

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 UT-121994

COMMISSION STAFF'S
RESPONSE IN SUPPORT OF THE
ALTERNATIVE RELIEF
PROPOSED IN CLECS' MOTION
TO DISMISS

I. INTRODUCTION

1 Staff of the Washington Utilities and Transportation Commission (Commission) submits this response in opposition to dismissal of the proceeding but in support of the alternative relief that the CLECs propose in the 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 filed March 7, 2013 (Joint Motion).

II. BACKGROUND

2 On January 24, 2013, Frontier Communications Northwest Inc. (Frontier) filed a Replacement Amended Petition for Approval of Minimal Regulation in Accordance with RCW 80.36.320 (Petition). Frontier had filed an earlier, almost identical, petition on December 24, 2012. In response, partly, to the concerns of Commission Staff (Staff) regarding customer notice, Frontier replaced that petition with a later filing, which facilitated provision of notice to Washington customers, including wholesale customers, that Frontier was seeking competitive classification.¹

¹ See Declaration of Carl A. Gipson of Additional Notice in Accordance with WAC 480-120-198 dated January 25, 2013, on file in this docket.

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In its Petition, Frontier presents various data to support its assertions concerning retail competition in its service area. Frontier does not allege in the Petition that there is competition to provide wholesale services. On February 28, 2013, Frontier filed written direct testimony discussing competition from other providers of wholesale services² and indicating that it was seeking pricing flexibility for wholesale services as well as retail services.³

III. ARGUMENT

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Staff agrees with the legal analysis in the Joint Motion but does not support dismissing the Petition in its entirety. For the reasons discussed below, Staff believes the alternative approach proposed in the Joint Motion is fair to the parties and in the public interest.

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Under RCW 80.36.320, Frontier bears the burden of demonstrating that its services are subject to effective competition.⁴ “Effective competition means that the company’s customers have reasonably available alternatives and that the company does not have a significant captive customer base.” RCW 80.36.320(1). As the Joint Motion argues, Frontier simply has failed to plead in the Petition that its wholesale service customers have reasonably available alternatives and that they are not captive customers.

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It appears, from Frontier’s direct testimony, that Frontier is seeking pricing flexibility for wholesale services. Frontier did not state this in its Petition, however. In fact, the Petition contains no allegations that Frontier’s wholesale services are subject to effective competition. Frontier cannot pursue pricing flexibility in this proceeding without showing, as required in RCW 80.36.320, that these wholesale services are subject to effective competition.

² Direct Testimony of Jack D. Phillips, Exh. No. ___ (JP-1T), 27:15-20.

³ Direct Testimony of Billy Jack Gregg, Exh. No. ___ (BJG-2T).

⁴ WAC 480-121-061(5).

7 Because a petition for competitive classification can be granted at an Open Meeting, without consideration of additional evidence, it is vital that a competitive classification petition contain complete (and well supported) allegations. Frontier's Petition addresses competition in the retail market only. Accordingly, the issue of whether Frontier is subject to effective competition for wholesale services is not before the Commission. It follows that, in excluding a whole class of services, Frontier's Petition does not fit under RCW 80.36.320.

8 Because Staff believes it is plausible that Frontier is subject to competition in at least some retail markets, Staff believes that it is appropriate to move forward with the analysis of whether there is effective competition for certain retail services. The competitive classification statutes were enacted to provide the industry with regulatory flexibility where the Commission determined that was appropriate. Dismissing this case in its entirety would conflict with the legislative policy of implementing regulatory flexibility for companies that provide services in a competitive market.⁵

9 Although Staff supports moving forward with this case, Staff perceives a risk with proceeding under RCW 80.36.320. In Staff's analysis, if the Commission finds that any of Frontier's services for which the company seeks pricing flexibility is *not* subject to effective competition, the Petition may be denied. In that case, Frontier might not receive competitive classification for any services, even if the company could meet its burden with respect to some services. Such a result would involve an unnecessary expenditure of Staff resources and the resources of other parties as well.

10 Because of the possibility that one or more services may not be subject to effective competition, Staff supports proceeding in this docket under RCW 80.36.330, which allows

⁵ RCW 80.36.300(6).

the Commission to classify particular services as competitive, or under the Alternative Form of Regulation (AFOR) statute, RCW 80.36.135. Because RCW 80.36.330 involves the same market analysis as does RCW 80.36.320, converting the proceeding to an analysis under RCW 80.36.330, rather than dismissing the Petition, would not unduly prejudice Frontier. Regarding AFOR, Frontier did once commit to file an AFOR plan. When Frontier acquired Verizon's local exchange company in Washington, Frontier agreed to file an AFOR petition in five years. The Commission modified the commitment to provide that Frontier could, but was not required to, petition for an AFOR within five years.⁶ An AFOR proceeding could allow greater flexibility in analysis and result. Accordingly, Staff proposes as a further alternative, that Frontier's petition be amended to convert this proceeding to an AFOR proceeding.

IV. CONCLUSION

11 In summary, Staff concurs with the legal analysis in the Joint Petition but believes that the public interest is best served by converting the proceeding rather than dismissing the Petition. Terminating the proceeding, when it is likely that Frontier is subject to competition in at least some markets, would squander the expenditure of Staff and other party resources to date as well as frustrate the Legislature's policy permitting flexible regulation of competitive telecommunications services. Accordingly, Staff supports converting the proceeding to an RCW 80.36.330 proceeding or to an AFOR under RCW 80.36.135.

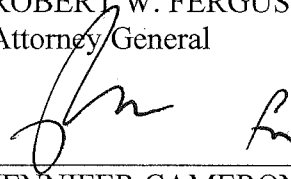
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⁶ *In the Matter of the Joint Application of Verizon Communications, Inc., and Frontier Communications Corporation for an Order Declining to Assert Jurisdiction Over, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest, Inc.*, Docket UT-090842, Order 06, Final Order Approving and Adopting, Subject to Conditions, Multiparty Settlement Agreements and Authorizing Transaction, p. 88 (April 16, 2010).

DATED this 14th day of March, 2013.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

Handwritten signature of Robert W. Ferguson in black ink, consisting of a stylized 'R' and 'W' followed by 'FERGUSON'.

JENNIFER CAMERON-RULKOWSKI
Assistant Attorney General
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Transportation Commission Staff