BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

FRONTIER COMMUNICATIONS NORTHWEST INC., Complainant, v. PUGET SOUND ENERGY, INC., Respondent.	DOCKET NO. UE-151344 PUGET SOUND ENERGY, INC.'S RESPONSE TO FRONTIER COMMUNICATIONS NORTHWEST, INC.'S MOTION FOR SUMMARY DETERMINATION AND CROSS-MOTION FOR SUMMARY DETERMINATION

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I. INTRODUCTION

1. On September 11, 2015, the King County Superior Court denied Frontier Communications Northwest Inc.'s ("Frontier") Motion to Dismiss or Stay Puget Sound Energy's ("PSE") breach of contract complaint and, thereby, ruled that the Washington Utilities and Transportation Commission ("Commission" or "WUTC") does not have primary jurisdiction over the common law dispute between PSE and Frontier.[1]

2. Because the King County Superior Court denied Frontier's Motion to Dismiss/Stay, PSE's claims against Frontier for breach of contract by failing to pay amounts due in 2013 and 2014, for anticipatory breach of contract by declaring it will not pay amounts due in 2015, and for declaratory relief are moving forward to trial in February 2016.

3. Frontier's WUTC Motion for Summary Determination is legally unfounded because it is premised upon the Superior Court agreeing that the WUTC has primary jurisdiction and because the WUTC's authority to decide whether rates are just and reasonable is prospective only.

4. Even assuming Frontier had requested a prospective rate change for 2015 or later—and is has not—Frontier's claims would still not be ripe for WUTC review at this time because the applicable proposed draft rules have not yet been implemented.

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[1] Declaration of Karen B. Bloom in Support of PSE's Cross-Motion for Summary Determination ("Bloom Decl."), Ex. A (September 11, 2015, Superior Court Order Denying Frontier's Motion) & Ex. B (Frontier's Motion to Dismiss/Stay PSE's Complaint). The Superior Court also exercised its jurisdiction over this dispute by granting PSE's Motion to Compel production of the personnel file of Frontier's key representative, Michael Foster. *Id.* Ex. C (September 1, 2015, Superior Court Order Compelling Frontier's Production).

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II. RELIEF REQUESTED

5. PSE respectfully requests the WUTC (i) deny Frontier's motion for summary determination and (ii) dismiss Frontier's complaint and/or grant summary determination that Frontier is not entitled to a retroactive rate change under the relevant statutes.

III. STATEMENT OF FACTS

A. The Pole Attachment Agreement and Annual Billing Procedure

6. PSE is an electric utility company that provides retail electric service in the State of Washington. PSE owns utility poles for the purposes of transmitting and distributing electricity to customers.[2] Frontier is a Washington telecommunications company that provides telephone and other services to customers in Washington. Frontier also owns utility poles. Frontier is the successor to Verizon Northwest Inc. ("Verizon").[3]

7. In August 2002, PSE and Frontier's predecessor, Verizon,[4] negotiated and entered into the Pole Attachment Agreement (the "Agreement"). The Agreement provides each party with the right to charge the other party a rental rate for attaching equipment to some portion of their respective utility poles.[5]

8. The procedure for charging each other an annual rental rate is relatively simple. Toward the end of each annual billing cycle (i.e., October of each year), each party calculates its own "rate" based on a formula set out in the Agreement.

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[2] WUTC Compl. ¶ 16.

[3] WUTC Compl. ¶ 14.

[4] For the purposes of this brief, PSE refers to the entities collectively as "Frontier."

[5] WUTC Compl. ¶ 19.

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9. As part of calculating this rate formula, the parties must tabulate their total number of "distribution poles."[6] Each party is responsible for performing its own distribution pole count and coming up with its own appropriate rate. The party multiplies this rate by the number of poles with attachments to arrive at an annual bill. Each party then sends this annual bill to the other and each is expected to remit full payment within 30 days (i.e., by the end of November each year).[7]

B. The Parties' 10-Year Course of Performance and Understanding That the Agreement Requires "Whole Poles"

10. At the time that Frontier and PSE negotiated the Agreement in 2002, Frontier owned approximately 130,000 distribution poles in its relevant territory.[8] Over half of these poles, or around 70,000 distribution poles, were poles that Frontier jointly (or fractionally) owned with Snohomish County PUD.[9]

11. Frontier continues to jointly own these same approximately 70,000 distribution poles with Snohomish County PUD to this day.[10]

12. When the parties entered into the Agreement, both PSE and Frontier understood that these fractionally-owned distribution poles would each be counted as a single pole, or a "whole pole," despite Frontier's partial ownership. Frontier submitted its rate

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[6] WUTC Compl. ¶ 20.

[7] Agreement at §§ 6.2-6.3.

[8] Bloom Decl., Ex. D.

[9] Brubaker Decl. ¶ 3.

[10] *Id.*

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calculation to PSE in August 2002—the same month the Agreement took effect—reflecting these distribution poles counted by Frontier as whole poles.[11]

13. Frontier continued to send PSE an annual bill for ten more years (2003 to 2012), each time counting these same fractionally-owned distribution poles as whole poles for purposes of coming up with its own rate.[12] PSE, in turn, promptly paid Frontier's bill each year and provided its own bill to Frontier, which Frontier promptly paid until 2013.[13]

14. Frontier now claims that it "discovered" the parties had not accounted for Frontier's fractional ownership of these same jointly-owned distribution poles for the first time in 2013, and asked PSE for a refund for this "mistake."[14]

15. While Frontier claims that there was a mistake, several facts suggest otherwise. First, Frontier was aware when it signed the Agreement that the rate formula was based on a "whole pole" count. By its own admission, Frontier's jointly-owned Snohomish County poles constituted more than half of Frontier's total number of distribution poles when it signed the Agreement.[15]

16. Second, the parties' own written correspondence demonstrates that Frontier knew about this issue and agreed that the formula required a "whole pole" count. On September 23, 2004, Frontier sent a letter to PSE informing PSE that Frontier had decided to

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[11] Bloom Decl., Ex. D.

[12] Brubaker Decl., Ex. B (spreadsheet prepared by Frontier detailing the amounts billed by Frontier using whole poles during this period).

[13] Bloom Decl. ¶ 7.

[14] WUTC Compl. ¶ 24.

[15] Bloom Decl., Ex. D.

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change its pole count method and to start counting the 70,000 jointly-owned poles to account for Frontier's fractional ownership, or as "equivalent poles."[16] PSE disagreed, and PSE and Frontier engaged in meetings regarding this issue for several months. Ultimately, Frontier agreed not to change its distribution pole count method and to continue using "whole poles," in accordance with PSE's interpretation of the Agreement.[17] In a letter to PSE dated July 19, 2005, Frontier stated:

> ***After careful consideration***, Verizon is in agreement with PSE that we will continue using the calculation components that were agreed to in the original agreement dated 8/1/2002. ***Therefore, we will continue to use whole poles in our calculation methodology for PSE.***[18]

C. Frontier's Failure to Pay PSE in 2013 Triggers the Agreement's Dispute Resolution Process

17. Frontier notified PSE in April 2013 of its newly-discovered belief that Frontier had "underbilled" PSE for ten years by applying the whole pole method to the rate formula.[19] PSE disagreed and issued its 2013 annual bill to Frontier in October 2013, with full payment due in November 2013.[20] Instead of paying its bill—as it had done for 10 years—Frontier simply did nothing. Then in May 2014, Frontier notified PSE that Frontier had decided to "offset" the amount it owed to PSE for PSE's rate (a rate which Frontier does not claim is unreasonable) in the amount of $624,472.39 for the difference between the

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[16] Bloom Decl., Ex. E.

[17] Bloom Decl., Ex. F.

[18] *Id.*

[19] WUTC Compl. ¶ 24; Bloom Decl. ¶ 10.

[20] Bloom Decl. ¶ 10.

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"whole pole" method that Frontier had previously charged and Frontier's newly-adopted "equivalent pole" method.[21]

18. PSE provided Frontier with a Notice of Default/Breach on January 29, 2015, demanding immediate payment of all outstanding amounts and reserving the right to exercise all rights and remedies under the Agreement.[22]

19. Under the Agreement, the parties were required to engage in mediation to attempt to resolve the dispute.[23] After mediation in early February 2015 was unsuccessful, PSE filed a lawsuit in King County Superior Court on February 8, 2015. PSE sought $2,600,000, consisting of outstanding charges and interest for the 2013 and 2014 bills, and anticipatory damages from the 2015 bill, as well as PSE's fees and costs.[24]

D. Frontier Agrees that the King County Superior Court Should Resolve This Dispute Before Deciding to Forum Shop

20. Until recently, Frontier consistently indicated, in a variety of ways, that the King County Superior Court is the proper forum for the dispute instead of the WUTC. First, after the parties were unsuccessful in negotiating a resolution, Frontier agreed to participate in mediation under the plain terms of § 16.16 of the Agreement:

> Any action, dispute, claim or controversy between or among the parties, whether sounding in contract, tort or otherwise, ***other than a matter within the regulatory authority of the Washington Utilities and Trade Commission*** or other governmental authority with proper jurisdiction, (a

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[21] WUTC Comp. ¶ 28; Motion ¶ 16.

[22] Bloom Decl., Ex. G (PSE King County Superior Court Complaint) at ¶ 23.

[23] Agreement at § 16.16.

[24] Bloom Decl., Ex. G. at ¶¶ 1-2.

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> Dispute'), shall, at the option of either Party, and at such Party's expense, be submitted to mediation . . .[25]

In other words, only disputes that are not within the regulatory authority of the WUTC are subject to mediation.[26] Frontier never attempted to invoke the regulatory authority of the WUTC when PSE proposed mediation and instead fully participated in the parties' joint mediation efforts.[27]

21. Second, the Agreement provides that if mediation is unsuccessful, "the parties may, at their option, initiate any and all appropriate legal action to resolve the Dispute."[28] Frontier thus expressly acknowledged when it signed the Agreement that the parties had the option to take any appropriate legal action, including by filing suit in superior court.

22. Third, Frontier filed its Answer, Affirmative Defenses and Counterclaims on March 6, 2015, conceding that the King County Superior Court has jurisdiction. In its Answer, Frontier admitted in paragraph 4 that "[t]his Court has jurisdiction . . . and venue properly rests with this Court."[29] Frontier also asserted three specific affirmative defenses to PSE's claims, none of which implicated the WUTC's primary jurisdiction.[30] Furthermore, Frontier affirmatively invoked the King County Superior Court's jurisdiction by filing

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[25] Agreement at § 16.16.

[26] *Id.*

[27] Bloom Decl. ¶ 12.

[28] Agreement at § 16.16.

[29] Bloom Decl., Ex. H (Frontier King County Superior Court Answer) at ¶ 4.

[30] Bloom Decl., Ex. H at p. 5.

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counterclaims and asking the Court to award it relief, including a declaratory judgment and attorneys' fees under the terms of the Agreement.[31]

23. Fourth, Frontier actively litigated this action in the Superior Court, including responding to and serving discovery requests, producing a large volume of documents, and engaging in numerous discovery meet and confer conferences to resolve discovery disputes.[32]

E. Frontier Invokes the WUTC's Jurisdiction After Nearly Thirteen Years of Performance under the Agreement

24. On June 29, 2015, Frontier filed its WUTC complaint. Only after nearly five months of active litigation in the Superior Court did Frontier change course and assert, for the first time, that the Commission has "primary jurisdiction."[33]

25. Frontier framed its complaint as a dispute over "PSE's unjust and unreasonable utility pole attachment rates."[34] But it is undisputed that the parties do not disagree about the reasonableness of PSE's rates. Instead, Frontier ironically asks the Commission to find that Frontier's own rates were unjust or unreasonable during the period between 2002 and 2014.[35]

26. Frontier also conspicuously omits from its complaint several legal and factual elements weighing in PSE's favor. Specifically, Frontier: (a) characterizes the issue as a dispute over the reasonableness of the rate it charges PSE, but neglects to explain that the

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[31] Bloom Decl., Ex. H at pp. 5-9.

[32] Bloom Decl. ¶ 14.

[33] WUTC Compl. ¶ 5.

[34] WUTC Compl. ¶ 1.

[35] Motion ¶¶ 10; 32.

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crux of the dispute is about the accrued debt Frontier owes PSE for payment of PSE's rates;[36] (b) omits from its description of the facts that it has been fully aware of its fractional pole ownership for over a dozen years, and even raised the exact issue with PSE over 10 years ago before the parties came to a mutual agreement regarding the contract interpretation;[37] (c) asks the Commission to award relief up to the full $624,472 that it originally demanded from PSE, despite agreeing with PSE that Frontier is legally barred from such a recovery by the statute of limitations;[38] and (d) asks the Commission to ignore contractually-mandated interest at 1.5% and contractually-mandated attorneys' fees that have accrued as a result of Frontier's refusal to pay and may be awarded by the King County Superior Court if PSE prevails.[39]

27. Before the parties even had a chance to convene for a pre-hearing conference, Frontier filed its WUTC Motion for Summary Determination on August 7, 2015, asking the Commission to make the following findings:

> (i) the just and reasonable interpretation of "Total number of distribution poles" in the Agreement's attachment rate calculation requires the parties to account for fractionally owned poles; (ii) that this was the just and reasonable interpretation throughout the course of the Agreement; (iii) that Frontier appropriately offset the amounts it under-billed for the five years between 2008 and 2012; (iv) that Frontier appropriately calculated the amounts due from PSE for the years 2013 and 2014 by accounting for fractionally owned poles; and (v) the fees and interest

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[36] WUTC Compl. ¶¶ 7-8.

[37] WUTC Compl. ¶ 24.

[38] WUTC Compl. ¶ 32.

[39] *Id.*

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sought by PSE as a result of Frontier's offset and disputed billing for 2012-2014 are improper and unreasonable.[40]

28. In other words, Frontier asks the Commission to intervene in the parties' private contract dispute and to disrupt or delay PSE's efforts in King County Superior Court to collect on a debt that has been outstanding for over two years.

IV. STATEMENT OF ISSUES

Whether the Commission should deny Frontier's motion for summary determination and grant PSE's cross-motion for summary determination that Frontier is not entitled to a retroactive rate change under the relevant statutes.

V. EVIDENCE RELIED UPON

PSE relies upon the record in this action and the accompanying Declaration of Karen B. Bloom and supporting exhibits.

VI. ARGUMENT

A. This Private Contract Dispute is Already Appropriately Before the King County Superior Court

29. While the WUTC undoubtedly has expertise and authority to review and determine whether a rate is "just, reasonable and sufficient,"[41] that is not the issue here. PSE filed suit in the Superior Court because Frontier agreed to the rates but has failed to pay its bills in full.

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[40] Motion ¶¶ 10; 32.

[41] RCW 80.54.020-030

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30. In sum, PSE simply seeks to recover the payments owed, along with interest and attorneys' fees, in this breach of contract case. In weighing these claims and defenses, the King County Superior Court need only apply standard contract interpretation principles, including evaluating the evidence of the parties' previous discussion of the issues in 2005 and the parties' consistent course of dealing and course of performance for ten years. No special regulatory expertise is required and these issues are well within the Superior Court's competence, as Judge Schapira appropriately concluded in her September 11, 2015, order denying Frontier's motion.[42]

31. There is also no need for the Commission to weigh in here because this is an isolated contract dispute that Frontier has not alleged is a "widespread" concern.[43]

32. Resolving this dispute as a private contract matter is consistent with long-standing authority under pole attachment regulations that favor private negotiation of pole attachment agreements and private resolution of disputes.[44]

33. This is precisely the reason that PSE and Frontier entered into the Agreement in the first place; so that the parties could agree on terms and conditions for pole attachments without resorting to Commission involvement.[45]

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[42] Bloom Decl., Ex. A.

[43] *See D.J. Hopkins, Inc. v. GTE Nw., Inc.*, 89 Wn. App. 1, 9, 947 P.2d 1220 (1997) (not necessary for agency to assume jurisdiction "when the claimant's allegations involve an isolated action or transaction.").

[44] *See, e.g., In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C. Rcd. 6777 (1998) ("The statute, legislative policy, administrative authority, and current industry practices all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity.") (footnotes omitted).

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34. Indeed, in light of this being a straightforward breach of contract action and Frontier's forum-shopping approach to defending the case, the Superior Court refused to dismiss or stay the case.

B. Under the Pole Attachment Statute, the WUTC's Authority is Limited to Determining Pole Rental Rates That Do Not Apply to PSE's Claims Against Frontier

35. There is no basis for the WUTC to assume jurisdiction here because a decision would have no effect on the contract claims that will be heard by King County Superior Court. Frontier asks the Commission to find that, as a matter of law, Frontier's revised distribution pole definition "was the just and reasonable interpretation throughout the course of the Agreement" and therefore "Frontier appropriately offset the amounts it under-billed for the five years between 2008 and 2012." But none of the relevant statutes the WUTC would apply provides for such retrospective relief.

36. The primary statute to be applied here is RCW 80.54 ("Pole Attachment Statute"), which grants the Commission the authority to regulate the "rates, terms, and conditions for attachments."[46] Nothing in the Pole Attachment Statute authorizes the Commission to award the retroactive relief Frontier seeks. Instead, any relief the WUTC can provide would be prospective and would relate to rental rates applicable to time periods after

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[45] The Agreement terms reflect this spirit and purpose. *See, e.g.* Section 16.16 (the parties agree to "act in good faith and use commercially reasonable efforts to resolve any Dispute" prior to legal action or agency involvement); Section 6.1.2 (permitting the parties to privately negotiate and agree to amend the rate formula among themselves).

[46] RCW 80.54.020.

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those at issue in PSE's King County Superior Court case and after the time periods demanded in Frontier's motion.[47]

37. Under the Pole Attachment Statute, the only mechanism for the Commission to exercise its authority to rule on the reasonableness of a rate is in response to a complaint by a utility that believes it is being charged an unjust or unreasonable rate.[48] Only after a utility brings a complaint may the Commission weigh in on a rate question.[49] And even then, the Commission's power in ruling on pole attachment disputes is limited solely to *prospective* relief.[50]

38. Specifically, RCW 80.54.030 provides that "[w]henever the commission shall find . . . that the rates, terms, or conditions . . . are unjust, unreasonable . . . the commission shall determine the just, reasonable, or sufficient rates, terms, and conditions ***thereafter to be observed*** and in force and shall fix the same by order."[51]

39. Contrary to Frontier's assertion, the Commission has no authority under RCW 80.54.030 to interpret the reasonableness of—or to revise or award a refund of—a rate charged solely in the past. The statute plainly prohibits the Commission from doing so.[52]

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[47] See Motion ¶¶ 10; 32 (seeking relief for rates Frontier charged PSE during 2002 to 2014).

[48] RCW 80.54.030.

[49] *Id.*

[50] *Id.*

[51] *Id.* (emphasis added).

[52] This is consistent with Washington law and general WUTC position in other non-pole attachment contexts prohibiting retroactive ratemaking. *In re Puget Sound Energy*, Docket UE-010410, Order Denying Petition to Amend Accounting Order ¶ 7 (Nov. 9, 2001) (pursuant to the retroactive ratemaking doctrine, "the Commission is charged with setting rates on a *prospective* basis.")

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40. Frontier also asks the Commission to determine that "the fees and interest charged by PSE are improper and unfair."[53] But this issue is already properly before the Superior Court. The Superior Court would be well within its discretion to award contractually-mandated attorneys' fees and interest if it determines that Frontier breached the Agreement by refusing to pay its full debt to PSE. Moreover, Frontier has cited no statutory authority for the Commission to review or decide on the reasonableness of a fee or interest provision in a private contract.

C. The Other Statutes Cited in the Commission's Pre-Hearing Order do Not Apply and Cannot Provide Retroactive Relief

41. In its briefing to the Superior Court, Frontier argued that "multiple statutes permit the WUTC to award retrospective damages in various circumstances," citing RCW 80.04.220 and RCW 80.04.230.[54] Relying on the prehearing order issued by the Commission, Frontier argued that "the WUTC itself has already decided that these statutes specifically addressing retrospective relief apply to *this* dispute" (emphasis added).[55]

42. Frontier is mistaken for several reasons. First, Frontier has never cited either statute in its request for relief to the WUTC, nor offered any explanation for how either statute would apply to its demand for a setoff for amounts it has allegedly under-billed to

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(emphasis in original). This also comports with Commission staff's own interpretation of a similar statute governing utility rates, which restricts the WUTC's authority to setting a rate to be "thereafter observed." *See* Reply Brief of Commission Staff, *WUTC v. PacifiCorp*, Docket No. UE- 020417, *et al.* at ¶ 10 (Sept. 6, 2002) (observing that the "express statutory embodiment of the rule against retroactive ratemaking" is found in the statute, "which empowers the Commission to order only the just and reasonable rates 'to be *thereafter* observed and in force . . . .'")(emphasis in original).

[53] Motion ¶ 10.

[54] Bloom Decl., Ex. I at p. 3.

[55] *Id.*

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PSE for over ten years. This is not surprising because on their face both statutes are inapplicable.

43. RCW 80.04.220 applies to a claim for "reparations" and provides an award of damages for a customer who has been charged an "excessive or exorbitant" rate by a public service company. Nowhere has Frontier alleged that PSE has charged an "excessive or exorbitant" rate. On the contrary, Frontier does not dispute the rates charged by PSE. Rather, Frontier asserts that its own rate has not been "just" or "reasonable." Thus, RCW 80.04.220 is not germane.

44. RCW 80.04.230 applies to a claim for "overcharges" and provides for a refund if a public service company charges a customer "rendered in excess of the lawful rate in force at the time such charge was made." Again, Frontier's claim that this statute applies fails as a matter of law because Frontier's claim does not relate to a rate charged by PSE "in excess"; rather, Frontier complains that it has undercharged PSE. More importantly, there was no rate set by law at the time Frontier claims that it made the charges because the rate was determined solely by the parties' private Agreement. Thus, there can be no violation of a "lawful" rate.

45. Finally, assuming, *arguendo*, that either statue applied to the facts here, neither would justify the relief Frontier seeks in the form of a retroactive decision on the rates it charged PSE over 10 years ago. This is because both statutes are subject to a very short statute of limitations. Claims for "reparations" must be filed with the Commission within *six months* of the alleged exorbitant charge and claims for "overcharges" must be filed within *two years*.[56] Even giving Frontier the benefit of the doubt and assuming that it honestly did

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[56] *See* RCW 80.04.240.

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not "discover" the underbilling issue until April 2013, Frontier's July 2015 WUTC complaint still exceeds either statute of limitations.[57]

D. The Commission's Draft Rulemaking Would Only Apply Prospectively

46. Frontier's request that the Commission award it retroactive relief for 2002 to 2014 rate charges would also not survive even if we assume that the Commission will at some point adopt the current proposed draft rules. Indeed, several sections of the proposed draft rules bar Frontier's retroactive claims.

47. First, section 480-54-070(1) of the draft rules is consistent with the Pole Attachment Statute and provides that, after hearing a complaint regarding a rate, the commission will determine the fair, just, reasonable, and sufficient rates, terms, and conditions *thereafter to be observed and in force . . .*"[58] In other words, the draft rules would permit the Commission to only award prospective relief.

48. Second, the draft proposed section 480-54-070(4) limits a party's ability to challenge a rate previously agreed to with another party pursuant to an attachment agreement to situations where either (a) the parties were unable to resolve a dispute about a rate prior to executing an agreement and "such challenge is brought within six months from the agreement," or (b) "the party challenging the rate, term or condition was reasonably unaware

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[57] *See Glick v. Verizon Northwest, Inc.*, Docket UT-040535, Initial Order Granting, In Part, Verizon's Motion for Summary Determination (Aug. 6, 2004) (agreeing with Verizon that claim for refund under RCW 80.04.220 was barred as untimely filed under the RCW 80.04.240 statute of limitations). And as discussed above, it is clear that Frontier's predecessor was fully aware of the whole pole issue since at least 2004, if not since the inception of the Agreement in 2002. From that perspective, the statute of limitations ran on Frontier's claims over ten years ago.

[58] *See* Bloom Decl., Ex. J (WUTC CR-102 Proposed Rules, Chapter 480-54 WAC "Attachment to Transmission Facilities" (July 24, 2015)) at 480-54-070(1) (emphasis added).

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of the other party's interpretation of that rate, term, or condition when the agreement was authorized."[59] Here, Frontier waited over ten years to challenge the rate in the parties' agreement and cannot claim that it was "reasonably unaware" of the agreed-upon rate. This is because of all the indicia that Frontier's predecessor was well aware of a significant number of partially-owned poles in its system and yet never challenged the fact that the rate formula counted all of Frontier's poles as whole poles.

49. Third, under the draft proposed section 480-54-070(8), the Commission may require the inclusion of a different rate in an attachment agreement if the Commission determines the existing rate is unjust or unreasonable. But the draft rules explicitly limit the period for which the Commission may order a "refund or payment of the difference" between the old and new rates to "the time the owner was charging the rate *after the effective date of this rule*."[60] Here, given that the rules have not yet been implemented, Frontier's claim for any refund is premature and barred by the express language of the draft rules.

E. The Commission and the Parties are Not Required to Adopt the FCC's Statements Regarding Pole Attachment Rates

50. Finally, Frontier argues that the Commission should intervene in this private contract dispute on the basis that the FCC has stated its view that the total number of poles a utility owns should be "adjusted to the total number of equivalent poles."[61] While the Commission may look to the FCC for guidance in certain situations, none of the FCC's statements are binding on the Commission. Nor are the parties required to adopt the FCC's

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[59] *Id.* at 480-54-070(4).

[60] *Id.* at 480-54-070(8) (emphasis added).

[61] Motion at ¶ 31.

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view when it conflicts with the parties' clear understanding since the inception of the Agreement and over a ten-year course of performance.

51. Moreover, Frontier concedes that the FCC legal authority it relies upon is "not new" and has been in place since 2002.[62] In other words, not only has Frontier been aware of the facts giving rise to a potential complaint to the WUTC since 2002, but Frontier should have reasonably been aware of the same legal support it now cites. And yet, Frontier inexplicably waited almost thirteen years to bring its WUTC Complaint regarding this exact issue.

F. Frontier is Free to Seek a Revision of the Rate After the Rules are Implemented

52. Because the draft proposed rules are not yet in place, there is no existing rule for the WUTC to apply to this dispute. Thus, Frontier cannot, as a threshold matter, demonstrate that its complaint is ripe for WUTC consideration.[63]

53. The relevant statutes do not give the WUTC the authority to issue any decision that would have a retroactive impact. Thus, Frontier's sole potential claim before the Commission would only arise after the rules are actually implemented.[64]

54. When and if the WUTC's proposed draft rules are implemented with the definition of "distribution pole" that Frontier advances here, Frontier would be within its

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[62] *Id.* ("The issue presented in this dispute is not new.)

[63] *See Walker v. Munro*, 124 Wn. 2d 402, 879 P.2d 920 (1994) (citizens' action challenging initiative measure was dismissed because the initiative measure had not yet taken effect; the court may not render advisory opinions or pronouncements upon abstract or speculative questions).

[64] PSE notes that Frontier's Motion for Summary Determination is explicitly limited to Frontier's request that the Commission order retroactive relief for 2002 to 2014. *See* Motion ¶¶ 10; 32. Frontier has not asked the Commission to determine the fairness of any rate charged for 2015 or going forward.

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rights under Section 6.1.2 of the Agreement to request that the WUTC order a revision of the rate to be thereafter charged. Until that time, Frontier's claims are barred as a matter of law and should be dismissed.

VII. CONCLUSION

55. Frontier asks the WUTC to re-write the terms of a contract to which it agreed, with full knowledge of the material terms and under which it had consistently performed for over 10 years. Since the inception of the Agreement in 2002, Frontier has been aware of its own fractional ownership of certain poles and yet, year after year, it provided PSE with pole count numbers based on counting "whole poles." Frontier went so far as to engage PSE in letters and meetings during 2004 and 2005 regarding this exact issue, but ultimately agreed to continue using "whole poles" to calculate the pole attachment rental rates.

56. If Frontier actually believed the Agreement and rate were "unjust" or that intervention by the WUTC was warranted, Frontier could have and should have sought the Commission's opinion in 2002 or any year thereafter before accruing the contract debt that is now owed to PSE. It did not. Instead, Frontier simply violated the Agreement and stopped paying PSE in midstream after a 10-year course of performance.

57. PSE's request to enforce the Agreement and collect on the full debt owed, including interest and fees, is properly pending before the Superior Court. Therefore, PSE respectfully requests that the WUTC decline to interrupt the King County Superior Court proceeding, deny Frontier's Motion for Summary Determination, and grant summary determination for PSE.

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DATED this 18th day of September, 2015.

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Docket UE-151344

CERTIFICATE OF SERVICE

CAROL KNESS states as follows:

1. I am a litigation secretary at Perkins Coie LLP, one of the attorneys of record for Puget Sound Energy, Inc., have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. On the 18th day of September, 2015, I made arrangements for the original of the foregoing Puget Sound Energy, Inc.'s Response to Frontier Communications Northwest, Inc.'s Motion for Summary Determination and Cross Motion for Summary Determination to be electronically filed with the WUTC by email delivering a true and correct copy to records@utc.wa.gov.

3. On the same day, I made arrangements for the original of the foregoing to be forwarded via overnight mail to:

Executive Director and Secretary
Washington State Utilities & Transportation Commission
P.O. Box 47250
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

4. On the same day, I made arrangements for a true and correct copy of the same document to be delivered via email and U.S. Mails as follows:

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I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 18th day of September, 2015, by CAROL KNESS.

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