BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

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

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MOTION TO STRIKE

1. Frontier's Reply to Staff and Public Counsel's Response in support of CLEC Intervenors' Joint Motion to Dismiss ("*Frontier Reply*"),[1] improperly introduces a new argument in a manner that is prohibited under well-accepted pleading and procedural rules. Specifically, Frontier now argues that a different test/legal standard exists under RCW 80.36.320, arguing that a Petitioner need not show 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. Frontier's improper attempt to introduce this new argument into the record, at this stage of pleading, violates the well-established rule of procedure that reply pleadings must be limited to a response to the issues in the brief to which the reply is directed. *See, e.g.*, Wash. R.A.P. 10.3(c), and King Co. Civ. Rule 7(4)(E) ("Reply. Any documents in strict reply shall be similarly filed . . .") (emphasis added).

2. Frontier's new argument goes to the merits of the CLEC Intervenors' Motion to Dismiss, and should have been raised in Frontier's Response to the Motion to Dismiss, which the company filed on March 14. By raising the argument now, in its final pleading opportunity, Frontier deprives the CLEC Intervenors' of an opportunity to reply to this new argument. For that reason, the Commission should strike from the record those portions of Frontier's Reply that raise this new argument.[2]

3. Alternatively, should the Commission decline to strike the impermissible

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[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").

[2] Specifically, the second to last sentence in paragraph 1 (asserting a "test for effective competition"), and paragraphs 6 and 7 (in their entirety) of Frontier's Reply should be struck from the record.

arguments from Frontier's Reply, it should grant the CLEC Intervenors leave to file the attached supplemental reply brief. Acceptance of the CLEC Intervenors' supplemental reply brief is supported by basic notions of fairness and equity, as Frontier has introduced a new argument to which CLEC Intervenors have had no opportunity to reply. Further, if the CLEC Intervenors' are not granted an opportunity to reply, the record on this question will be unbalanced without fully developed issues and arguments.

4. Reflecting fundamental principles of fairness and balance, Washington's rules of procedure do not permit litigants to raise new arguments in reply pleadings. For example, Washington R.A.P. 10.3(c) establishes that reply pleadings must be "limited to a response to the issues in the brief to which the reply [] is directed." In other words, an argument cannot be raised for the first time in a reply brief. State v. Pleasant, 38 Wn. App. 78, 684 P.2d 761, review denied, 103 Wn.2d 1006 (1984). This rule must be strictly enforced; otherwise parties will be incented to save arguments for a reply brief, which the Washington Supreme Court has explained would "lead to an unbalanced and incomplete development of issues for review." State v. Clark, 124 Wn.2d 90, 95 n. 2, 875 P.2d 613 (1994), overruled on other grounds, State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997).

5. Frontier's improper arguments are presented in paragraphs 1, 6 and 7 of its pleading, Frontier Reply, ¶¶ 6-7, where it argues that the US West case presents a test/legal standard different than the plain language of the statute. Specifically, Frontier argues that the "test for effective competition under RCW 80.36.320" focuses only on retail services, not wholesale services. Frontier Reply at ¶ 1.

6. This new argument speaks to the test/legal standard for obtaining relief under the

statute, an issue and argument raised in the CLEC Intervenors' Motion to Dismiss. See CLEC Intervenors' Motion to Dismiss at ¶¶ 9-16. Indeed, Frontier effectively concedes this point in its Reply when it directs its counter-arguments at the CLEC Intervenors' Motion to Dismiss (rather than Staff or Public Counsel's later pleadings), stating in paragraph 6: "[t]he ***Motion to Dismiss***, and the requested alternative remedy which Staff and Public Counsel support, appear to be premised on a legally incorrect assumption." Frontier Reply at ¶ 6 (emphasis added). Because Frontier's new argument addresses an issue and argument first raised in the Motion to Dismiss, that new argument should have been presented in Frontier's March 14th Response to the Motion to Dismiss, rather than in its latest reply pleading.

7. By raising this new argument for the first time in its latest reply filing Frontier has deprived the CLECs of a reasonable opportunity to reply to the new argument. That, in turn, will lead to an unbalanced record which does not fully develop the issues and arguments on both sides since the CLEC Intervenors have not had an opportunity to reply to Frontier's arguments regarding the proper interpretation of the US West case.

8. The impropriety of Frontier's attempt to raise the argument for the first time in its reply is compounded by the fact that neither Staff nor Public Counsel argued that the Motion to Dismiss should be granted. Instead, Staff and Public Counsel directed their arguments towards alternative forms of relief. Thus, Frontier's latest reply should have been limited to those issues. But Frontier went beyond the arguments raised in Staff and Public Counsel's pleadings, and decided to present new arguments responding to the Motion to Dismiss. Thus, an argument attacking the basis for the Motion to Dismiss in Frontier's Reply to Staff and Public Counsel's pleadings is completely inappropriate and violates the Washington Supreme Court's directive to

avoid pleadings which lead to an "unbalanced and incomplete" development of issues. Clark, 124 Wn.2d at 95, n. 2.

9. Furthermore, Frontier's new argument contradicts the company's own prior pleadings and assertions regarding the appropriate standard of proof. In its response to the Motion to Dismiss Frontier asserted that it satisfied the burden of pleading facts sufficient to prove that all of its retail and wholesale services are subject to effective competition. Frontier Response to Motion to Dismiss at ¶¶ 19-21 (emphasis added). However, Frontier's new argument in its latest pleading appears to be that it is not required to make any showing of effective competition for wholesale services. Frontier Reply at ¶ 6 (asserting that Frontier is not required to plead or demonstrate that other carriers have wholesale service alternatives). Frontier cannot be permitted to improperly present new arguments which the CLEC Intervenors have had no opportunity to respond, and which contradict its own prior pleadings.

10. For the reasons stated herein, and pursuant to Washington R.A.P. 10.3(c) and principles of administrative efficiency and fairness, those portions of Frontier's Reply which improperly raise new arguments should be stricken from the record. Specifically, the second to last sentence in paragraph 1 (asserting an alternative "test" for effective competition), and paragraphs 6 and 7 (in their entirety) of Frontier's Reply should be struck from the record.

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11. Alternatively, should the Commission decline to strike the impermissible arguments from Frontier's Reply, it should grant Joint CLEC Intervenors leave to file the attached supplemental reply brief.

DATED this 26th day of March, 2013.

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