

**Minnesota Public Utilities Commission**  
*Staff Briefing Paper*

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Meeting Date: January 7, 2014.....\*\* Agenda Item #   2  

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Company: Farmers Mutual Telephone Co.; Frontier Communications of Minnesota

Docket No. P-522, 405/C-13-941  
In the Matter of the Complaint by Farmers Mutual Telephone Co. (Farmers)  
Against Frontier Communications of Minnesota (Frontier) Regarding Early  
Termination Fees

Issues: Does the Commission have jurisdiction over the matter and are there grounds for  
further investigation of the allegations?

Staff: Kevin O’Grady.....651-201-2218

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*Relevant Documents*

Farmers/Frontier ICA (09-766)..... June 29, 2009  
Farmers Complaint.....October 8, 2013  
Frontier Motion to Dismiss.....October 22, 2013  
Farmers Comments.....November 22, 2013  
DOC Comments.....November 22, 2013  
Public Comments Within Comment Period..... December 5, 2013  
Public Comments Outside Comment Period ..... December 5, 2013

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## ***Introduction***

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On October 8, 2013, Farmers Mutual Telephone Co. (Farmers) filed a complaint against Frontier Communications of Minnesota (Frontier) arguing that Frontier is engaging in anticompetitive and unreasonable business practices by its imposition of early termination fees (ETF) and its use of automatic renewal of contract terms without first obtaining informed customer consent.

The Commission's first response to such complaints is to determine (i) whether it has jurisdiction over the matter and (ii) whether the matter warrants further investigation.

On October 22, 2013, Frontier filed a motion seeking dismissal of the complaint arguing, in part, that the Commission does not have jurisdiction over the matter.

On November 22, 2013, Farmers and the Minnesota Department of Commerce (DOC) filed comments in opposition to Frontier's motion to dismiss.

On December 5, 2013, fourteen individual letters from current and former customers of Frontier were entered into the record.

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## ***Farmers Complaint***

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Farmers is a competitive local exchange carrier (CLEC) in competition with Frontier, an incumbent local exchange carrier (ILEC). Farmers argues that Frontier is engaging in anticompetitive and unreasonable business practices by its inappropriate imposition of early termination fees (ETF) and its use of automatic renewal of contract terms without first obtaining informed customer consent. Frontier's use of these practices on existing and prospective customers has interfered with those customers' ability to exercise their choice of provider of telecommunications services and has created a barrier to Farmers' ability to effectively compete.

Farmers argues that Frontier has levied ETFs on customers that have terminated service with Frontier to subsequently purchase service from Farmers, and that Frontier has relied on automatic contract renewal terms to hold customers captive. When Frontier customers have contacted Frontier disputing the existence of a contract and objecting to the imposition of ETFs, Frontier has routinely refused to produce a signed copy of the contract or a transcript of the sales call evidencing the customer's informed acceptance of the terms.

Frontier's practices have been the subject of regulatory scrutiny elsewhere. In particular, four years ago, the New York Attorney General's office found that Frontier had not spelled out the existence of early termination fees and contract renewals to its customers, and as a result required Frontier to refund those fees to New York customers.

Farmers requests that the Commission:

1. Commence an investigation into Frontier's use of ETFs and automatic contract renewals;
2. Grant temporary relief enjoining Frontier from further efforts to collect ETFs from its former customers pending a completion of the Commission's investigation;
3. Based upon the record developed through its investigation, grant appropriate relief, including but not limited to:
  - a. Requiring Frontier, upon request, to produce a copy of the signed contract authorizing the imposition of an ETF as well as setting forth all terms, conditions, and circumstances under which the ETF applies, or, absent a signed contract, requiring Frontier to produce a recording of the sales discussion wherein the terms relating to ETFs are explained to, and agreed upon by, the customer;
  - b. Requiring Frontier to refund any ETF charged to any customer for whom Frontier is unable to produce either a signed contract or recorded sales call authorizing the imposition of an ETF;
  - c. Requiring Frontier, upon request, to produce documentation that any terms and conditions regarding automatic contract renewal - including any term relating to the application of ETFs during any renewal term, were explained to, and agreed upon by, the customer;
  - d. Ordering such other and further relief as may be supported by the record.

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## *Disposition of Formal Complaints*

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Minn. Rules 7829.1800, subparts 1, 2 and 4, respectively, set forth the procedure for Commission review of a formal complaint:

The commission shall review a formal complaint as soon as practicable to determine whether the commission has jurisdiction over the matter and to determine whether there are reasonable grounds to investigate the allegation. On concluding that it lacks jurisdiction or that there is no reasonable basis to investigate the matter, the commission shall dismiss the complaint.

And,

On concluding that it has jurisdiction over the matter and that investigation is warranted, the commission shall serve the complaint on the respondent, together with an order requiring the respondent to file an answer either stating that it has granted the relief the complainant requests, or responding to the allegations of the complaint. The answer must be filed with the commission and served on the complainant, the department, and the Residential Utilities Division of the Office of the Attorney General within 20 days of service of the complaint and order.

And,

If the respondent fails to answer a complaint served by the commission under subpart 2, the commission shall consider the allegations of the complaint denied.

Minn. Rules 7829.1900, subparts 2 and 3, respectively, make provision for the filing of comments by interested parties:

A person wishing to comment on a formal complaint shall do so within 30 days of the date of a commission order requiring an answer to the complaint. Comments must be served on the complainant, respondent, department, Residential Utilities Division of the Office of the Attorney General, and any other known parties.

And,

A commenting party has ten days from the expiration of the original comment period to file reply comments. Reply comments must be limited in scope to the issues raised in the initial comments and must be served on the complainant, respondent, department, Residential Utilities Division Of the Office of the Attorney General, and any other known parties.

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## ***Responses to Complaint***

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On October 22, Frontier requested dismissal of the complaint. Its arguments addressed the Commission's jurisdiction and whether there are reasonable grounds to pursue the matter. Subsequently, DOC and Farmers responded to those arguments. In addition to the comments received from Farmers and DOC the Commission also received 13 letters from former Frontier customers and one letter from a current Frontier customer. These letters address the grounds for investigation.

### **Commission Jurisdiction**

#### **Frontier Position**

Frontier argues that the Commission does not have jurisdiction over the matter. The ETFs referenced by Farmers apply to high-speed internet service, a service which is not subject to the Commission's jurisdiction. High-speed internet service is not a telephone service. It is not (nor has it ever been) tariffed with the Commission or subject to the jurisdiction of the Commission. Rather, internet broadband service is an "information service" subject to the exclusive jurisdiction of the FCC. Both the federal district court in Minnesota and the Eighth Court of Appeals have upheld the FCC's exclusive jurisdiction over internet services and previously enjoined the Minnesota Commission's attempts to regulate internet services.

Frontier offers an intrastate/interstate Digital Phone service bundle, which provides customers both local telephone and long distance service. The intrastate components of the service are reflected in Frontier's tariff on file with the Commission. The interstate long distance components of the Digital Phone service are provided by Frontier's long distance affiliate - Frontier Communications of America, Inc. The Digital Phone service ETFs are billed out of Frontier Communications of America's interstate price list and are not part of the intrastate service Frontier offers. As a result, the Commission does not regulate the rates, terms and conditions associated with the interstate long distance service, including the ETFs reflected in the interstate price list.

#### **Farmers Position**

Under Minnesota law, the Commission's investigatory authority is extremely broad. The Commission is authorized to commence an investigation whenever it believes that a service is inadequate or cannot be obtained or that an investigation of any matter relating to any telephone service should be made. The practices alleged in the complaint affect telephone service - specifically, the ability of Minnesota consumers to exercise their right to choose their provider to

telephone service-both directly and indirectly. Frontier's practice of applying ETFs and automatic contract renewals in connection with its Digital Phone product directly impedes a customer's ability to change telephone service providers.

Frontier asserts, incorrectly, that the core of the Farmers complaint relates to changes that only apply to high-speed internet service. However, Frontier's customer bills assign an ETF for its Digital Phone service which is not an internet service and, furthermore, Frontier markets its high speed internet service bundled with its Digital Phone service. When a customer purchases phone service bundled with internet service it is unrealistic to assert, as Frontier has, that labeling an early termination charge "Term HS EDLP Term Penalty" means that the charge relates solely and exclusively to the customer's internet service and is, therefore, beyond the Commission's reach. Indeed, the notices that Frontier says it puts on customers' bills refers generally to the customer's Frontier services, it does not distinguish between internet service and phone service. Plainly the charge affects the customer's telephone service, at least indirectly, and therefore falls within the Commission's investigative authority.

### **DOC Position**

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 the Farmers complaint raises matters concerning service bundles that include intrastate telecommunications services within the Commission's jurisdiction, the Commission has the authority to investigate.

Frontier argues that the ETFs it imposes on certain customers of its Digital Phone service bundle are not part of the intrastate service that Frontier offers, that the ETFs relate only to the interstate components of the bundled service and, therefore, the ETFs fall outside the scope of the Commission's authority. This argument is misleadingly simplistic. This docket involves alleged unreasonable conduct of an ILEC in the provision of intrastate services, over which the Commission has exclusive jurisdiction. 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.

## Grounds for Investigation

### Frontier Position

Frontier argued that the Commission should find that there is no reasonable basis for further investigation because Frontier adequately discloses its service terms and conditions, including price, early termination fees, and auto-renewal terms. Frontier informs customers of the ETFs at the time service is originated and on the periodic bills issued to the customers. Additionally, for those customers that subscribe to services with terms of two or more years, Frontier sends an email, which includes a hyperlink to the online terms and conditions associated with the service.

Additionally, Section 8 of the Frontier/Farmers interconnection agreement requires the mediation of disputes prior to the initiation of a formal complaint with the Commission. To date, Farmers has neither requested nor has there been any mediation of the issues raised in its Complaint. The Commission should respect the terms of the parties' negotiated contract and dismiss Farmers' complaint to allow Farmers and Frontier an opportunity to resolve the matter through mediation, as contemplated in their interconnection agreement.

### Customer Letters

The Commission received form letters from 13 former retail customers of Frontier. The main body of the letters state:

I am writing today as a former Frontier Communications customer that has received invoices which included early termination fees. Shortly after changing to a new phone and internet company, I received a bill from Frontier which included \$ \_\_\_ in early termination fees. When I first ordered service from Frontier, I agreed to a term contract for service, but that contract had expired when I terminated service. When I called Frontier to complain about the early termination fees, the customer service representative claimed the contract automatically renewed. The automatic renewal was not discussed when I signed up for service.

Frontier should not be allowed to engage in business practices which impose early termination fees after the initial term has been satisfied. If an automatic renewal clause were allowed, it should be fully explained to the consumer at the time the contract is signed, and the difference in the rate with and without term pricing should be explained. Consumers could then make an informed decision.

The blank in the above text contained handwritten figures ranging from \$200 to \$500.

One customer used the same form letter but noted that he did not terminate service with Frontier because of the ETF which Frontier indicated that it would charge. The customer stated that he did not agree to automatic renewal of the contract.

### **Farmers Position**

The goals that this Commission has been directed to consider as it executes its regulatory responsibilities include:

1. Encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner;
2. Promoting customer choice;
3. Ensuring consumer protections are maintained in the transition to a competitive market for local telecommunications service.

Frontier's application of ETFs and automatic contract renewals without first obtaining the customer's agreement to these terms directly implicates these policy goals. Frontier's practices are designed to discourage, if not prevent, customers from changing service providers. Those practices harm customers and harm competition.

In support of its motion to dismiss, Frontier refers to various types of disclosures that it claims it makes to customers regarding ETFs and automatic contract renewals. Many of these disclosures, such as notices printed on bills, however, appear to only be made after the service commences. Frontier cannot unilaterally impose contract terms after the fact by printing those terms on a bill, along with the words "as you agreed." To the extent that Frontier does, in fact, obtain documentation of customers' prior consent to the ETF and automatic renewal terms, then it should be easy for Frontier to demonstrate that. Thus far, Frontier has not done so. If Frontier does not have documentation that the customer agreed to a contract including an ETF and/or automatic renewal provision, that customer should not be charged in the first instance.

With respect to Frontier's argument that the complaint is premature, that Farmers must first avail itself of the dispute resolution process in the parties' interconnection agreement, Farmers states that the dispute resolution process applies only to disputes arising from the ICA. As Farmers' complaint is not based on the ICA its provisions are inapplicable.

### **DOC Position**

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.”

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. DOC believes there are sufficient grounds for the Commission to investigate.

With respect to the Parties’ ICA, a dispute concerning Frontier’s treatment of its end-user customers does not arise under or in connection with the Frontier/Farmers ICA, and even if the ICA governs in this investigation its terms do not warrant dismissal of the Farmers complaint. The issues raised in the Farmers complaint are based on a practice between Frontier and Frontier’s own customers that Farmers alleges has had an anti-competitive effect. 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 ICA between Frontier and Farmers. Thus, this dispute does not arise out of the ICA and thus does not appear to be subject to the dispute resolution terms of the interconnection agreement.

To the extent that the dispute resolution terms in the interconnection agreement are found to be applicable to this matter, DOC 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. Therefore, the timing of Farmer’s complaint does not conflict with the terms of the ICA. 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. Minn. R. Civ. P. directs that pleadings be construed to do substantial justice.

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### *Staff Analysis*

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Minn. Rules 7829.1800, subpart 1, dictates that the “commission shall review a formal complaint as soon as practicable to determine whether the commission has jurisdiction over the matter and

to determine whether there are reasonable grounds to investigate the allegation.” Jurisdiction and grounds are discussed in turn.

### **Jurisdiction**

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.

Staff believes that the Commission has jurisdiction over the local telephone service provided by Frontier and that the bundling of that service with interstate service and/or high speed internet service does not alter that authority.

#### **Commission Options Re: Jurisdiction**

- A.1. Find that the matter is not within the Commission’s jurisdiction. Grant Frontier’s motion and dismiss the complaint. Close the docket.
- A.2. Find that the matter is within the Commission’s jurisdiction.

Staff recommends option A.2.

### **Grounds for Investigation**

If the Commission does not find that it has jurisdiction over the matter there is no need to proceed to the issue of reasonable grounds for investigation.

Staff agrees with the arguments of Farmers and DOC that there are grounds to investigate the matter and that the parties’ ICA does not govern the disposition of the complaint. Under Minn. Stat. § 237.011 the Commission has the obligation to consider certain state goals for telecommunications, including, “maintaining just and reasonable rates,” “encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner,” and, “promoting customer choice.” Furthermore, 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.”

Staff agrees with DOC and Farmers that the Frontier/Farmers ICA does not govern the dispute. The ICA governs issues such as the exchange of traffic, points of interconnection and the rates applying to interconnection and traffic exchange. The dispute resolution clause of the ICA addresses only “a default or any other dispute arising hereunder or in connection herewith.”

Consider, too, that 14 former and current customers of Frontier have expressed concerns with Frontier’s ETF and auto-renewal practices. That those customers are not party to the ICA does not obviate their concerns.

### **Commission Options Re: Grounds for Investigation**

- B.1. Find that there are not reasonable grounds to investigate the complaint. Grant Frontier’s motion and dismiss the complaint. Close the docket.
- B.2. Presuming that the Commission has taken jurisdiction of the matter, find that there are reasonable grounds to investigate the complaint, serve the complaint on Frontier, and require Frontier to file an answer to the complaint within 20 days pursuant to Minn. Rules 7829.1800, subpart 2. Note that interested parties may file comments and replies pursuant to Minn. Rules 7829.1900, subparts 2 and 3.

Staff recommends option B.2.