

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 REPLY TO STAFF AND PUBLIC
COUNSEL'S RESPONSE IN SUPPORT OF
CLEC INTERVENORS' JOINT MOTION TO
DISMISS

INTRODUCTION

1. On March 14, 2013 the respective parties filed the Public Counsel's Response to CLEC Intervenor's Joint Motion to Dismiss ("Public Counsel Response") and the Commission Staff's Response in Support of the Alternative Relief Proposed in CLEC's Motion to Dismiss ("Staff Response"). The Public Counsel Response and Staff Response fail to identify a legal basis for dismissing Frontier's Petition in this proceeding. In fact, both the Public Counsel Response and Staff Response reinforce the conclusion that the Motion¹ should be denied for at least two independent reasons. First, Public Counsel and Staff fail to consider the limited and liberal pleading threshold that is the controlling law with respect to the CLEC Motion to Dismiss and that Frontier has alleged and identified sufficient facts in the Petition and testimony regarding all of its services, including wholesale services to warrant proceeding to the evidentiary phase of this proceeding. Second, the Motion should be denied for an additional reason: Staff and Public Counsel are concerned about facts immaterial to Frontier's Petition because the test for effective competition under RCW 80.36.320 focuses only on end user customers and not on service alternatives available to other carriers. In the alternative, to the extent the

¹ CLEC Intervenor's 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").

Commission determines that the Petition was insufficient, the Commission should merely allow Frontier to clarify the Petition and proceed with the current proceeding pursuant to RCW 80.36.320.

**STAFF AND PUBLIC COUNSEL DISREGARD THE PROPER
STANDARDS FOR A MOTION TO DISMISS**

2. Both Public Counsel and Staff ignore the facts that Frontier has already identified in its Petition and prefiled testimony, which are more than sufficient to support the proceeding going forward with respect all of the services Frontier provides in Washington, including wholesale service. 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. In the Petition and in its testimony Frontier has identified alternative service providers that have constructed their own networks, including cable wireless and other facilities, and no longer rely on Frontier's facilities to offer service. Petition, ¶ 32 *see also* Frontier's Response², ¶¶ 3-5. In light of the facts identified in the Petition and Frontier testimony, the Motion is without merit and Staff and Public Counsel, like the CLEC Intervenors, fail to provide any legal basis to support the underlying premise of the Motion, that Frontier had not pleaded sufficient facts to constitute a claim under RCW 80.36.320.
3. As Frontier explained in its Response, the 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). The obligation to plead detailed facts has long been eliminated under Washington standards,:

² Frontier's Response to CLEC Intervenors' Joint Motion to Dismiss.

No longer is it necessary for a plaintiff to plead the facts ‘constituting a cause of action.’ Indeed, the phrase ‘cause of action’ no longer appears anywhere in the rules of civil procedure. The word ‘claim’ alone is used. ... The present requirement is: ‘(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems entitled.’ Rule of Pleading, Practice and Procedure 8(a)(1) RCW Vol. 0. Rule of Pleading, Practice and Procedure 7(c) RCW Vol. 0, abolishes demurrers. This means that demurrers are abolished, not masqueraded under another name, and that there is no necessity for stating the facts constituting a ‘cause of action;’ but that, on the contrary, a complaint is sufficient if it contains a short and plain statement of the claim showing that the pleader is entitled to relief and the demand therefore.

Sherwood v. Moxee School .Dist. #90, 58 Wn.2d 351, 352-53, 363 P.2d 138 (1961) (some citations omitted; quoting predecessor to CR 8 and CR 7(c)). Frontier has adequately identified facts when the Motion is considered under the principles enunciated in WAC 480-07-380(1), which expressly incorporates CR 12(b)(6) standards; the Motion should therefore be denied. The alternative relief sought in the Motion, and echoed in Staff’s and Public Counsel’s Response³ is thus simply without basis.

4. An analysis of both the Staff Response and Public Counsel Response mandates that the Motion be denied. Staff recognizes that Frontier has identified facts regarding competition in the wholesale market. Staff Response, at ¶3. Staff claims that a petition under RCW 80.36.320 must meet some heightened pleading standard, Staff Response, at ¶ 7, without identifying any source for this obligation. Indeed, the inference Staff seeks –

³ Public Counsel appears to improperly allege unrelated grounds to dismiss, never asserted in the Motion, or in Public Counsel’s own motion to dismiss. Public Counsel asserts, with no further analysis, that Frontier’s recognition that it is under independent obligations to continue to participate in low-income and hearing impaired programs, E-911, the ETC status program, carrier of last resort requirements and obligations arising under federal law, somehow impacts Frontier’s status as a participant in today’s wholly competitive telecommunications market. Public Counsel’s Response, at 1. If Public Counsel had intended to assert that Frontier’s petition should be dismissed, it should have done so by way of a motion so that the issues could be thoroughly briefed to the Commission.

that a petition under RCW 80.36.320 must meet a heightened pleading requirement because it may be considered at an Open Meeting of the Commission – is belied by the statute. If the Commission finds a petition incomplete, it may be suspended and set for hearing. RCW 80.36.310(2). There is no requirement in WAC 480-121-061 for the heightened burden of pleading that Staff seeks to infer. The only requirement is that the petition “clearly and concisely sets for the grounds for the petition and the relief requested.” WAC 480-07-370(1)(b)(ii).

5. Indeed, the Public Counsel Response illustrates why a hearing must be had in this matter. Public Counsel alleges that “initial discovery ... indicates that the level of competition faced by Frontier varies significantly between services and geographic areas.” Public Counsel’s Response, at ¶1. Frontier disagrees that any such variation undermines the facts identified in Frontier’s Petition demonstrating that all of its services throughout its service territory are subject to effective competition. Nonetheless, precisely such “variations” are the type of factual disputes that can only be resolved upon consideration of evidence – not pleadings. The Motion should be denied, and Staff and Public Counsel illustrate in their responses why.

THE STAFF RESPONSE AND PUBLIC COUNSEL RESPONSE REINFORCE THAT THE MOTION IS DIRECTED AT AN IRRELEVANT CONSIDERATION

6. As Staff and Public Counsel make clear, the issue presented in this proceeding is whether Frontier’s services are subject to effective competition, focused on whether “the company’s customers” have available alternatives and whether Frontier has a significant “captive customer base.” RCW 80.36.320(1). The Motion to Dismiss, and the requested alternative remedy which Staff and Public Counsel support, appear to be premised on a legally incorrect assumption. Staff Response references the Motion and asserts “Frontier

simply has failed to plead in its Petition that wholesale service customers have reasonably available alternatives and that they are not captive customers.” Staff Response, at ¶ 5. Staff also raises concern that a finding that there is not effective competition for wholesale services Frontier provides to other carriers could undermine the proceeding and the granting of any regulatory relief for Frontier. Staff Response, at ¶¶ 6-9. Frontier appreciates Staff’s concern and perspective. However, the requirement that Frontier plead and ultimately demonstrate that other carriers, as opposed to end user customers, have service alternatives has been rejected by the Commission and approved by Washington courts.

7. In *US West Communications, Inc. v Washington Utilities & Transport. Comm’n*, 86 Wn. App. 719, 937 P.2d 1326 (1997), the incumbent appealed the classification of ELI and TCG as competitive telecommunications companies pursuant to RCW 80.36.320. 86 Wn. App. at 725-26. US West challenged the classification, contending that ELI and TCG would have a captive customer base: the carriers forced to use ELI’s and TCG’s service to terminate calls to their end users. *Id.* 726-27. The court examined the statute and its legislative history and had little difficulty rejecting US West claims:

Thus, the Legislature intended that the decisions regarding the competitive classification of telecommunications companies be made after analyzing the impact of the decision on the ratepayer. Consistent with this legislative intent, it follows that *the “customer” to which the competitive classification statute refers is the ratepayer, that is, the end user customer, not the carriers which use the company’s access services.*

Id. at 728 (emphasis added). The effect of the court and Commission prior ruling is clear: the purported (and disputed) absence of competition in the wholesale market is not basis

to dismiss Frontier's petition under RCW 80.36.320, or to recharacterize it as Staff and Public Counsel support.

THE STAFF RESPONSE AND PUBLIC COUNSEL RESPONSE REQUESTS TO RECHARACTERIZE THIS PROCEEDING AS AN AFOR OR PETITION UNDER RCW 80.36.330 ARE THE INAPPROPRIATE ALTERNATIVE REMEDY

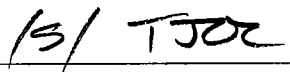
8. In accordance with its own rules, the Commission should "liberally" construe the Petition, "with a view to effect justice among the parties". WAC 480-07-395(4); see also RCW 4.36.240. As evidenced by the fact that CLECs have intervened and actively participated in this proceeding and the Staff Response and Public Counsel Response, there is no question that the parties recognize that Frontier intended to seek classifications as a competitive carrier for all of its services, including wholesale services, under RCW 80.36.320. No party will be prejudiced by the case proceeding under RCW 80.36.320 and Frontier should be afforded the opportunity to demonstrate the existence of competition with respect to all services, including wholesale services. Therefore, even assuming *arguendo* that Frontier failed to sufficiently distinguish between the wholesale and retail services in the Petition, the Commission's rules specifically provide that such defects in a pleading are not dispositive. WAC 480-07-395(4). Even if the Commission were to find, which it should not, that the Petition was somehow insufficient, instead of dismissing the case or recharacterizing the case as an AFOR or RCW 80.36.330 proceeding as suggested by Staff Response and Public Counsel Response, the Commission should allow Frontier to correct or amend the Petition in accordance with WAC 480-07-395(3) or WAC 480-07-395(5), respectively and proceed under RCW 80.36.320. Given the understanding of the parties from the beginning of this proceeding that wholesale services were included within the scope of the relief sought by Frontier

and that Frontier has addressed competition with respect to wholesale services in its prefiled testimony already filed in this docket, no intervening party would be prejudiced and the case could proceed on the existing procedural schedule.

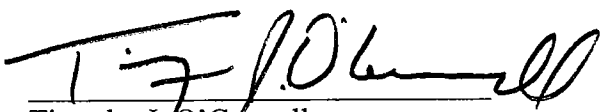
CONCLUSION AND RELIEF REQUESTED

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

Submitted this 21st day of March, 2013.



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