MINNESOTA DEPARTMENT OF COMMERCE

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November 22, 2013

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: **Comments of the Minnesota Department of Commerce**
Docket No. P522, 405/C-13-941

Dear Dr. Haar:

Attached are the comments of the Minnesota Department of Commerce in the following matter:

> In the Matter of the Complaint by Farmers Mutual Telephone Co. (Farmers) Against Frontier Communications of Minnesota (Frontier) Regarding Early Termination Fees

The Departments recommendation is contained herein. The Department is available to answer any questions the Commission may have.

Sincerely,

/s/ KATHERINE DOHERTY
Rates Analyst

KD/ja
Attachment

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

COMMENTS OF THE MINNESOTA DEPARTMENT OF COMMERCE REGARDING FRONTIER'S MOTION TO DISMISS MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. P522,405/C-13-941

I. BACKGROUND

On October 8, 2013, Farmers Mutual Telephone Company (Farmers) filed a Verified Complaint and Request for Temporary Relief against Frontier Communications of Minnesota, Inc. (Frontier) for engaging in anticompetitive and unreasonable business practices.

Farmers alleges that Frontier inappropriately imposes early termination fees and automatic renewal of contract terms without first obtaining informed customer consent which unreasonably interferes with the ability of Frontier customers to exercise their choice of telecommunications provider and creates a barrier to Farmers' ability to compete. Farmers requests that the Commission commence an investigation, grant temporary relief pending completion of the Commission's investigation, and other appropriate relief.

On October 22, 2013, Frontier filed a Motion to Dismiss Farmers' Complaint, seeking dismissal of this matter, on three grounds. First, Frontier claims that the Commission lacks jurisdiction over high speed internet and interstate services. Second, with respect to the intrastate telecommunications services, Frontier states that there is no reasonable basis to investigate the Complaint because Frontier provides subscribers with notice of the early termination fees and automatic renewal term. Finally, Frontier argues that the Complaint is premature because an interconnection agreement between Farmers and Frontier requires mediation before Farmers may request a Commission investigation, but mediation did not occur.

On October 24, 2013, the Commission issued a Notice of Comment Period to address Frontier's Motion to Dismiss.

II. ARGUMENT

A. THE COMMISSION HAS JURISDICTION TO INVESTIGATE FARMERS' COMPLAINT

1. The Commission Has Authority to Regulate Intrastate Telecommunications Services

Frontier offers a phone service bundle that provides customers with local telephone service, intrastate long distance service, and interstate long distance service and various custom calling features. Frontier markets this set of services as "Digital Phone" service. The Commission has authority over intrastate telephone and telecommunications services,[1] and there appears to be no dispute that the Commission has authority over the Farmers' Complaint to the extent that it relates to its Digital Phone service and the intrastate components of its Digital Phone service bundle.

Frontier argues that the Early Termination Fees (ETFs) it imposes on certain customers of its Digital Phone service bundle "are not part of the intrastate service Frontier offers"[2] and relate only to the interstate components of the bundled service.[3] Therefore, Frontier argues, the ETFs fall outside the scope of the Commission's authority. This argument is misleadingly simplistic because it does not address the "bundling" practice of Frontier. Federal law preempts the Commission's authority to determine prices or other terms for a standalone retail interstate long distance service,[4] or standalone retail internet access service[5] but such standalone services are not at issue in this docket.

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[1] Minn. Stat. § 237.02 provides that the Commission has authority over telephone companies doing business in this state; Minn. Stat. § 237.01 subd. 7 defines a "Telephone Company" as any person, firm, association, or any corporation furnishing any telephone service to the public; Minn. Stat. § 237.07 provides the tariff requirement for regulated telephone services.

[2] Motion to Dismiss, page 6.

[3] Motion to Dismiss, note 3 ($50 fee relates to the interstate component of Digital Phone Essentials service) page 6 (Digital Phone Essentials has termination fee of up to $200.00) and page 8 (termination fee is imposed for "Digital Phone Basic").

[4] 47 U.S.C. § 152(a). (The FCC has jurisdiction over interstate communication by wire "and to all persons engaged within the United States in such communication.")

[5] *ITMO Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.* CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶¶ 102-04, 110, 118, 127. Date adopted: August 5, 2005 (The FCC classifies wireline broadband Internet access service as an information service, and the transmission component of broadband service as telecommunications. The FCC stated that the scope of its subject matter jurisdiction over broadband Internet access service extends to matters where the authority of the FCC is "reasonably ancillary" to the FCC's Title II authority. The FCC further stated that its classification of broadband service as an information service has no effect on ILECs' obligations toward requesting telecommunications

Instead, this docket involves alleged unreasonable conduct of an ILEC in the provision of intrastate services, over which the Commission has exclusive jurisdiction, which Frontier sells at retail within a package,[6] that includes services not regulated by the Commission. The Commission has authority to investigate matters "relating to any telephone service"[7] including matters involving unregulated services bundled with regulated services. Intrastate services that are included in a bundle of services are directly affected by the application of an ETF to the bundle of services. Because a LEC's allocation of an ETF to particular products or services within a bundle is controlled exclusively by that regulated LEC, and because it is not clear whether or under what circumstances a customer can avoid the ETF on its intrastate services, the practice should not be presumed to be outside the Commission's jurisdiction without an investigation. The Commission should find that it has jurisdiction to investigate.

Under Minnesota Law, the Commission has the subject matter jurisdiction to investigate this matter. Specifically, Minn. Stat. § 237.081, subd. 1, provides that, whenever the Commission believes that an investigation of any matter relating to any telephone service should for any reason be made, the Commission may investigate the service or matter. Because Farmers' Complaint raises matters concerning service bundles that include intrastate telecommunications services within the Commission's jurisdiction, the Commission has the authority to investigate.

2. *A Commission Investigation of the Facts is Appropriate.*

Under Minn. Stat. § 237.011 the Commission has the obligation to consider certain state goals for telecommunications, including, "encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner," and, "promoting customer choice."

Indeed, the Commission's role in setting conditions for entry is solely to ensure competition: the legislature gave the Commission exclusive authority to authorize companies to furnish local telephone service solely "[f]or the purpose of bringing about fair and reasonable competition for

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carriers' UNE rights under 47 U.S.C. § 251 as to the facilities used to provide broadband service.) The Frontier Motion at p.3, however, overstates the import of the *Vonage* dockets, which were NOT broadly concerned with "Internet service," but instead with State entry regulation of nomadic VoIP providers. The scope of State authority over Internet-related communication services is unsettled. For example, States may collect State USF on intrastate iVoIP traffic and State USF contribution rules for ***nomadic*** iVoIP are not preempted if they are consistent with the FCC's contribution rules for interconnected VoIP; *ITMO Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-112, FCC 10-185, Declaratory Ruling (rel. Nov. 5, 2010) (10-185).

6 Frontier Motion, p. 5 ("Frontier offers an intrastate/interstate Digital Phone service bundle, which provides customers both local telephone and long distance service.")

7 Minn. Stat. § 237.081, subd. 1.

local exchange telephone services…"[8] and the Commission is required by statute to "protect against … unfair competition, and other practices harmful to promoting fair and reasonable competition."[9] Minn. Stat. § 237.21 requires that, "No telephone … charges shall be allowed or approved by the commission under any circumstances, which are inadequate and which are intended to or naturally tend to destroy competition or produce a monopoly in telephone service in the locality affected."

Farmers' Complaint raises allegations of unreasonable, anticompetitive practices that could inhibit customers' choice. There are significant factual issues raised by Farmers in its Complaint, which are related to the provision of regulated services. The Commission needs to be cautious about dismissing a complaint concerning anti-competitive behavior prior to the investigation into such behavior. Frontier's claim that the allegations are unfounded is at this point simply an assertion by one party that does not negate the need for a Commission investigation to develop the record on the matter. While the Commission also needs to weigh the possibility that the complaint is frivolous and that an investigation will consume some resources of all involved, given the existing set of facts and allegations, the Department believes there are sufficient grounds for the Commission to investigate.

B. A DISPUTE CONCERNING FRONTIER'S TREATMENT OF ITS END USER CUSTOMERS DOES NOT ARISE "UNDER" OR "IN CONNECTION WITH" THE INTERCONNECTION AGREEMENT BETWEEN FRONTIER AND FARMERS; AND, EVEN IF THE ICA GOVERNS IN THIS INVESTIGATION, ITS TERMS DO NOT WARRANT "DISMISSAL" OF FARMER'S COMPLAINT

As a competitive local exchange carrier (CLEC), Farmers would have an interest in practices that interfere with the ability of consumers to exercise their choice of provider, and that create a barrier to a CLEC's ability to compete. To that end, the issues raised in Farmers' Complaint are based on a practice between Frontier and Frontier's own customers that Farmers alleges has had such an anti-competitive effect. The dispute resolution terms in the interconnection agreement between Frontier and Farmers only apply, "…in the event of a default or any other dispute arising hereunder or in connection herewith…."[10] There is no basis for concluding that a dispute between Frontier and its customers is contemplated by, arises under, or is in connection with the interconnection agreement between Frontier and Farmers. Thus, this dispute does not arise out of the interconnection agreement and thus does appear to be subject to the dispute resolution terms of the interconnection agreement.

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[8] Minn. Stat. § 237.16. Moreover, section 237.16 subd.1 (a)(2) (2) authorizes the Commission to establish terms and conditions for the entry of telephone service providers ***so as to protect consumers from monopolistic practices*** and preserve the state's commitment to universal service.

[9] Minn. Stat. § 237.16 subd.8 (a)(7).

[10] Motion to Dismiss, page 12.

To the extent that the dispute resolution terms in the interconnection agreement are found to be applicable to this matter, the Department does not believe the terms prohibit Farmers' Complaint. The terms do not require the mediation of disputes prior to the initiation of a formal complaint, as Frontier claims in its Motion to Dismiss. The terms merely require that, "…the aggrieved Party *shall first discuss* the default or dispute with the other Party *and seek resolution* prior to taking any action before any court or regulator...."[11] (emphasis added). Therefore, the timing of Farmer's does not conflict with the terms of the interconnection agreement. Finally, even if completion of a full-blown mediation were mandatory, the failure to seek mediation as a remedy in the Complaint does not warrant dismissal of the matter.[12]

III. CONCLUSION AND RECOMMENDATION

The Complaint by Farmer's is within the Commission's jurisdiction, and an investigation is warranted to develop the record in regards to numerous factual issues and allegations raised by the parties. The Department recommends that the Commission take the following actions:

1) Assert jurisdiction over the complaint;
2) Require an answer by Frontier pursuant to Minnesota Rule 7829.1800, subpart 2;
3) Require Frontier, in its answer, to explain why it should not be Enjoined from further efforts to collect ETFs from its customers pending a Commission's determination on the complaint;
4) Require Frontier, with its answer, to produce copies of the customer contracts for the services at issue. Require Frontier, with its answer, to produce a recording of a sales discussion wherein the terms relating to ETFs are explained to, and agreed upon by, the customer;
5) Require Frontier, with its answer, to identify any customer that had an ETF imposed, where Frontier is unable to produce either a signed contract or recorded sales call authorizing the imposition of an ETF;
6) Require Frontier, with its answer, to produce documentation showing terms and conditions provided in writing to customers regarding automatic contract renewal, including any term relating to the application of ETFs during any renewal term, and how such terms are agreed upon by the customer;
7) Order any further relief the Commission deems appropriate.

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11 *Id.*

12 Minn. R. Civ. P. directs that pleadings be construed to do substantial justice.

CERTIFICATE OF SERVICE

I, Sharon Ferguson, hereby certify that I have this day, served copies of the following document on the attached list of persons by electronic filing, certified mail, e-mail, or by depositing a true and correct copy thereof properly enveloped with postage paid in the United States Mail at St. Paul, Minnesota.

Minnesota Department of Commerce
Comments

Docket No. P522,405/C-13-941

Dated this **22nd** day of **November, 2013**

/s/Sharon Ferguson

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