

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of)	DOCKET UT-121994
)	
FRONTIER COMMUNICATIONS)	CLEC INTERVENORS' REPLY IN
NORTHWEST INC.,)	SUPPORT OF JOINT MOTION TO
)	DISMISS FRONTIER'S PETITION
To be Regulated as a Competitive)	
Telecommunications Company Pursuant)	
to RCW 80.36.320)	
)	
)	
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ARGUMENT

I. Joint CLECs' Motion Correctly Targets a Failure of the Pleading on its Face, Not a Failure of Proof.

1. Frontier's Response¹ incorrectly contends that the CLEC Intervenors have confused Frontier's burden of pleading with its ultimate burden of proof. Frontier Response, ¶¶ 1, 16. However, that is not the case. As identified in CLEC Intervenors' Joint Motion,² Frontier's Petition³ fails because of key gaps and inconsistencies in what Frontier has (and has not) alleged. The fundamental problem is not that Frontier has failed to offer evidence to prove its allegations, which it did not, but that even if Frontier proved all of its allegations in the Petition (that is, assuming the allegations are true), Frontier still would not be entitled to relief. *See Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wash.2d 384, 389, 258 P.3d 36 (2011) ("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."). The Joint Motion identifies two key reasons why the allegations fail to state a claim on which relief can be granted.

A. Frontier Has Failed to Allege a Plausible Basis for Concluding Effective Competition for Wholesale Services Exists Today.

2. First, even if Frontier's allegations were all proven true, the proven allegations would not entitle Frontier to reclassification of the entire company under RCW 80.36.320, because

¹ Frontier's Response to CLEC Intervenors' Joint Motion to Dismiss (filed March 14, 2013) ("Response").

² 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 8, 2013) ("Joint Motion").

³ Frontier Communications Northwest Inc.'s Replacement Amended Petition for Approval of Minimal Regulation in Accordance with RCW 80.36.330 (filed January 23, 2013) ("Petition").

there are material gaps and inconsistencies in the allegations concerning wholesale services. Frontier's ultimate burden of demonstrating effective competition for all services under RCW 80.36.320 matters here, not because Frontier must prove its allegations at this stage, but because Frontier's allegations -- even when assumed to be true -- fall well short of the required demonstration. Competitive classification under RCW 80.36.320, unlike RCW 80.36.330, is all-or-nothing. Unless *all* a company's services are subject to effective competition throughout its service territory, then it cannot obtain relief under RCW 80.36.320. The failure to even *allege* facts that, *if proven*, would show effective wholesale competition means that Frontier has no hope of satisfying its ultimate burden of proof -- and is not entitled to the relief it seeks.

3. Second, Frontier's own allegations concerning competition for *retail* services are actually inconsistent with the existence of effective competition for *wholesale* services. Specifically, Frontier alleges, in essence, that effective retail competition results from CLECs' access to Frontier's own wholesale services and facilities. *See, e.g.*, Petition, ¶ 33 ("By reselling Frontier's retail services, CLECs have the ability to reach every single business and residential customer that Frontier serves in Washington and to provide the same retail services Frontier currently provides."); ¶ 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."), ¶ 34 ("CLECs also provision retail business services solely from Frontier's wholesale services, utilizing UNE-P, which provides a complete retail service using Frontier unbundled network elements."). If those allegations about retail competition are true -- as is assumed on a motion to dismiss -- then the Commission must recognize that such retail competition is a direct result of the federal and state policies which imposed those wholesale obligations. Because

Frontier’s own allegations indicate that CLECs rely on essential wholesale inputs to provide their competitive retail products and services, they necessarily remain captive customers who lack alternatives to Frontier in the wholesale market.

4. Frontier correctly asserts that hypothetical facts may be considered in a motion to dismiss, Response at ¶ 11, as noted in the Joint Motion. Joint Motion, ¶ 8. But Frontier overlooks the limitation that any such hypothetical facts must be consistent with the pleading. *See Perry v. Rado*, 155 Wash.App. 626, 639-40, 230 P.3d 203 (Ct. App. 2010), *rev. denied*, 169 Wash.2d 1024 (2010) (“Dismissal under CR 12(b)(6) is appropriate in those cases where the plaintiff cannot prove any set of facts, *consistent with the complaint* that would entitle the plaintiff to relief.”) (emphasis added); *see also Gorman v. Garlock, Inc.*, 155 Wash.2d 198, 215, 118 P.3d 311, 320 (2005) (“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.*”) (emphasis added).
5. Here, the pleading makes clear that CLECs depend on Frontier for wholesale services while competing for retail customers. Yet the existence of effective competition for *all* services (including wholesale) is a precondition for relief under RCW 80.36.320. Therefore, no hypothetical facts that are consistent with the allegations in the Petition would entitle Frontier to relief. Even if one accepts Frontier’s after-the-fact characterization of certain paragraphs as having alleged that all of its services are subject to competition, *e.g.*, Response, ¶¶ 24, 28, that just exacerbates the inconsistency, ensuring that no set of facts could be consistent with the Petition, such that dismissal is warranted.

6. Frontier also suggests, in essence, that less rigorous pleading requirements exist for a RCW 80.36.320 petition than a petition under RCW 80.36.330. Response, ¶ 14. That suggestion is incorrect. First, under WAC 480-07-370(b)(ii)(B), “[a] petition must state: . . . [f]acts that constitute the basis of the petition” Here, the basis on which Frontier claims to satisfy the requirements expressly applies to classification of a company under RCW 80.36.320 and WAC 480-121-061. *Cf.* CR 8 (requiring “(1) a short and plain statement of the claim *showing that the pleader is entitled to relief.*”) (emphasis added). Allowing companies that seek more to plead less makes no policy sense, and is thus an implausible interpretation of the Commission’s rules. Contrary to Frontier’s characterization of notice pleading, Response, ¶ 24, the Commission’s rules expressly require the factual basis for relief to be pleaded. WAC 480-07-370(b)(ii)(B). As Staff aptly notes, “[b]ecause a petition for competitive classification may be granted at an Open Meeting without additional evidence, it is vital that a competitive classification petition contain complete (and well supported) allegations.” Staff Response, ¶ 7.⁴ In fact, Frontier sought approval of its Petition at a Commission Open Meeting. *See* Washington Utilities and Transportation Commission, Minutes, January 31, 2013, Item A-1. The fact that the Commission decided to subject the Petition to further proceedings does not remove Frontier’s burden of pleading in this docket.

B. Frontier Has Failed to Allege Facts Identifying Relevant Markets by Service.

7. Frontier openly admits “[t]he fact that the Petition does not distinguish between the wholesale and retail markets,” Response, ¶ 28. This failure to even attempt to identify the distinct markets relevant to wholesale and retail services is compounded by the fact that the

⁴ Staff Response in Support of the Alternative Relief Proposed in CLECs’ Motion to Dismiss (filed March 14, 2013) (“Staff Response”).

remaining allegations in the Petition focus entirely on retail competition. *See* Joint Motion, ¶ 19; Staff Response, ¶ 7 (“Frontier’s Petition addresses competition in the retail market only.”). While Frontier points to its identification of the geographic area in which it seeks competitive classification, Response ¶ 26, Frontier overlooks a key distinction between ILEC service boundaries (which reflect monopoly era boundaries, not boundaries of competitive markets), and the boundaries of markets for wholesale and retail services. Merely identifying ILEC wire centers for reclassification is insufficient, because *competitive* markets are defined by not only geography, but by services and customer purchasing constraints. RCW 80.36.320 reflects a sophisticated, antitrust-style market analysis where market power is measured using factors like ease of entry into the relevant market. *See* Sharon L. Nelson, Washington State’s new Regulatory Flexibility Act, 117 Public Utilities Fortnightly 1 (Jan. 9, 1986), at 31 (“Furthermore, the statute [section 4, now RCW 80.36.320] dictates certain factors, resembling those used in antitrust analysis, that the Commission shall consider in making this determination.”). The geographic boundaries of a market need not correspond to ILEC boundaries, just as the market for agricultural commodities may be larger (or smaller) than a single county or state. *Cf. Ballo v. James S. Black Co.*, 39 Wash.App. 21, 29, 692 P.2d 182 (1984) (“The relevant geographic market for purposes of antitrust law is determined, in part, by the area to which the purchaser can reasonably turn to obtain the product.”). While the Commission makes the final determination of the relevant markets, Frontier has failed to make sufficient allegations to show that it is entitled to the relief it seeks, even assuming its allegations were true.

C. Frontier's Pre-filed Direct Testimony, Declaration, and Discovery Cannot Save the Petition's Defective Allegations.

8. Frontier repeatedly attempts to cite testimony, portions of CLEC websites, and new declarations to supplement the allegations in the Petition, Response, ¶¶ 4, 8, 19, 20. However, later-filed evidence does not remedy the facial defects of Frontier's pleading. Such evidence does not form part of the pleadings in this proceeding that are the subject of the Joint Motion. *See* WAC 480-07-380 (defining pleadings). Because the pleadings are defective on their face, in light of the gaps and inconsistencies identified above and in the Joint Motion, such added evidence is immaterial, and does not convert the Joint Motion into one for summary judgment. *See Haberman v. Washington Public Power Supply System*, 109 Wash.2d 107, 121, 744 P.2d 1032, 1046 (1987) ("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.") (emphasis added). Frontier further suggests that the potential for further discovery creates potential factual issues that preclude dismissal, Response, ¶ 21 n. 7. But any suggestion of a continuance under CR 56(f), *see* Response, ¶ 21, n. 7, ignores the nature of the motion to dismiss (akin to a CR 12(b)(6) or 12(c) motion, not a CR 56 motion for summary judgment), which relies on no factual issues, but points to the deficiencies in what Frontier has alleged with respect to the relief it seeks. The Commission need not consider anything outside the pleadings to decide the pending Joint Motion, and need not accept any evidence offered by Frontier.

9. In any case, Frontier's declarations fail to fill gaps in its allegations concerning relevant markets and wholesale competition, and cannot rectify the inconsistencies between Frontier's allegations that Frontier-provided wholesale services are essential for retail competition with a bare assertion that those same wholesale services are subject to effective competition as required under RCW 80.36.320.
10. Even if the Commission were to consider Frontier's pre-filed testimony, it would find that Frontier has still not posited facts that would support relief if found to be true. For example, *nowhere* has Frontier alleged that its intrastate switched access services are subject to competition. *Cf.* Direct Testimony of Billy Jack Gregg, at 6, line 2, to 7, line 19 (citing FCC regulation and Commission monitoring, not market forces, as governing rates). Thus, there is no set of alleged facts that, if proven, would support the requested relief.
11. Finally, Frontier's attempt to rely on the fact that it has issued discovery requests on CLECs is completely misguided. This discovery was issued *after* the deadline for Frontier to pre-file its direct testimony, in which Frontier was required to provide evidence to support its prima facie case. The fact that Frontier is only now seeking such data emphasizes that its pleadings and testimony, even taken together, are insufficient to support its burden of pleading.

II. As an Alternative to Dismissal, Treating the Petition as a Request for Competitive Classification of Retail Services under RCW 80.36.330, or as a Petition for an Alternative Form of Regulation, Would Be Efficient and Just.

12. If the Commission determines that the allegations in the Petition would support a petition under RCW 80.36.330 for competitive classification of retail services, then conversion is a fair viable alternative to dismissal. As Staff and Public Counsel have noted, converting the petition to one under RCW 80.36.330, in that circumstance, would save time and resources

and allow Frontier to avoid having to start over with a new petition, possibly in a new docket, following dismissal. Moreover, conversion would allow the parties to focus testimony and discovery on just those retail services that the Petition actually alleges are subject to effective competition, thereby conserving the Parties' resources, and containing discovery costs.

Thus, principles of administrative and judicial efficiency would support a decision to treat this Petition as a request under RCW 80.36.330.

13. The Joint CLECs also support, in the alternative, Staff's recommendation that the docket proceed under the Alternative Form of Regulation ("AFOR") statute, RCW 80.36.135. Staff Response, ¶¶ 10-11.

CONCLUSION AND RELIEF REQUESTED

14. For the reasons stated herein and in the Joint Motion, the CLEC Intervenors respectfully request that the Joint Motion be granted.

DATED this 21st day of March, 2013.

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