

Page 17

1 BEFORE THE WASHINGTON STATE
 2 UTILITIES AND TRANSPORTATION COMMISSION

4 FRONTIER COMMUNICATIONS NORTHWEST,)
 5 INC.,)
 6 Complainant,))
 7 v.) DOCKET UE-151344
 8 PUGET SOUND ENERGY,)
 9 Respondent.)

10 ORAL ARGUMENT
 11 VOLUME II - Pages 17-41
 12 ADMINISTRATIVE LAW JUDGE GREGORY KOPTA

14 1:00 P.M.
 15 NOVEMBER 3, 2015

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Page 18

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Page 20

1 OLYMPIA, WASHINGTON NOVEMBER 3, 2015
 2 1:00 P.M.

3
 4 JUDGE KOPTA: Let's be on the record in
 5 Docket UE-151344; Caption: Frontier Communications
 6 Northwest, Inc. vs. Puget Sound Energy.
 7 We're here today for oral argument on cross
 8 motions for summary determinations of Frontier's complaint.
 9 And we will begin by taking appearances,
 10 starting with Frontier.

11 MR. HERNANDEZ: Your Honor, Roman Hernandez
 12 of K&L Gates, here on behalf of Frontier.

13 MR. THOMSON: Your Honor, good afternoon.
 14 George Baker Thomson, Jr. I'm in-house with Frontier
 15 Communications.

16 JUDGE KOPTA: Thank you.
 17 And for Puget Sound Energy?

18 MR. WILLIAMS: Good afternoon, your Honor.
 19 This is James Williams with Perkins Coie in Seattle on
 20 behalf of Puget Sound Energy, and I have on the phone with
 21 me my colleague, Karen Bloom.

22 JUDGE KOPTA: Thank you.
 23 And for Commission Staff?

24 MS. CAMERON-RULKOWSKI: Jennifer
 25 Cameron-Rulkowski Assistant Attorney General on behalf of

Page 21

1 Staff.

2 JUDGE KOPTA: Thank you.

3 I have read all of the pleadings. And when I

4 was in private practice, I always appreciated a judge that

5 sort of said where they were coming from to sort of give

6 some direction to the argument. So I will extend that same

7 practice as the judge here.

8 My own inclination is that I think Frontier

9 has the law correct in terms of what the FCC requires and

10 what the Commission has included in the rules that it

11 recently promulgated that will take effect on January 1.

12 My problem comes in interpreting the

13 agreement. I don't see anything in the agreement that would

14 incorporate those particular requirements. And without

15 that, I think we are in a position where there's not much

16 the Commission can do.

17 I'm also cognizant of the Superior Court

18 proceeding, and I don't want to step on any toes there. So

19 I'm a little cautious in terms of dealing with issues that

20 might become -- might be becoming before the court.

21 But as I see it, the Commission did not

22 promulgate rules until recently that addressed this

23 particular issue. And the statute is very general.

24 And the FCC decisions were not binding on the

25 Commission because of RCW 80.54, which essentially reversed

Page 22

1 -- preempted, in the terminology of the industry -- the FCC

2 from regulating in this area in the state of Washington.

3 So I certainly am willing to require that the

4 agreement be amended to include this requirement as the

5 agreement itself provides.

6 But as far as going back, I question whether

7 there's any ability that the Commission has to do anything;

8 and even if we did, whether that would be a wise use of

9 Commission authority when there's already a pending case

10 before the Superior Court that was filed before the

11 complaint in this docket.

12 So that's what my preliminary thoughts are.

13 Mr. Hernandez, I leave it to you to convince

14 me otherwise or support whatever it is that I am already

15 inclined to do.

16 MR. HERNANDEZ: Your Honor --

17 JUDGE KOPTA: You may sit. You don't need to

18 stand unless you want to.

19 MR. HERNANDEZ: Your Honor, let me first

20 address the points that the Commission has raised regarding

21 the determination going forward.

22 And while it is true that the Commission has

23 promulgated rules after significant rule making, a process

24 by which it undertook comments from various stakeholders,

25 the fact remains that this is a situation where the

Page 23

1 Commission has ample authority provided to it by the

2 legislature to decide what was the just and reasonable

3 rental rate, including partial pole, into that analysis.

4 JUDGE KOPTA: Yes. But -- that may be. But

5 aren't we dealing here with a contract, and isn't the

6 Commission looking at the four corners of the contract to

7 determine what the appropriate rate should be because the

8 parties' agreement is what governs their relationship?

9 MR. HERNANDEZ: The parties' agreement is

10 only one part of it.

11 The Commission has greater responsibility and

12 authority. A party cannot contract with another party in

13 contravention of the statutory requirement that the rental

14 rates be just and reasonable. The Commission has oversight.

15 And it must protect the public and insure that the rates are

16 just and reasonable. So you have the --

17 JUDGE KOPTA: I accept that in some sense.

18 But just as a hypothetical, Frontier -- I'm not sure they

19 still do have tariffs. But at one time Frontier had

20 tariffs. And if that tariff had been in effect for ten

21 years and a customer came in and said, "Commission, this

22 rate isn't fair; it's not consistent with the statutory

23 obligation to have fair, just, reasonable, and sufficient

24 rates," and they were able to demonstrate that to the

25 Commission's satisfaction, are you saying that the

Page 24

1 Commission could then go back ten years and say, "Well, it

2 never was and so we can afford you some difference between

3 what we think the rate should have been ten years ago up to

4 now," or, as my understanding is, does the Commission say,

5 "Well, you're right, and from now on you have to charge the

6 rate that we think is fair, just, reasonable, and

7 sufficient?"

8 MR. HERNANDEZ: We think that the Commission

9 does have authority to issue an order that's allowed by

10 statute concluding that its determination was the rate that

11 was being charged before was unjust and unreasonable. In

12 fact, the Commission is empowered to do just that.

13 Whether that would have an effect on the

14 state court proceeding and its assessment of damages, it's

15 important to note that in this proceeding Frontier is not

16 seeking any damages. Instead, it's bringing forth the issue

17 that this is really an issue about what is just and

18 reasonable rates.

19 And your Honor, the -- if there's any

20 stepping on toes, it is that of the Superior Court upon this

21 Commission's responsibility and obligations to the public

22 because the rates need to be just and reasonable.

23 Granted, the parties have made a mistake.

24 But now that they have determined that mistake, the

25 opportunity is for the Commission to make a determination as

Page 25

1 to what is the just and reasonable rate, including the
 2 analysis of partial poles and including the methodology.
 3 The Commission could enter an order saying, "Yes, based on
 4 the fact that the Commission has already promulgated rules
 5 that include partial pole methodology, given the fact that
 6 the FCC has a similar analysis, inclusion of partial poles
 7 is required for a just and reasonable rate. In fact, PSE
 8 does not dispute that.
 9 And as to the motion pending before the
 10 Commission, there is no genuine issue of material fact or
 11 law that including partial poles into the analysis is
 12 required where there is a determination that there is a just
 13 and reasonable rate. There's no argument to the contrary.
 14 As to the appropriate prospective,
 15 absolutely. There's no dispute that the rule takes effect in
 16 2016. But nevertheless, the prospective relief sought by
 17 Frontier includes the conclusion by the WUTC that for the
 18 current calendar year 2015, partial poles must be included
 19 in the analysis in determining a just and reasonable rate.
 20 JUDGE KOPTA: Let me interrupt you just for a
 21 moment here. If the Commission were to rule that in fact a
 22 just and reasonable sufficient rate under the statute is as
 23 you described it, and required that the contract reflect
 24 that rate on a going forward basis, why would we go beyond
 25 that?

Page 26

1 I mean, would that be sufficient for you, or
 2 would you want something more than that in terms of
 3 interpreting the contract?
 4 MR. HERNANDEZ: I need to point out that the
 5 contract itself provides that it isn't subject to review and
 6 revision by the Commission; and nevertheless, that the
 7 parties have been operating under a misunderstanding of what
 8 is the -- whether it's partial poles or whole poles, in the
 9 contract itself, in 6.1.2, it states, and I quote,
 10 Notwithstanding the foregoing paragraph, 6.1.1, which
 11 addresses the rate schedules, the formulas to determine the
 12 annual rate shown in Schedules 1 and 2 of Appendix 4, the
 13 rental rate, may be revised during the term by mutual
 14 agreement between the parties or by imposition of a revision
 15 by the WUTC.
 16 The parties have already consented that the
 17 WUTC has ultimate authority, and it makes sense. Both are
 18 regulated utilities.
 19 As to this issue here, it's important to note
 20 that the term "distribution poles" is not defined anywhere
 21 in the contract. This is not an issue of contract
 22 interpretation, the four corners. Instead, it incorporates
 23 the legislative authority conveyed to the WUTC. So yes, you
 24 may impose what is the just and reasonable rental rate.
 25 And given that the Commission's already

Page 27

1 concluded partial poles are to be included in that
 2 methodology, the WUTC can make a determination that it
 3 should have been all the time being.
 4 Frontier's not here seeking damages.
 5 Whatever transpires in the state court is a separate
 6 proceeding, although the court stated that it would take
 7 whatever this body said into account.
 8 JUDGE KOPTA: So let me ask you, I mean, you
 9 would agree with me that parties can agree to something
 10 other than what the law requires in a private agreement,
 11 yes?
 12 MR. HERNANDEZ: They may.
 13 JUDGE KOPTA: And in 2002, I think when this
 14 agreement was executed, the FCC had ruled just exactly what
 15 you've said in terms of there being a requirement to only
 16 look at the ownership interest in a pole, not the entire
 17 pole; is that also correct?
 18 MR. HERNANDEZ: Yes.
 19 JUDGE KOPTA: So why would I not look at that
 20 and say you were aware of that, you agreed to something that
 21 didn't reflect that in the contract, and that was the
 22 deal?
 23 MR. HERNANDEZ: You certainly could make that
 24 determination.
 25 However, that does not take into account the

Page 28

1 requirement that the pole rental rates be just and
 2 reasonable, because the Commission is not looking out for
 3 the interest of Frontier nor of PSC, but that of the
 4 ratepayer. And the rates need to be just and reasonable.
 5 JUDGE KOPTA: But the ratepayer in this case
 6 is PSE. And this is Frontier's rate that's being charged,
 7 and the ratepayer doesn't seem to be complaining about what
 8 the rate was that you charged. So how is it that the
 9 Commission is protecting PSE by saying you should be paying
 10 more?
 11 MR. HERNANDEZ: There are subscribers to both
 12 utilities whose interests are affected by whatever rates the
 13 two parties in this room agree to, PSE and Frontier. The
 14 public interest is what the WUTC should be concerned about,
 15 not whether the particular ratepayer consented or Frontier
 16 consented. Instead, it is was it a just and reasonable
 17 rate, and if it was not, because it did not account for
 18 partial ownership.
 19 JUDGE KOPTA: I'm troubled by the thought
 20 that the Commission can come in later after the parties have
 21 reached their own agreement and say, "You know what, I know
 22 you guys agreed on this; but I'm sorry, the rate just isn't
 23 fair, just, reasonable and sufficient, so we're going to
 24 overrule your private agreement." Is that what you're
 25 saying we can do?

Page 29

1 MR. HERNANDEZ: Yes, your Honor. You can.
 2 And you have that authority by the legislature. It's found
 3 in statutes that we've cited in our motion, 80.54.020,
 4 80.54.030, 80.54.040. Yes, you have that authority granted
 5 to you by the legislature.
 6 JUDGE KOPTA: Well, I don't see how that
 7 statute impacts agreements between private parties. That's
 8 where I'm not on board with you in terms of what you're
 9 saying.
 10 And I think as PSE correctly points out, at
 11 least two of those statutes have to do with the rates that
 12 are being charged by the company as opposed to rates that
 13 are being paid by another company.
 14 So in this case, yes, you can't overcharge
 15 someone. But there's nothing in there that says you can't
 16 undercharge someone. And so I don't see any authority in
 17 the statute that specifically addresses that particular
 18 situation.
 19 MR. HERNANDEZ: The statute is not clear on
 20 this point.
 21 But the statutes and the administrative rules
 22 neither limit the WUTC's authority to craft an order
 23 concluding that again, the determination that the previous
 24 rental rate charged was unjust and unreasonable.
 25 JUDGE KOPTA: Let me go back to the Superior

Page 30

1 Court for a minute. I understand that you asked them to
 2 hold their proceedings in light of the primary jurisdiction
 3 of this Commission and that the court entered an order
 4 denying that motion, which is singularly unilluminating
 5 because there's no explanation for why the court denied your
 6 motion other than it was denied. Did the judge give any
 7 indication in oral argument or any other pleading or order
 8 why she was deciding as she did?
 9 MR. HERNANDEZ: The court concluded that both
 10 proceedings would proceed in tandem. I read the transcript.
 11 I wasn't there, your Honor, but I did read a transcript of
 12 the proceedings; that they would proceed in tandem. And she
 13 did caution the parties as to whether or not they would have
 14 deadlines that would overlap, and that she could adjust the
 15 schedule there.
 16 She did not intend that this court or this
 17 administrative body would hold its proceedings in lieu of
 18 its jurisdiction.
 19 JUDGE KOPTA: Okay. It's just sort of a
 20 black hole based on the information I had.
 21 MR. HERNANDEZ: Yes, your Honor.
 22 JUDGE KOPTA: Anything more that you want to
 23 say at this point?
 24 MR. HERNANDEZ: I think it's important to
 25 note that the relief that Frontier is requesting, it's not

Page 31

1 damages. It is a determination that it is correct and was
 2 correct in including partial pole ownership for the five
 3 years that it conducted its offset.
 4 Going forward in 2015, this Commission
 5 expressly has authority to make a ruling that a just and
 6 reasonable rate must include an analysis of partial poles.
 7 In 2016, we realize that there's already a
 8 rule coming out that way. But the -- Frontier's requesting
 9 that this body acknowledge the authority that it has by the
 10 Washington legislature and conclude that from those -- that
 11 five-year period that Frontier offset, it did that because
 12 the just and reasonable rental rate supersedes any
 13 responsibility between the contracted parties, must include
 14 partial pole ownership.
 15 JUDGE KOPTA: Okay.
 16 One other question that I neglected to ask
 17 you before: In the affidavit that PSE provided, Ms. Bloom's
 18 affidavit, there is a letter from 2004 from Frontier raising
 19 the very issue that you raise now and providing a
 20 recalculation of rates, and then a subsequent letter which
 21 is unsigned, so I don't know whether it was actually sent,
 22 saying that after discussions, that Verizon at that time
 23 agreed to continue on with counting the poles in their
 24 entirety as opposed to the divisional interest. Is that an
 25 issue of fact, or do you agree that those letters actually

Page 32

1 were exchanged between the parties?
 2 MR. HERNANDEZ: There is an issue of fact
 3 concerning the authority of individuals to contract into
 4 that type of arrangement; whether a specific person at
 5 Frontier who sent that letter -- and I know which letter
 6 your Honor is referencing. It was from Michael Foster. And
 7 there is an issue of fact as to whether or not he had
 8 authority to do so.
 9 JUDGE KOPTA: Okay. And I don't want to get
 10 into issues of fact at this point because we're talking
 11 about summary determination.
 12 MR. HERNANDEZ: That's right.
 13 JUDGE KOPTA: I just asked that question
 14 because you didn't say anything in response to PSE's motion,
 15 so I didn't know what your position was on those particular
 16 letters.
 17 MR. HERNANDEZ: Your Honor, that's a separate
 18 proceeding before the Superior Court. Those issues will be
 19 fleshed out and argued and presented to the court through
 20 evidence.
 21 But the issues here are not the breach of
 22 contract. It is essentially determining what the just and
 23 reasonable rental rate is.
 24 JUDGE KOPTA: Okay. Thank you for the
 25 clarification.

Page 33

1 Mr. Williams?
 2 MR. WILLIAMS: I prefer to stand, your Honor,
 3 if you don't mind.
 4 JUDGE KOPTA: You may.
 5 MR. WILLIAMS: It's easier to speak that way.
 6 Good afternoon, and thank you for making the
 7 time.
 8 I have to respectfully disagree with my
 9 eloquent opposing counsel, Mr. Hernandez.
 10 First, I think the record should be clear. I
 11 think there's a question about whether partial poles were
 12 ever considered before the rate -- calculation rate was set
 13 in motion in 2002.
 14 We think if you look at the contract itself
 15 and all the correspondence, the notion of fractional poles
 16 was always there as an issue at the very beginning. This is
 17 not a surprise. It was something specifically negotiated by
 18 the parties. They knew there was potential ownership of
 19 these poles then, 12 years ago; they know it now. So
 20 there's nothing fresh there.
 21 But the three reasons why we submit that this
 22 notion should be denied as follows:
 23 The first one is the Superior Court has
 24 exercised jurisdiction over the dispute. From our
 25 perspective, this is, and we've always said, nothing more

Page 34

1 than a common law breach of contract dispute between two
 2 parties who negotiated a deal. And now one of the parties
 3 has decided that they don't like the terms.
 4 This is garden variety, ordinary course of
 5 business for the King County Superior Court. They hear
 6 these kind of cases every day. Jurors decide these kinds of
 7 facts every day. And the Superior Court heard those
 8 arguments and agreed.
 9 Now what Mr. Hernandez didn't tell you,
 10 because he wasn't there, is the judge did give a variety of
 11 reasons why she denied the motion, because their motion to
 12 the Superior Court is almost a carbon copy of what they're
 13 arguing to this Commission right now.
 14 One of the things she was troubled by was the
 15 fact that they were forum shopping. She said, you know, it
 16 looks like forum shopping. And we made it pretty clear.
 17 They didn't like the common law rules. They didn't like the
 18 fact that there's a statute of limitations that prohibits
 19 them from going retroactively.
 20 JUDGE KOPTA: I'm going to interrupt you
 21 right here. I know. I understand that there was a dispute
 22 in the Superior Court, and I just prefer to leave it there.
 23 What I want to deal with right now is what I
 24 have before me with these two motions.
 25 MR. WILLIAMS: Yes, your Honor.

Page 35

1 JUDGE KOPTA: Now I understand what you're
 2 saying in terms of going backward in interpretation of the
 3 contract.
 4 Is it your position that the Commission can't
 5 at this point require the parties to revise their contract
 6 to reflect the rate as it would be calculated under the
 7 rules that the Commission has recently promulgated?
 8 MR. WILLIAMS: The answer is from January 1,
 9 2016 forward, the Commission should and can weigh in, as
 10 Frontier's requested, to have the pole attachment agreement
 11 reflect what is the current state of the pole attachment
 12 rule.
 13 With respect to everything that happens
 14 before January 1, 2016, we believe the Commission does not
 15 have any authority to retroactively change the terms of the
 16 parties that the parties agreed to in the contract.
 17 As a matter of fact, we're on the third
 18 billing cycle. They already owe us -- we're behind two
 19 years. They owe us for 2013. They owe us for 2014. And
 20 the clock just ran again on 2015 at the end of October.
 21 That's three years this debt has been outstanding.
 22 And they've been trying everything they can
 23 to avoid paying their just debt. They're trying to get out
 24 of the Superior Court, coming here hoping for a different
 25 result.

Page 36

1 Although Mr. Hernandez says they weren't
 2 trying to claw back money, they are. If he wants you to
 3 make a ruling that says whatever the rate is now applies
 4 back five years ago, that's a retroactive application. And
 5 he's going to take it right up to the Superior Court and
 6 say, "Hey, see, WUTC agrees we should be able to set off
 7 what we are -- what we owe Puget Sound Energy."
 8 We don't think that's fair. That's not
 9 right. There's nothing in the statute or regulation that
 10 authorizes the WUTC to do that.
 11 It's just as the judge said in the Superior
 12 Court ruling: It is forum shopping. It is inappropriate
 13 and shouldn't have any business in this litigation.
 14 The second reason why this ought to be denied
 15 is because we are talking about, again, a debt. This is a
 16 debt collection action. It's not about the rate.
 17 And the last point that I'll make is we think
 18 the WUTC has already decided this issue, so this motion
 19 they're making now is actually moot.
 20 The WUTC promulgated the rules. Those rules
 21 specifically say when they go into effect. Those rules do
 22 not say they're retroactive. And that would be inconsistent
 23 with everything else that's in the statutory body of law
 24 that governs the WUTC. There is absolutely no legal
 25 authority for the position that Frontier's taking before

Page 37

1 this Commission.
 2 So from our perspective, their motion should
 3 be denied for all those reasons, and it is now moot as a
 4 result of the Commission's own rules.
 5 And we also ask that if this court is -- if
 6 the Commission is not going to deny or dismiss the complaint
 7 altogether, at a minimum it should be stayed so that we can
 8 finish the Superior Court work and we're not forced as PSE
 9 to litigate this on two separate fronts.
 10 JUDGE KOPTA: Have there been any
 11 negotiations between the parties to amend the agreement to
 12 reflect the Commission's rules that will become effective on
 13 January 1?
 14 MR. WILLIAMS: I don't think we've gotten
 15 that far, your Honor. We're just trying to get our money
 16 that's outstanding. We want to get paid first. And then
 17 we'll talk about whether or not on a going forward basis
 18 whether or not we should modify.
 19 But until they pay, we're still waiting for
 20 them to do the right thing.
 21 JUDGE KOPTA: And is it your view that the
 22 Commission could not now enter an order requiring the
 23 parties to reflect that interpretation of the rules into the
 24 parties' agreement?
 25 MR. WILLIAMS: As I said at the outset, your

Page 38

1 Honor, if you're talking January 1, 2016 forward, I think
 2 that's true because that is what the Commission has said in
 3 its rulemaking.
 4 But we don't think that the Commission has
 5 the authority to interfere with what the parties have
 6 contracted for that is retrospective of the rule's
 7 application.
 8 JUDGE KOPTA: If the Commission were to enter
 9 such an order, when, in your view, would the new rates take
 10 effect?
 11 When would you start reflecting that new
 12 interpretation in the billing?
 13 You just talked about cycles, that you just
 14 missed one in October.
 15 MR. WILLIAMS: Right. So the new cycle
 16 started on November 1. 2015 is due at the end of November.
 17 We would say -- I guess November and December would probably
 18 reflect the old rate, and the new rate required by the
 19 Commission would start in January.
 20 JUDGE KOPTA: Okay. All right.
 21 Anything further?
 22 MR. WILLIAMS: Not unless my colleague
 23 Ms. Bloom has something to add.
 24 MS. BLOOM: Nothing. No, thank you.
 25 JUDGE KOPTA: All right. Thank you.

Page 39

1 Mr. Hernandez?
 2 MR. HERNANDEZ: Your Honor, I need to clarify
 3 a couple of points.
 4 Your Honor asked Mr. Williams whether or not
 5 the Commission has the authority to modify the current
 6 agreement. Absolutely it does. It does. It has that
 7 authority granted to it by the Washington legislature.
 8 Not only that, but the parties agreed in
 9 their agreement that the rates were subject to revision --
 10 that's the key word, quote, revision, end quote -- by WUTC
 11 found in the parties' agreement.
 12 Frontier takes the position that this is not
 13 just a breach of contract case. We have the overarching
 14 issues here concerning the just and reasonable rates.
 15 Prospective relief which Frontier requested
 16 if its motion of summary determination, which is un rebutted
 17 by PSE, means that the just and reasonable rate must take
 18 fractional ownership into account. And that applies in this
 19 calendar year, 2015. This billing cycle that Mr. Williams
 20 said ended in November, that's applicable to a ruling by the
 21 WUTC regarding this motion. It's prospective relief.
 22 And on those points, I'll close.
 23 JUDGE KOPTA: All right. Thank you,
 24 gentlemen.
 25 Ms. Cameron-Rulkowski, did you have anything

Page 40

1 that you wanted to add?
 2 MS. CAMERON-RULKOWSKI: No, your Honor.
 3 JUDGE KOPTA: Thank you.
 4 All right. Then we're adjourned.
 5 (Whereupon, the proceedings were
 6 concluded at 1:29 p.m.)
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CERTIFICATE OF REPORTER)
STATE OF WASHINGTON)
)
COUNTY OF KING)

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