[Service Date March 29, 2013]

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	DOCKET UT-121994
	)	
FRONTIER COMMUNICATIONS NORTHWEST INC.,	)	ORDER 04
	)	
To be Regulated as a Competitive Telecommunications Company Pursuant to RCW 80.36.320	)	ORDER DENYING CLEC INTERVENOR MOTION TO DISMISS PETITION
. . . . .	)	

BACKGROUND

1 On January 24, 2013, Frontier Communications Northwest Inc. (Frontier or Company) filed with the Washington Utilities and Transportation Commission (Commission) a Replacement Amended Petition for Approval of Minimal Regulation in Accordance with RCW 80.36.320 (Petition), seeking classification as a competitive telecommunications company throughout its current service territory. The Commission suspended the filing and set the matter for hearing.

2 On February 15, 2013, the Commission entered Order 02, Prehearing Conference Order, establishing a procedural schedule. Pursuant to that schedule, on March 7, 2013, the competitive local exchange carrier (CLEC) intervenors filed a joint motion to dismiss the Petition (Motion).[1] These parties contend that Frontier has failed to assert any facts to prove that the wholesale services the Company provides are subject to effective competition. Because those services are not competitive, the CLEC Intervenors argue, Frontier cannot be classified as a competitive telecommunications company under RCW 80.36.320.

3 On March 14, 2013, Frontier filed its Response to the Motion, advocating that it should be summarily denied. Frontier contends that it has adequately identified facts sufficient to demonstrate that all of its operations, including wholesale services, are competitive, and whether Frontier is able to prove those facts and whether they are sufficient to support the relief Frontier requests in its Petition are

[1] The CLEC Intervenors include Cbeyond Communications, LLC, Charter Fiberlink WA-CCVII, LLC, Integra Telecom of Washington, Inc., Level 3 Communications, LLC, and twtelecom of washington, llc.

issues the Commission should determine after an evidentiary hearing, not at this early stage of the proceeding.

4 Commission Staff and the Public Counsel Section of the Office of the Washington Attorney General (Public Counsel) also each filed a response to the Motion on March 14, 2013. Both Staff and Public Counsel agree with the CLEC Intervenors' legal analysis and recommend that the Commission convert this docket to a proceeding for competitive classification of services under RCW 80.36.330, rather than one to classify the Company as competitive under RCW 80.36.320.

5 On March 21, 2013, the CLEC Intervenors, Commission Staff, and Frontier each filed replies in support of their positions. For the first time, Frontier contends that the Commission has previously rejected the argument that a company must "plead and demonstrate that other carriers, as opposed to end user customers, have service alternatives."[2]

6 On March 27, 2013, the CLEC Intervenors filed a motion to strike, or alternatively to file supplemental briefing to address, the portion of Frontier's reply that make arguments Frontier should have made in its response to the Motion.

DISCUSSION

7 As an initial matter, we will accept the CLEC Intervenors' supplemental reply brief addressing arguments Frontier made for the first time in its reply brief. We agree that Frontier should have raised these arguments in its response to the Motion and that the CLEC Intervenors should have the opportunity to reply. However, it does contribute discussion of relevant judicial precedent and past Commission decisions on competitive classification of local exchange carriers (LECs) that would have been useful earlier in the briefing.

8 Frontier filed its Petition pursuant to RCW 80.36.320, which requires the Commission to classify a "company as a competitive telecommunications company if the services it offers are subject to effective competition. Effective competition means that the company's customers have reasonably available alternatives and that the company does not have a significant captive customer base."[3] The Commission must consider several factors when determining whether a company's services are

[2] Frontier Reply to Staff and Public Counsel ¶ 6.

[3] RCW 80.36.320(1).

subject to effective competition, including but not limited to the extent to which alternative providers make functionally equivalent or substitute services readily available in the relevant market at competitive rates, terms, and conditions.[4]

9 The CLEC Intervenors contend that the statutory language, legislative history, and sound public policy require Frontier to demonstrate that all of its services, including services provided to other carriers, are subject to effective competition before the Company can be classified as competitive. Frontier correctly counters, however, that the Commission has rejected that interpretation of RCW 80.36.320.

10 When CLECs first sought company competitive classification, the Commission granted that classification over the objection of US WEST Communications, Inc. (US WEST) that it was a captive customer of CLECs' switched access services. In that 1995 case, the Commission disagreed and adopted Staff's view that "the primary concern in determining whether [the CLEC] is subject to effective competition is the effect on end-use customers. . . . [S]ince end-use customers are not [the CLEC's] 'captives,' then [the CLEC] cannot hold captive either US WEST, or any other alternative connecting carrier."[5] The Court of Appeals agreed, deferring to the Commission's determination that "end use customers were the entities upon which to focus in deciding whether [CLECs] had a captive customer base," and if "none of [the CLECs'] end use customers is captive, the companies cannot hold US West or any other carrier captive."[6]

11 We continue to adhere to that interpretation of RCW 80.36.320, which as the Court of Appeals observes, "is consistent with the legislative intent behind the competitive classification statute."[7] Frontier has alleged in its Petition that it has no captive customer base of end user customers, which satisfies the Company's pleading obligation. Frontier must prove those allegations, but it is entitled to the opportunity to do so.

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[4] *Id.*

[5] *In re Petition of Electric Lightwave, Inc. for an Order Granting Amendment to Competitive Telecommunications Company Classification*, Docket UT-940403, Order Granting Petition at 4 (Jan. 11, 1995).

[6] *US WEST v. WUTC*, 86 Wn. App. 719, 728-29, 937 P.2d 1326 (1997).

[7] *Id.* at 729.

12 The CLEC Intervenors claim that the facts of this proceeding are distinguishable from those before the Commission and the Court in the 1995 case because Frontier is an incumbent LEC with a substantial market share, rather than a new entrant with no customers. These are factual distinctions without a difference. The inquiry remains whether the Company has a significant number of captive end user customers, regardless of how many customers it has. Indeed, the CLEC Intervenors concede that "[t]he proper lesson to be gleaned from the *US West* case, and prior Commission precedent, 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."[8] Frontier in its Petition proposes to make just such a showing, identifying wireless carriers, cable companies, and voice over Internet protocol providers, not just CLECs, as alternative suppliers of retail competitive services to end user customers.

13 The CLEC Intervenors nevertheless assert that the CLECs that originally sought classification as competitive telecommunications companies did not offer wholesale services other than switched access, and their ability to use that service to their competitive advantage was and remains constrained by WAC 480-120-540. Frontier, by contrast, provides interconnection and a variety of other wholesale services in addition to switched access, and the CLEC Intervenors argue that the Commission's terminating access rule would provide no limitation on Frontier's ability to abuse its bottleneck intrastate switched access service.[9]

14 Again, the number of services a company provides is not relevant to the inquiry under RCW 80.36.320. We must determine whether a company's end user customers have reasonably available alternatives to the company's services, regardless of the extent to which the company also provides services to other

[8] CLEC Intervenor Supp. Reply Brief ¶ 7.

[9] The CLEC Intervenors make this claim by construing the language in WAC 480-120-540 to require only that competitively classified LECs price terminating access no higher than the incumbent LEC's rates, which would be a meaningless constraint if Frontier is both an incumbent and competitively classified. The Commission, however, does not construe its rules to be meaningless. A more plausible reading of WAC 480-120-540 would be to continue to require that Frontier's intrastate terminating switched access services not exceed the lowest rate the Company charges for comparable local interconnection service, although that issue may be moot in light of the Federal Communications Commission's recent assertion of jurisdiction over the pricing of intrastate access services.

carriers. That is not to say that the Commission is unconcerned with the potential to leverage wholesale market power into retail markets. Effective competition cannot exist if Frontier has the ability to eliminate or substantially hamper its competitors' ability to make functionally equivalent or substitute services readily available in the relevant market at competitive rates, terms, and conditions. But we cannot determine at the pleading stage of this proceeding whether such a potential exists.

15 Even at this point, however, we observe as a matter of law that classification of Frontier as a competitive telecommunications company would have no effect on the legal requirements applicable to virtually all, if not all, the services Frontier provides to other carriers. Federal law governs interconnection, access to unbundled network elements, and other services Frontier must provide to its local exchange service competitors.[10] The Commission may implement and enforce those federal obligations, but it lacks any authority to reduce or eliminate them, including in conjunction with a grant of competitive classification under state law.[11] So, even if we were to reverse our previous interpretation of RCW 80.36.320 to apply to wholesale services, federal law would serve to preempt that decision.

16 The existing constraints on Frontier's provision of services to competitors thus are indistinguishable from the restrictions on CLECs' switched access service for the purposes of determining the existence of effective competition. The Commission declines to dismiss the Petition on the grounds that CLECs will continue to need wholesale services from Frontier, as classifying the Company as competitive would not impact the CLECs' ability to obtain those services at rates, terms, and conditions that are subject to Commission review and approval.

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[10] *E.g.*, 47 U.S.C. § 251-52.

[11] The Commission nevertheless has the ability to adopt appropriate conditions on any competitive classification granted to Frontier to ensure the vitality of competition and protect end user customers, but we will do so only based on a record that supports any such conditions.

ORDER

17 THE COMMISSION ORDERS that the CLEC Intervenors' Joint Motion to Dismiss Frontier's Petition or in the Alternative to Treat the Petition as a Request under RCW 80.36.330 is DENIED.

DATED at Olympia, Washington, and effective March 29, 2013.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner