards of inquiry are for all practical purposes identical in RCW 80.36.320(1) and RCW 80.36.330(1). The only question is the scope of those services compared to the Company's operations. If the Commission were to ultimately conclude that Frontier did not carry its burden of proof as to one or more services such as wholesale services, the Commission could potentially limit the scope of the resulting classification with respect to those particular services. No recharacterization is necessary or appropriate at this early phase in the proceeding.

CONCLUSION AND RELIEF REQUESTED

31. For all the foregoing reasons, the Motion should be denied.

Submitted this 14th day of March, 2013.

/s/ TJOC per e-mail authorization
Kevin Saville
Vice President & Associate General Counsel
Frontier Communications Corporation
2378 Wilshire Blvd.
Mound, Minnesota 55364
Phone: (952) 491-5564
Fax: (952) 491-5577
e-mail: Kevin.Saville@FTR.com

Timothy J. O'Connell
Stoel Rives, LLP
One Union Square
600 University St., 36th Floor
Seattle, WA 98101
Phone: (206) 386-7562
Fax: (206) 386-7500
e-mail: tjoconnell@stoel.com