BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of FRONTIER COMMUNICATIONS NORTHWEST INC., To be Regulated as a Competitive Telecommunications Company Pursuant to RCW 80.36.320	)	DOCKET UT-121994 **CLEC INTERVENORS' SUPPLEMENTAL REPLY BRIEF IN RESPONSE TO FRONTIER'S RESPONSE TO STAFF AND PUBLIC COUNSEL'S RESPONSE I/S/O CLEC INTERVENORS' JOINT MOTION TO DISMISS**

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ARGUMENT

1. As explained in the accompanying Motion to Strike, Frontier's Reply to Staff and Public Counsel's Response in support of CLEC Intervenors' Joint Motion to Dismiss ("*Frontier Reply*"),[1] improperly presents a new argument in a manner that is inconsistent with accepted pleading rules and procedures. Specifically, Frontier now argues that a different test/legal standard exists under RCW 80.36.320, such that it need not prove that its wholesale services are subject to competition, only that all of its retail services are subject to competition. *Frontier Reply* at ¶¶ 1, 6-7.

2. This Supplemental Reply Brief responds to that argument and explains why the Washington Appeals Court decision in *US West Communications, Inc. v. Washington Utilities & Transport. Comm'n*, 86 Wn. App. 719, 937 P.2d 1326 (1997), is distinguishable and does not support Frontier's argument. Frontier's assertion that the test for effective competition under RCW 80.36.320 focuses only on end user customers (retail competition) and not alternatives available to other carriers (wholesale competition), is based on a narrow and inaccurate reading of the *US West* case and ignores the broader policy objectives of the statute. Frontier's inappropriately narrow construction of that case also ignores the distinguishing facts of that case. Unlike the petitioners in the *US West* case, in this proceeding Frontier is an incumbent local exchange carrier with physical facilities that extend to virtually all customer premises in its service territory. Given those ubiquitous facilities and the advantages of incumbency, Frontier has a dominant share of both the retail and wholesale markets. Further, if accepted, application of the test articulated by Frontier would undermine the basic tenets of pro-competition regulatory

[1] Frontier's Reply to Staff and Public Counsel's Response In Support of CLEC Intervenors' Joint Motion to Dismiss (filed March 21, 2013) ("Frontier's Reply").

policy which ensures that competitors have access to essential wholesale facilities that are used as inputs to the retail services they provide in competition with Frontier.

3. The *US West* case must be construed within the context of the specific facts raised in that case, including the relative market share of the petitioners in that case. As this Commission well knows, the petitioners in that case, ELI and TCG, were new entrants into the market, who at the time of their petition had "no market power whatsoever." *US West*, 86 Wn. App. at 1330. As the court explained, the ELI and TCG petitions in that case reflected a complete "lack of market power" precisely because both ELI and TCG had an "initial zero percent market share." *Id.* at 1332. Thus, the court clearly understood that because the petitioners had "zero" market share, they could not exploit their market position to charge excessive rates to their wholesale access customers because doing so would jeopardize their ability to exchange traffic with U.S. West, the incumbent local exchange carrier (LEC) which then held nearly 100 percent of the retail landline market at that time.

4. Those facts were central to the appellate court's decision in *US West*. In addition to the fact that as new entrants ELI and TCG could not "charge exorbitant rates" for wholesale services provided to other customers, *see id.* at 1332, the court also noted that, "[g]iven the dominance of U.S. West, preservation of access to U.S. West customers will be critical for ELI and TCG, whose customers would otherwise only be able to call each other." *Id.* Thus, the court recognized that the critical question in any analysis of effective competition under the statute is which entity holds the dominant market share, and controls access to customers in a manner that would affect customers' ability to call each other (i.e., interconnection to the public switched network, or "PSTN"). In contrast to the CLEC petitioners in the *US West* case, here Frontier

continues to control access to, and interconnection with, the PSTN by virtue of its position as the incumbent provider in all markets. It, therefore, must prove that and is required to prove that this is no longer the case in order to be classified as competitive for these services.

5. The *US West* case is also distinguishable on the grounds that there was no indication that ELI or TCG currently offered, or were planning to offer, any wholesale services other than switched access.[2] And in its discussion of such services the court was simply rejecting U.S. West's disingenuous argument that notwithstanding the fact that ELI and TCG had no market share, no market power, and no captive retail customers, they could have a significant captive customer base for switched access service. Further, the present WAC 480-120-540(2) and its predecessor in effect at the time of the *US West* case ensure that a CLEC's switched access rates are reasonable by providing that "[t]he rates charged by a local exchange company for terminating access services that are classified as competitive pursuant to RCW 80.36.320 or 80.36.330 must not exceed the rates charged by the incumbent local exchange company for terminating access service in the comparable geographic area." WAC 480-120-540(2).[3] If the ILEC is classified as a competitive company, or its terminating access service is classified as a competitive service, this rule would not make sense and there would be no meaningful restriction on the rates for terminating access service. In contrast to the situation in the *US West* case, Frontier's Petition in this proceeding seeks competitive classification for not only interconnection and network access, but also for special access and other wholesale services. Thus, an analysis of effective competition in this proceeding cannot rest solely on the standard

[2] To the extent ELI or TCG did offer wholesale services other than switched access, by virtue of being new entrants into an existing market, these services would naturally be subject to competition.
[3] *See also* WAC 480-120-540(5).

articulated in *US West*. It is significant that ELI's and TCG's wholesale access services remained subject to regulatory oversight, where Frontier's services would not. This is particularly troubling given that several parties are challenging the FCC order reforming intercarrier compensation rate reforms,[4] and if that order is overturned by the Tenth Circuit, it could leave Frontier intrastate switched access services unregulated and unconstrained by any effective competition.

6. Moreover, the Commission cannot ignore the obvious intent of the statute in the first instance: to provide lesser regulation to providers with no market power. The appellate courts' focus on the lack of any market power in the retail market, and the concomitant disregard for whether the CLEC also provided wholesale service competition, reflects an understanding that the statute has always been contemplated for use by new entrants, not ILECs. Thus, the *US West* case is inapposite to an application by an ILEC, like Frontier, who has not demonstrated that it no longer has market power over wholesale services, including interconnection to the PSTN.

7. The proper lesson to be gleaned from the *US West* case, and prior Commission precedent,[5] is that the focus of the captive customer base test for effective competition is whether there are a sufficient number of alternative suppliers of retail, facilities-based, competitive services to the end user. An incumbent provider, like Frontier, cannot be permitted to demonstrate effective competition for its retail services by relying on retail competition from competitors that are dependent on the very wholesale services the incumbent seeks to deregulate,

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[4] *See In re: FCC 11-161*, On Petition for Review of an Order of the Federal Communications Commission; Case No. 11-9900 (10th Cir).

[5] *See, e.g., In re Electric Lightwave, Inc.*, Docket No. UT-940403, Order (Wash. UTC 1995).

without first showing that those wholesale services are subject to effective competition. Otherwise, granting a petition seeking competitive classification of wholesale services would undermine the basis for the petitioner's demonstration of effective competition in the retail markets.

8. In other words, to be a meaningful competitor in the retail market, that competitor cannot itself be vulnerable to the unchecked market power of a petitioner for competitive classification who controls the essential wholesale inputs the competitor uses to provide its competitive retail services. Because an ILEC essentially always has facilities to the end user, in order to get competitive classification of the ILEC's wholesale services, it must prove the presence of sufficient alternative suppliers of such facilities who make them available to other carriers on a wholesale basis.

9. Finally, the Commission must consider these issues within the larger policy framework and theory articulated under the Regulatory Flexibility Act (RCW 80.36.300, .320, .330). These statutes reflect a general principle that effective competition can do a better job of protecting the public interest than regulation. However, in the ***absence of effective competition*** the public interest demands that existing regulatory protections remain in place.[6] Under these circumstances an incumbent, like Frontier, cannot gain pricing and other regulatory flexibility for important wholesale services that are critical to competition for retail services, without first

[6] *See* S. Nelson, "Washington State's New Regulatory Flexibility Act," Public Utilities Fortnightly, Jan. 9, 1986, at 30-31 ("The [Joint Select Committee] also stated that it thought that where competition ***actually, factually existed***, that regulation had no rational place. Thus, the committee 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. . . . Many members believed that some markets might be more susceptible to robust competition than others. It followed that the preferred public policy would allow competition to develop while maintaining regulatory protection for remaining monopoly ratepayers. Thus, the legislature fashioned a classification scheme which reflects this policy assumption.") (emphasis added).

requiring that incumbent to demonstrate that those wholesale services are themselves subject to effective competition. If accepted, Frontier's assertion that it need not demonstrate effective competition for its wholesale services, but at the same time can still obtain deregulation of such wholesale services would undermine the basic tenets of the pro-competitive regulatory scheme and threaten the public interest, which the competitive classification statute was designed to protect.

10. Accordingly, for the reasons set forth herein, the Commission should reject Frontier's assertion that the test for effective competition under RCW 80.36.320 does not require any proof as to the competitiveness of the wholesale services market in Frontier's territory. The policy principles underlying the statute demonstrate that the opposite is true: Frontier is not entitled to a finding of effective competition under the statute unless it proves that such competition exists in both the retail ***and*** wholesale markets.

DATED this 26th day of March, 2013.

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