

Staff Briefing Papers

Meeting Date October 17, 2019 Agenda Item 1**

Company Frontier Communications of Minnesota, Inc.;
Citizens Telecommunications of MN LLC

Docket No. **P407, 405/CI-18-122**

In the Matter of a Commission Inquiry into the Service Quality, Customer Service, and Billing Practices of Frontier Communications

Issues 1. Should the Commission approve the settlement filed by the Department of Commerce and Frontier?
2. Should the Commission take any other action?

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 **Relevant Documents**

Date

| | |
|--|-------------------|
| Order Initiating Investigation and Referring Matter for Public Hearings | April 26, 2018 |
| Order on Reconsideration | June 1, 2018 |
| Notice Requesting Comments on Frontier Communications' Billing Practices | November 9, 2018 |
| OAH Report on Public Hearings | November 16, 2018 |
| Department Report of Investigation and Attachments | January 4, 2019 |

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

 **Relevant Documents**

| | Date |
|--|-------------------|
| Order Extending Deadline for Frontier's Response and Proposing Mediation | February 15, 2019 |
| Frontier Response to Department (Public and Trade Secret) | March 5, 2019 |
| Department, Proposed Stipulation of Settlement | August 2, 2019 |
| OAH Report, Statement in Support of Proposed Stipulation of Settlement | August 2, 2019 |
| Office of Attorney General, Comments | August 21, 2019 |
| Frontier Comments | August 21, 2019 |
| Department of Commerce, Reply Comments | September 4, 2019 |
| Frontier Reply Comments (Public and Trade Secret) | September 4, 2019 |

I. Statement of the Issues

1. Should the Commission approve the settlement filed by the Department of Commerce and Frontier?
2. Should the Commission take any other action?

II. Background

On February 12, 2018, the Commission issued a notice initiating the current docket. Due to the volume of complaints, the Commission ordered public hearings, a report from the Department of Commerce (Department), and responses to the report. Upon receiving an extension request for responses to the Department report, the Commission's Order on February 15, 2019 proposed that the parties enter into mediation. The parties subsequently entered into mediation, and requested several extensions of time to continue the mediation. The notices extending time also required periodic reports from Frontier on the status of customer complaints and related issues. A settlement between Frontier and the Department was filed on August 2, 2019. Comments and reply comments were filed on the settlement.

Other Filings in Record

As of the writing of these briefing papers, this docket contains 397 filings, many of them customer comments and complaints. Staff has included only a limited number of documents in the "Relevant Documents" section for decision making purposes, although the Commission is free to peruse the entire record in eDockets.

ALJ Report

The Commission required 6 public hearings to be held around the state in Frontier's service areas. On November 16, 2018, the ALJ filed his report of those hearings. According to the ALJ Report, 53 people listed their names on the sign-in sheets in Ely; 57 in McGregor; 95 in Wyoming; 41 in Slayton; and 74 in Lakeville.¹ The ALJ noted the large number of complaints by attendees and the fact that many Frontier customers' complaints centered on internet service rather than telephone. Generally, the ALJ grouped the customer complaints into the following categories:

- Frontier's 1-800 customer service number (very long hold times, multiple calls to fix a problem, and apparent lack of notes on customers' past calls are some examples);
- Frequent service interruptions, disconnections and outages of phone and internet access service;
- Failure to repair or maintain network equipment, or update to new equipment;
- A variety of billing errors and resistance or refusal to credit bills;

¹ ALJ Report, p. 2.

- Inconvenient repair windows, missed repair appointments, repairs only temporarily improving service;
- And other related customer service issues.²

The ALJ's Conclusions begin at Section VII (Page 47). The ALJ noted the expiration of the Frontier and Citizens AFORs and also suggested some possibilities for the Commission to pursue:

- "the Commission should consider whether Frontier is meeting the service quality standards in the Commission's rules."³
- "Because only a small subset of Frontier's approximately 100,000 Minnesota customers attended the hearing or sent a complaint to the Commission in this docket, the Commission might consider requesting that Frontier match the complaints made at the hearings with entries in its record of customer complaints. Minnesota Rule 7810.5000 requires a utility operated in conjunction with any other enterprise (such as internet access) maintain "suitable records . . . so that the results of the telephone operation may be determined" Being unable to match complaints made at the hearing to its own records could indicate problems in Frontier's complaint recording procedures."⁴
- The ALJ also noted that at least as far as the customer testimony at public hearings, there were questions about whether Frontier was complying with: a) Minn. Rules 7810.1400's requirement for pro rata charges in the case of outages lasting at least 24 hours; b) 7810.3300's requirement that telephone plant and equipment be maintained; c) 7810.5200's requirement that 90% of customer calls be answered within 20 seconds; and 7810.5800's requirement that 95% of all out-of-service troubles be cleared within 24 hours.⁵

Department Report

On January 4, 2019, the Department filed a report. The full report is 140 pages, not including attachments. Some excerpts from the Report:

- Over a thousand consumer complaints and comments were submitted;
- Customers from all areas around the state filed complaints and comments;
- It appears that Frontier has been violating at least 35 separate laws and rules;
- The Minnesota Legislature has provided a clear set of remedies;
- Frontier's recordkeeping "appears to have become so deficient that...the Company's records cannot be relied upon by Frontier's executives or the Commission to know if the company is meeting its performance obligations or not."⁶

² ALJ Report, pp. 8-15.

³ ALJ Report, p. 49

⁴ ALJ Report, Para. 156, p. 49.

⁵ ALJ Report, pp. 48-50.

⁶ Department Report, pp. 2-3.

- The Commission will need verifiable methods to ensure compliance.

Frontier Reply to Department Report

On March 5, 2019, Frontier responded to the Department, disagreeing with the Department's report and requesting a contested case. For instance:

If this investigation is not resolved by settlement, Minn. Stat. § 237.081 will require a contested case because of many unresolved material fact issues... The Commission has often ordered contested cases in Commission-initiated investigations under Minn. Stat. § 237.081, including in service quality investigations. The unresolved material fact issues in this investigation require the same approach.⁷

The response also included the Declarations of four (4) Frontier personnel.

Proposed Settlement

On August 2, 2019, the Department and Frontier filed a proposed settlement. The settlement includes provisions on a refund plan and various types of filings, including a maintenance plan, Frontier's training materials, and reports on a variety of topics.

ALJ filing on Settlement

On August 2, 2019, the ALJ filed a statement in support of the Proposed Settlement. The ALJ explained why it took approximately five (5) months for the parties to reach the Proposed Settlement and pointed out that resources are better directed towards a settlement than to a contested case, and provided other observations on the Proposed Settlement.

III. Parties Comments on the Proposed Settlement

Initial comments

Office of Attorney General

The OAG filed initial comments on the Proposed Settlement, neither recommending approval or rejection of the settlement, but including 18 recommendations for the Commission's consideration related to getting more information on the settlement before acting on it, potentially modifying the settlement, or making clarifications. The OAG made four overall points:

⁷ Frontier response, p. 19.

1) *Under state statute, the Commission must find that a settlement is in the public interest and supported by substantial evidence before accepting it*

The OAG observed that “the Commission must independently review settlements under section 237.076 in order to ‘make its own determination of the merits of the matters which come before it.’”⁸

2) *Compared to the severity of the problems in this docket as well as looking at past settlements, there is a valid question whether the settlement is supported by substantial evidence or in the public interest*

Specifically, the OAG stated:

The Proposed Settlement...does not guarantee that Frontier will provide its customers with any relief...[i]nstead, that agreement merely provides a procedural framework for the types of remedies available to Frontier customers in the event Frontier later agrees with a customer’s complaint regarding past conduct⁹.

Further:

The Commission should find it noteworthy that the Proposed Settlement offers certain customer relief for past Frontier conduct that is identical to the types of customer remedies already provided for by Frontier’s now-expired AFOR. This signals to the OAG that the remedies provided for in the Proposed Penalty for certain past conduct by Frontier are not commensurate with the gravity of the allegations by the Department Report.¹⁰

Finally, the OAG pointed out that the record was not clear how this proposed settlement helps improve Frontier’s performance going forward:

The Department Report highlights the “significant, multistep actions by the Commission” that will be required “to set Frontier on a path to reach an acceptable level of performance” and the fact that “any actions ordered by the Commission will need verifiable methods to ensure compliance.” The OAG recommends that the Commission explore the extent to which the Proposed Settlement will effectively ensure improvement to Frontier’s service quality, customer service, and billing practices. Similar to the Commission’s reasoning in its 1996 Order Accepting US West Settlement with Modifications, the Commission should be hesitant to accept the Proposed Settlement, which may inadvertently

⁸ OAG comments at 11, quoting *In re Northwestern Bell Telephone Company’s Request to Place Three Optional Features in the Private Line Transport Service Tariff and Price List*, Docket No. P421/EM-89-688.

⁹ OAG August 21 comments at 10.

¹⁰ OAG comments, pp. 10-11.

incentivize Frontier to deny customer remedies and force the Commission to satisfy its burden of proof while Frontier achieves “substantial performance” and thereby terminates its obligations under the Proposed Settlement.

3) A number of issues are excluded from the settlement or reserved (not decided), and the timeframes for items covered by the settlement are unhelpful.

In the OAG’s words, the settlement

merely “kicks the can down the road” and provides a procedural claims process that authorizes Frontier to deny customer remedies and force the Department (or individual customers) to mediate such disputed claims at OAH prior to any resolution by the Commission during an informal expedited proceeding under Minnesota Statutes section 237.61.¹¹

In other words, the Proposed Settlement does not provide sufficient immediacy and certainty to justify accepting that proposal in lieu of ordering further administrative proceedings. And even if such immediacy and certainty were provided to Frontier customers, the Commission has found that “[s]ignificant as they are, concerns about delay and uncertain outcome associated with a contested case proceeding are not enough in themselves to warrant acceptance of an otherwise unreasonable settlement. These considerations are always present in these kinds of disputes.”¹²

4) If the Commission approves the settlement it should incorporate protective modifications.

Staff has listed these protective modifications in the decision options, and they are also found at the OAG comments starting at p. 16.

5) The Commission and parties should be aware of the provisions of Minn. Stat. § 16A.151.

The OAG recommended that the Commission proceed with caution in approving either customer remedies for past Frontier conduct postdating the AFORs’ expiration or future customer remedies, as such relief may be prone to reversal as prohibited by Minnesota Statutes section 16A.151.

Reply Comments

The Department and Frontier filed reply comments responding to the OAG’s questions and urging approval of the settlement.

Department

¹¹ OAG comments, p. 14.

¹² OAG comments, p. 15.

The Department disagreed with the OAG's concerns, and asked that the Commission allow the Department to continue its investigation on the remaining issues.¹³ The Department stated that substantial evidence exists in the record as follows:

- Thousands of pages of customer complaints, comments, and Speak Up! Submissions;
- The Department's Report with attachments (including Frontier IR responses);
- Frontier's response to the Department's Report;
- Transcripts of public hearings;
- ALJ's report on public hearings.

The Department stated that Section III of the Proposed Settlement generally tracks the subsections and topics in the Department Report.¹⁴

The Department disagreed that the settlement violates Minn. Stat. §16A.151, which refers to state officials recovering money in settlements. The Proposed Settlement does not provide that any government agencies will recover money from Frontier.¹⁵

The Department also disagreed with the OAG that the Commission may not accept a Proposed Settlement because the Commission cannot order restitution itself. See pages 9 and 10 of the Department's comments for the Department's legal reasoning.

Finally, the Department disagreed that the Reserved or Excluded Issues should proceed on a timeframe established by the Commission. However, the Department stated it would make its best attempt to proceed on a schedule, if one is established by the Commission.

Frontier

Frontier also disagreed with the OAG that further information needed to be filed in the record before the Commission could find the proposed settlement was supported by substantial evidence and is in the public interest. Frontier noted that the ALJ's statement recommending adoption provided support in the record. Further, some past settlements were adopted without additional record support.¹⁶

The fact that the Commission may be without authority to order remedies is support for the settlement, not a defect, in Frontier's view. And Frontier noted that it provided approximately \$180,000 in credits under its past AFOR without reporting or supervision.¹⁷

¹³ Department September 4 comments, p. 4.

¹⁴ Department September 4 comments, p. 6.

¹⁵ Department September 4, comments, p. 7. See also page 8.

¹⁶ Frontier September 4 comments, pp. 3-4.

¹⁷ Frontier September 4 comments, p 4.

Further, Frontier pointed out that there would be significant and serious delays if the Commission does not accept the settlement.¹⁸

Frontier offered a detailed, point-by-point response to the OAG's comments at pages 8-13, which staff will not repeat here.

IV. Staff Analysis

Staff commends the parties for taking on the difficult task of negotiating a settlement. The docket has now been open for nearly two years and much has been in the record for the parties to digest and navigate as they make attempts to develop a document that can lead to improved performance for Frontier as well as transparency and certainty for the public.

There appear to be four general topics on which the Commission may want clarification: 1) how the settlement assigns roles to the Department and Commission; 2) the intent and impact of the reports, plans, and other documents filed; 3) the process, scope, and impact of the refund plan; and 4) whether, as the OAG asks, the settlement will lead to improvements in the company's service quality, customer service, and other performance.

Settlement Assignment of Roles Overall

As written, the settlement largely exchanges information between the Department and Frontier. The Commission may want to ask the settling parties why the settlement is structured like this, and either confirm that it is reasonable and appropriate for the Department to have primary responsibility for enforcing the settlement, or make changes to the settlement to locate the responsibility with the Commission.

In many places throughout the document, the Proposed Settlement states that Frontier shall provide filings to the Department:

| Proposed Settlement Language | Location |
|--|-------------------|
| All plans...communications, notices, or training materials subject to review by the Department are deemed accepted within 30 working days of the Commission by Frontier unless the Department notifies Frontier of an objection. | Section I.C, p.2 |
| Frontier will provide, subject to the Department's review and comment, a plan for consumers to seek refunds and credits. | Section II, p. 4. |
| Frontier will provide a monthly report with the Department...regarding the number of written [refund] claims....[w]here Frontier determines that a claim does not warrant a credit, Frontier will provide to the Department and the customer the reason why the determination was made. If the Department disagrees with Frontier's decision, Frontier may | Section II. p. 8. |

¹⁸ Frontier September 4 comments, p. 6.

| | |
|---|------------------------|
| provide the customer credit and/or seek mediation....through the Office of Administrative Hearings. | |
| Frontier will file a report with the Department, within 90 days of the Commission's Order...that demonstrates that Frontier complies with Minn. Rule 7810.3900... | Section III.B, page 10 |

Staff counts 25 places throughout the Proposed Settlement where Frontier is required to submit a filing specifically to the Department. There appear to be another 21 places where it is specified that a filing shall be submitted for the "Department's review and comment." There are two potential problems with this type of language. First, this language appears unnecessary since if Frontier must file it in eDockets, since eDockets automatically serves it upon the Department. Second, under the Commission's Rules of Practice and Procedure, carriers are required to make filings upon a docket's service list and anyone may comment. The language suggests that these filings would not be served on the entire service list, and also that only the Department would have the opportunity to comment and review the filings. It is unclear whether the parties intended to request a variance to the Commission's rules, and if so, why. Further, while there may be good reasons to structure the Settlement this way, the Commission may want to better understand those reasons or decide retain some of this authority for itself. Staff cannot find another settlement presented to or accepted by the Commission that contains this language.

Later sections of this staff analysis provide more specific examples where decision-making authority appears to be granted to the Department. In these instances, the language in the settlement may or may not permit the Commission to make any decisions, ask questions, or rule on filings, plans, compliance, or customer refunds. Staff has not seen any settlement ever accepted by the Commission that divides the tasks of the Department and Commission in this manner.¹⁹ There may be explanations for this structure. For example, it may be that this was an attempt to manage the volume of filings, particular in response to a refund plan. That said, the Commission manages refund plans on the energy side that involve hundreds of thousands of customers, and staff is confident that it can manage the refunds and compliance issues contemplated by the Settlement.

As the OAG points out, the Department's earlier report suggested that "significant, multistep actions by the Commission" would be needed "to set Frontier on a path to reach an acceptable level of performance" and the fact that "any actions ordered by the Commission will need verifiable methods to ensure compliance." However, it is not clear where the Proposed Settlement includes much action by the Commission. It is unclear how there verifiable methods to ensure compliance.

¹⁹ While Section VII.F states that the settlement does not limit or affect the authority of the Commission on 5 subject areas, the effect of the settlement, at least as written, is that the Commission loses its ability to independently review the many reports filed, to be involved as it normally is on refunds and claims. Thus, there appears to be confusion between the language in VII.F and the language in other parts of the settlement

Included as Attachment B to these briefing papers is a summary of some of the contacts that local governments in Frontier's service area made at public hearings. In Commission dockets, the Commission has employed its CAO to reach out to stakeholders that have participated in its proceedings. With the creation of its Public Advisor position, the Commission has indicated an even greater commitment to reaching out to stakeholders as part of its dockets. However, if this settlement were accepted as written, the Commission may have difficulty providing information on the settlement if filings and refund information are only provided to the Department.

The Commission may choose to modify the Proposed Settlement by simply restoring the more regular division of responsibilities between the Department and Commission. That is, the Commission could:

- 1) Modify the settlement to remove the language specifying that filings will be made to the Department, and eliminating the language stating that the Department may object to certain filings.
- 2) Modify the settlement to remove the language stating that filings are deemed accepted.
- 3) Clarify that the Commission may use its Public Advisor or other staff to design a public and stakeholder engagement program to gather follow up input during the term of the settlement.

Reports, Plans, and other Filings

A number of filings are to be made as part of this settlement. Some are reports, others are filings, such as a maintenance plan and training materials for Frontier staff. The number and frequency of reports appears high in comparison to other settlements. (Staff uses "Filings" and "Reports" interchangeably, to encompass the various filings listed in the Proposed Settlement that provide information.) As noted above, the majority of the Filings are subject to review and comment by the Department, which appears to preclude comments by other parties or review by the Commission.

Staff makes the following observations on the various filings.

The Impact on Stakeholders and the Public of the Many Filings

First, it should be pointed out that once the Commission requires a report from a regulated carrier, it is often perceived by stakeholders and the public as taking some sort of ownership over that topic. Reports can merely be informational, serving merely as a forum to obtain data, or they can be reports that could lead to Commission decision making and action. Given the public's interest in this docket, it is important to be transparent and clear about the nature of the reports that may be filed here.

Reports by themselves do not form the basis of a substantive settlement nor do they necessarily lead to problem solving. Frontier was subject to reporting during the term of its AFOR, and customer complaints suggest that many of these problems existed during the term of the AFOR. That past AFOR reporting did not tip off either agency to the problems that led to the opening of this docket; rather, it was the Commission's Consumer Affairs Office that tracked complaints and identified the pattern of problems. This leads staff to the conclusion that the regulatory agencies need to be more forward looking and flexible about how they track and solve potential problems. Tracking problems and reporting on them may not lead directly to improved service quality, and it appears that some of the more pro-active parts of the settlement will be developed later without much Commission input, such as the maintenance plan.

The filing of a maintenance plan, in particular, or training materials, may give the public the impression that the Commission has authority over Frontier's maintenance schedule and plans, and has been heavily involved in training Frontier's staff. As discussed later in this staff analysis, the Commission has more recently focused on outcome or performance-based filings.

It is Unclear Why a Number of Filings are Deemed Accepted Unless Objected to By the Department

The Proposed Settlement states, "All plans, including the Maintenance Plan described in Section III.A below, communications, notices, or training materials subject to review by the Department are deemed accepted within 30 working days of submission by Frontier unless the Department notifies Frontier of an objection." The following are unclear:

- 1) what "deemed accepted" means, why it is necessary to deem such filings accepted, and how that label affects the Commission's decision-making authority.
- 2) whether the parties intended to request varying portions of the Commission's rules of practice and procedure in Chapter 7829, which allows the Commission to set comment periods, and allows any person or organization to file comments on a filing;
- 3) Whether there is a particular policy or other reason for only allowing the Department to object, and why it would direct its objection to Frontier rather than the Commission and the service list;

It seems likely that this "deemed accepted" process is similar to a "negative check off process," which regulated utilities have recently suggested in other dockets. The Commission has had robust discussions about when and whether to allow negative check off processes. In general, the Commission has only allowed a negative check off process when a filing does not involve any exercise of discretion or policy and is in the nature of a compliance filing, where a regulated company is simply memorializing that it carried out a particular task or calculation—after the Commission has made all of its policy decisions. These circumstances do not appear to apply here – a compliance filing is substantially different than determining whether a plan reasonably resolves the issues raised by the large numbers of consumer complaints received in this docket.

It May not Be Advisable to Commit to all Reports at the Beginning of the Proposed Settlement

Reporting does not need to be memorialized in a settlement; there may be unintended consequences from doing so. Both the Department and Commission may request information within the agencies' authorities at any time. The Commission has learned through experience that reporting is often an iterative process; in many dockets, the Commission directs a regulated company to provide information, and then adjusts the information it is requesting, so that the data it is receiving matches the situation it is monitoring. This is why the Commission has often directed the overall topic it wants reported by Order, with delegation handed to the Executive Secretary to determine the exact content of the reports.

In reviewing past telecommunications settlements, staff finds settlements that include virtually no reporting requirements; instead, the settlement contains almost exclusively steps the regulated carrier must take to improve its performance. Staff interprets this to mean that the state agencies and carriers have generally understood that the agencies can request information about compliance with the settlement, without it being committed to within the settlement. This Proposed Settlement is different, in that it contains comparatively less specific direction on what Frontier must do, but a wide variety of reporting requirements. The Commission may choose to consider that certain general topics or outcomes be reported throughout the term of this Proposed Settlement, but delegate the authority to the Executive Secretary to adjust those reporting requirements so that reports do not become obsolete or outdated, and continue to track the most relevant and necessary information for the proceeding.

Several of the Reports Do Not Measure Outcomes or Performance

Staff notes that on the energy side, the Commission has done much to examine how to move to performance-based reporting. Although energy utilities are much more heavily regulated than telephone companies, many of the Commission's telecom service quality rules take this performance-based approach, which the ALJ focused on in his report.

In the Commission's recent PBR (Performance Based Regulation) docket, the Commission very strongly adopted the recommendations of the Department, OAG, and other stakeholders in finding that reporting should be based on outcomes, not specific technology or actions. For instance, as to reliability, the OAG stated:

[R]eliability is a customer-facing outcome. Accordingly, the Commission should focus on metrics that measure how reliable the system is from the customers' perspective. There was some discussion of using storage as a metric to measure reliability. Storage, however, is a technology that could improve reliability, not a measurement of reliability. Thus, if the Company is able to effectively utilize storage to improve its reliability, metrics that more directly measure reliability outcomes will appropriately capture that use of storage. To the extent that these metrics are ever used for financial incentives or penalties to the Company, the metrics should not reward the deployment of technology that might improve reliability. Rather, they should reward the effective use of that technology to

achieve measurable improvements in the reliability that ratepayers receive from their utility.²⁰

In the Conclusion section of the ALJ's report, the ALJ focused on certain service quality rules that appeared to be the focus of customer complaints. The Commission may choose to seek more record development before accepting the settlement, asking why it should not modify settlement to only include outcome-based reporting, and why it could not adjust those reports as necessary.

A number of the Commission's telecom service quality rules are performance-based and appear to be tied to the most likely customer complaints. Further, the Commission could take the ALJ's suggestion that there be a comparison between the individual customer complaints filed here and Frontier's records, to determine whether Frontier's record keeping is adequate.

Similarly, here, it is not clear why a maintenance plan is more useful rather than focusing simply on the quality of the service that customers are receiving.²¹ Some type of maintenance plan may be useful as a public engagement tool for customers and local representatives in Frontier's service area, but again, there is little in the record on exactly what the maintenance plan will include, why it should be deemed accepted, whether it can be updated, and to what extent the Commission can independently take action on it. Training materials, likewise, may not be indicative of how Frontier uses those training materials with its staff nor may it represent what customers are experiencing.²²

As to reporting, the Commission may choose to:

1) issue a notice seeking comments on the questions above regarding the goal or process of the reports before approving the settlement. In particular, the notice can inquire why more focused, performance-based reporting should not be the priority. In addition, the Commission could ask why the reporting should not be more of an iterative structure, able to change reporting requirements in the event circumstances change. The Commission could also inquire

²⁰ OAG reply comments, Docket E002/CI-17-401.

²¹ Without knowing more about the maintenance plan, staff presumes the plan could appear reasonable on its face but there could still be problems with service quality, or vice versa.

²² Rather than reviewing training materials, the Commission could look to other recent dockets. In a recent MERC docket, the Department and OAG worked with the company on metrics related to the quality of service to the customer, including:

- Customer Transaction Satisfaction
- Residential First Call Resolution
- Billing Accuracy
- Billing Timeliness
- Field Service Appointments Kept

why there should not be more focus on actual customer complaints filed with the Commission compared to Frontier's records.

OR

2) Accept the Proposed Settlement but with modifications to the reporting, to align closer to the following:

- a) removal of the "deemed accepted" language, and reinstating the Commission's rules of practice and procedure for the process in filing and accepting filings.
- b) the Commission's Public Advisor design an engagement program to ensure any reports filed by Frontier are distributed to interested Frontier consumers (in particular, local governments and other organizations).

Attachment A includes such modifications, except that the Commission need not modify the settlement to designate its Public Advisor to work on an engagement program.

Refund Plan (Section II of the Proposed Settlement)

The Proposed Settlement allows Frontier customers to file a claim for refunds or credits related to a variety of problems, including but not limited to outages, incorrect billing for vacation rate, and late fees. See the table in Section II of the Proposed Settlement for a full list of refunds or credit.

First, the settlement states that "Frontier will provide, subject to the Department's review and comment, a plan for consumers to seek refunds and credits." Section II. It is not clear what "plan" must be filed for refunds/credit, what details would be added, and whether that would change the Commission's opinion of the adequacy of the refund plan.

The form to be used for customers to make a claim "will be discussed and mutually agreed upon between Frontier and the Department, as a plan subject to Department review and comment, before being sent to or accessible by customers." Section II.

The requirement that the Department approves the claim form to be used by customers departs from the Commission's earlier order stating that the Executive Secretary is to approve all materials that are sent to customers.²³ Neither Frontier nor the Department explain in the record why they chose to depart from the previous delegation. The delegation to the Commission's Executive Secretary for customer communications is a long standing practice that allows the Commission's CAO to ensure that materials sent to customers have been vetted by the staff experienced in customer engagement. In addition, the delegation ensures

²³ "The Commission delegates to the Executive Secretary the authority to approve customer notices, bill inserts, bill format, *and any other communications for the duration of this proceeding.*" Order in current docket, Issued April 26, 2018. The Commission has used this language in many other dockets and has always interpreted to mean that the Executive Secretary approves any customer communications for the rest of the proceeding until the docket is completely closed and no further work is performed on the docket.

transparency by allowing those documents to be filed in edockets along with a notice memorializing the Commission's approval of that document.

Next, the reports on customer claims are to be filed "with the Department, beginning the first month after issuing Claims Notices and ending with the last review of the written claims..." Further, if Frontier has determined that a claim does not warrant a credit, "Frontier will provide to the Department and the customer the reason why the determination was made." This appears to be inconsistent with state statute, which requires carriers to file all documents in edockets, and with the docket's service list.²⁴ (Customer identifying information would be redacted from a public version of this report.) The purpose of filing in edockets and on a service list goes beyond a mere legal technicality; the Commission, as a quasi-judicial agency, must operate with transparency, and has a long-established policy of allowing any interested stakeholder or member of the public to relevant documents filed in its proceedings.

In other Commission dockets related to refunds or credits, the Commission's Consumer Affairs Office has been the point of contact, with aggregated information on refunds and credits filed in edockets. CAO is specifically staffed with consumer mediators, has a toll free number, e-mail address, phone system, and a database to track customer inquiries. There is no information provided in the settlement on why a departure from this practice is needed. All previous communications sent out in this docket referenced the Consumer Affairs Office as the point of contact for the public. Section VII.E states that the settlement does not preclude any Frontier customer from filing a separate complaint with the Commission, but it is not clear if that section is intended to mean that a customer can circumvent the claim process in the settlement and approach CAO instead. Nor is it clear why that would be advisable.

Furthermore, if the Department disagrees with Frontier's decision, the two parties may enter into mediation. However, the settlement does not allow any other entity, including the Commission or another interested stakeholder, the authority to challenge Frontier's decisions. The settlement also takes the unusual step of allowing OAH mediation between the Department and Frontier as the only means to resolve the disagreement. OAH mediation (by statute) is closed to any other entity not involved in the mediation. The Commission may only be involved if and when if mediation is not successful to all disputed claims.²⁵

Staff has reviewed past settlements approved by the Commission. There is no record of an approved settlement ever restricting reports on refunds or credits to only being filed with the Department and only granting the Department the authority to challenge a denied refund/claim. In addition, the closed nature of the mediation process means that if a Frontier customer contacts CAO about an issue overlapping with a claim it has filed with Frontier, and if

²⁴ Minn. Stat. §216.17, subd. 3: "As of January 1, 2008, any telephone company or telecommunications carrier subject to Chapter 237...shall file documents with the commission via the commission's electronic filing system."

²⁵ "If such mediation is not successful as to all disputed claims, Frontier may provide the customer credit or aggregate all remaining disagreements in a single petition for resolution by the Commission." Section II. 3.

that claim is in mediation, CAO may be excluded and cannot effectively respond to the customer. Similarly, if Frontier is relying on a particular interpretation of Commission Rule in denying claims, the Commission appears to have no ability to weigh in on its own motion and exercise its decision-making authority.

In short, the Commission may seek clarity on the following issues related to the refund plan:

- 1) Why the Commission should move away from CAO as the point of contact;
- 2) the transparency or accessibility of the OAH mediation process to consumers, the Commission, or other interested stakeholders;
- 3) the lines between the claims/mediation process and the normal CAO complaint process running concurrently.

OR

Modify the Proposed Settlement as to the refund plan process. A copy of that language is provided in Attachment A.

Whether the Settlement Provides a Reasonable Assurance of Improvement

The OAG in its August 21 comments asks the Commission to examine whether the remedies provided for by the Proposed Settlement provide a reasonable assurance that Frontier will comply with telecommunications laws in the future. Specifically, the OAG states:

...the Commission should be hesitant to accept the Proposed Settlement, which may inadvertently incentivize Frontier to deny customer remedies and force the Commission to satisfy its burden of proof while Frontier achieves “substantial performance” and thereby terminates its obligations under the Proposed Settlement.²⁶

And

...the OAG expresses concern that the Proposed Settlement fails to resolve any past violation by Frontier of Minnesota’s telecommunications statutes or rules. Instead, it merely “kicks the can down the road” and provide a procedural claims process...[i]n other words, the Proposed Settlement does not provide sufficient immediacy and certainty to justify accepting that proposal in lieu of ordering further administrative proceedings.²⁷

The OAG’s point is well taken, particularly since the Commission must find the Proposed Settlement to be in the public interest in order to accept it. While there is a refund/credit plan,

²⁶ OAG comments at 14.

²⁷ OAG comments at 14, 15.

as submitted there is much undeveloped and unclear about the process as previously stated, and the myriad of filings required throughout the settlement do suggest, as the OAG does, that a number of issues are being delayed rather than resolved. For example, the Settlement does not appear to resolve whether Frontier violated any Minnesota laws or rules, and what action should be taken in response.

Whether a given settlement will provide assurance of improvement may be the most difficult issue for the Commission to predict, in any docket. One provision of the settlement that could be modified is Section IV.B, which sets the standards for whether Frontier will be found in substantial compliance with the settlement. In Attachment A, staff has offered edits which remove these predetermined standards and simply use a notice and comment process for that future determination.

Comparison with Past Settlements

Comparing the Proposed Settlement with past settlements may offer some guidance to the Commission.

This settlement omits the more inclusive parts of past settlements. For instance, in the McLeod settlement, McLeod was required to host monthly calls with the Department, OAG, and PUC staff, to review the quality of its responses to complaints.²⁸ The Commission has vast experience with refunds and credits on energy dockets; in those dockets, the number and dollar amounts of refunds are reported in edockets rather than just to the Department. And in the recent CenturyLink TAP docket, the refunds, compliance filings, training materials, and other documents were filed in edockets and able to be reviewed by CAO, Commission staff, and any other interested stakeholder.²⁹

In the USWest settlement, which Frontier relies to recommend acceptance of its settlement, the company was to file reports to both the Commission and Department, and customer contacts were reported to the Commission, without being reported to the Department. In addition, there is no language deeming the USWest reports approved if not objected to.

Further, as the OAG points out, the Commission reserved the right to terminate the USWest settlement if in its judgement it did not see improvement:

[T]he Commission is not so confident in the settlement's ability to solve previously intractable problems that it is willing to surrender its normal regulatory authority for two years. The Commission will therefore retain the right to terminate the operation of the settlement and deal with service quality through standard regulatory procedures, should that prove to be necessary. While the settlement is clearly designed to focus Company attention on service quality, it

²⁸ McLeod settlement, Exhibit A, page 3, Docket 03-140.

²⁹ P421/CI-17-796.

does not include any mechanism to compel Company action.³⁰

Staff does not see language in the Proposed Settlement giving the Commission this ability. Staff notes that in the McLeod settlement, the settlement stated, “The Parties will be bound by the terms of the Settlement Agreement, which shall be subject to the Commission’s enforcement authority.” McLeod settlement, page 7.

Miscellaneous Issues

Definition of Complaint

The OAG suggests in its August 21 comments that the Commission consider determining what a “complaint” is. The Proposed Settlement reserves that issue for further consideration but the OAG recommends taking up this issue.

Staff notes that the Commission was previously asked by the Department to come up with a definition of “complaint” and declined.³¹ The Commission’s rules require telephone companies to respond to “all customer inquiries, requests, and complaints.”³² It is not relevant whether a customer contact rises to the level of a complaint or not, the company must respond to it.

Digital Voice

Section III.S. of the Proposed Settlement states that the Commission’s Notice Requesting Comments related to its practices on its Digital Voice service are not included or resolved. Section III.S goes on to say that the Parties may take any action they deem appropriate before the Commission or any regulatory body or court.

The current docket is the Commission’s own proceeding, and the Notice referred to in Section III.S was issued by the Commission pursuant to statute, due to an impasse the Commission’s CAO reached with Frontier on a number of customer complaints. The Commission has the authority to continue to raise the issue if it chooses to do so and should not be constrained by this Proposed Settlement.

Contested Case

Although not specifically advocated for by any party, staff has included a decision option related to a contested case. Under Minn. Stat. §237.076, a contested case is an option if the Commission does not accept the settlement, or if the Commission modifies the settlement and a party rejects the modifications.

³⁰ OAG August 21, 2019 comments at 13, quoting the Commission’s Order in Docket No. P-421/CI-95-648, Order Accepting Settlement with Modifications.

³¹ Docket P421/CI-17-796.

³² Minn. Rules 7810.1100, subpart 1.

Staff has written the decision option to include a third party audit in the contested case, since many times throughout the record, there has been a concern raised that either Frontier's records may be incomplete or incorrect. Staff is not advocating for this or any other particular decision option, only providing a range of possible options for the Commission to consider.

V. Decision Options

A. Accept the settlement as proposed.

B. Modify the settlement as proposed by the OAG:

a. Require Frontier to make an upfront dollar-specific payment to a nonrefundable escrow account to discourage the company from arbitrarily denying both past and future customer claims;

b. Imposing a stayed civil penalty to be later recovered by the Office of the Minnesota Attorney General pursuant to section 237.461 in the event Frontier either continues to violate telecommunication laws or otherwise fails to comply with the Proposed Settlement.

c. Exploring additional enforcement measures that compensate Frontier customers without contravening legal precedent finding that the Commission is without express or implied authority to compel remedial damages.

d. Amending Section I.G to require Frontier to include in its quarterly report to the Department the details regarding all customer complaints for which Frontier denied the remedies provided for in Section I.G.1-6.

e. Clarifying, as appropriate, whether the Commission may approve (with or without modifications) the remedial relief provided to Frontier customers under section 237.076 without violating past legal precedent holding that the Commission is without express or implied legislative authority to order remedial relief.

f. Amending the Proposed Settlement to require a specific claims process for future Frontier customer complaints alleging violations of Section I.G.1-6 similar to the claims process for past Frontier violations as elucidated in Section II.

g. Include language maximizing the Commission's ability to terminate that agreement in the event Frontier continues to violate telecommunication laws in light of the 1996 Order Accepting US West Settlement with Modifications.

h. Amending Section VII.D so that the parties are provided ten days to respond to a Commission order modifying the Proposed Settlement to align the timeframe with that contained in section 237.076

i. Clarifying the extent to which the Department's or the Commission's actions to vindicate the rights of Frontier customers impact or otherwise preclude those customers' legal or administrative abilities to independently seek relief from Frontier.

j. Requiring Frontier to waive any equitable arguments (e.g., statutes of limitation, repose, etc.) that would preclude the Commission, the Department and/or any individual Frontier citizen from seeking remedies under the Proposed Settlement.

k. Moving the Excluded Issues and Reserved Matters from Section III.S-X, which governs future Frontier conduct, into Section I to clarify that such excluded issues and matters relate both to past and future Frontier conduct.

And take the following action to clarify issues under the settlement:

l. Resolving the parties' apparent disagreement over what constitutes a complaint for purposes of administering the Proposed Settlement;

m. Clarifying, as appropriate, that the Commission initiated its investigation to vindicate the rights of individual Frontier customers, in order to insulate the Proposed Settlement from potential section 16A.151 challenges;

C. Request more information as proposed by the OAG:

a. Direct the parties to submit a list of past Frontier customer complaints for which there is an agreement concerning the availability of remedies.

b. Direct the parties to further elucidate the extent to which substantial evidence in the record supports a finding that the Proposed Settlement resolves the issues framed by the Commission.

c. Direct the parties to submit proposals regarding the timeframe by which the Department will complete its investigation into the Excluded Issues and Reserved Matters over which the Department and/or Commission have jurisdiction and explain the Commission's options for next procedural steps after completion of such Department investigation;

d. Direct the parties to further elucidate the extent to which the Proposed Settlement's past remedies would be resolved in a more definite and timely manner than if the Commission were to refer this matter to a contested case hearing;

e. Direct the parties to further elucidate the extent to which the Proposed Settlement would provide the Commission with a reasonable assurance regarding Frontier's compliance with Minnesota's telecommunications statutes and rules in light of the 1996 Order Accepting US West Settlement with Modifications;

f. Direct the parties to further elucidate the extent to which the Proposed Settlement provides for reasonable remedies compared with Frontier's alleged conduct in light of the 1996 Order Accepting US West Settlement with Modifications;

D. Delegate the authority to the Executive Secretary to issue a notice seeking additional comments on why the settlement is in the public interest and supported by substantial evidence, including but not limited to the following topics:

1. Why any filings subject to the settlement should be deemed approved if not objected to by the Department;
2. Why filings, reports and plans should not be developed and adjusted rather than committed to during the entire term of the settlement;
3. Why the Commission should not require a comparison of customer complaints filed with the Commission to Frontier's records;
4. Why the refund plan requires customers to file claims, and why the chosen refund plan process is in the public interest;
5. Why the settlement selects the Department, rather than the Commission, as the primary agency to determine compliance and act as customer point of contact;
6. Why the settlement does not appear to follow the Commission's rules of practice and procedure, Chapter 7829.

E. Modify the settlement as listed in Attachment A. (*Staff note:* these modifications align process consistent with Chapter 7829 and continues the Commission's previous delegation of approval over customer communications to the Executive Secretary. However, most reporting requirements otherwise stay the same.)

F. Determine that more factual development is necessary to determine whether the settlement resolves all important issues, and refer the matter to contested case. As part of the record development in the contested case, Frontier shall retain and pay for the services of a third party auditor. The third party auditor shall be selected by the Department, and the auditor shall investigate whether Frontier is in compliance with the Commission's service quality rules in Chapter 7810, with particular focus on Frontier's obligations under Minnesota Rules 7810.4900-7810.5000 to maintain records of its operations. The Commission hereby delegates authority

to the Executive Secretary to work with the Office of Administrative Hearings to further determine a scope and schedule for the contested case.

G. Take some other action.