

**BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION
SUITE 350
121 SEVENTH PLACE EAST
ST. PAUL, MINNESOTA 55101-2147**

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| Katie Sieben | Chair |
| Dan Lipschultz | Commissioner |
| Valerie Means | Commissioner |
| Matthew Schuerger | Commissioner |
| John Tuma | Commissioner |

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

MPUC Docket No. P-407, 405/CI-18-122

**REPLY COMMENTS OF THE MINNESOTA
DEPARTMENT OF COMMERCE**

September 4, 2019

I. BACKGROUND

From March to August 2019, the Office of the Attorney General – Residential Utilities and Antitrust Division (“OAG”), the Minnesota Department of Commerce (“Department”), and Frontier Communications of Minnesota, Inc. and Citizens Telecommunications Company of Minnesota, LLC (collectively, “Frontier”) participated in mediation led by the Office of Administrative Hearings to attempt to resolve matters in this docket.

On August 2, 2019, the Department filed a Proposed Stipulation of Settlement between the Department and Frontier.¹ The Proposed Settlement did not include or resolve certain issues, which the Department addressed in comments also filed on August 2.²

On August 7, 2019, the Commission issued a Notice of Comment Period on Settlement.³ The following topics were listed as open for comment: (1) whether the Commission should approve, modify, or reject the Proposed Settlement; (2) what actions, if any, should the Commission take on the issues raised but not resolved in the Proposed Settlement; (3) what actions should the Commission take in response to the OAG’s and the Department’s August 2 comments; and (4) other issues or concerns related to this matter. The Notice set the initial comment period to close on August 21, and the reply comment period to close on September 4.

On August 21, the OAG filed comments in response to the Commission’s August 7 notice.⁴

¹ See Proposed Stipulation of Settlement Pursuant to Minn. Stat. § 237.076 (Aug. 2, 2019) (hereinafter “Proposed Settlement”).

² See Comment of the Minn. Dep’t of Commerce at 3-4 (Aug. 2, 2019). The OAG also filed comments on August 2. See Comments of the Office of the Attorney General (Aug. 2, 2019).

³ See Notice of Comment Period on Settlement (Aug. 7, 2019).

⁴ Initial Comments of the [] Office Attorney General (Aug. 21, 2018) (hereinafter “August 21 Comments”). Because the Department filed comments on many issues in the August 7 notice concurrent with filing the Proposed Settlement, the Department believed it unnecessary to reiterate its comments. Frontier also filed comments in response to the Commission’s August 7 (Footnote Continued on Next Page)

II. RESPONSE TO LEGAL ISSUES RAISED REGARDING THE PROPOSED SETTLEMENT

The August 21 Comments of the OAG “neither support[ed] nor oppose[d] the Proposed Settlement” but suggested modifications to the Proposed Settlement and further informational filings.⁵ The comments also indicated that several issues could cause the Proposed Settlement to be invalid.⁶ Among the legal issues raised by the August 21 Comments are:

- The Proposed Settlement lacks substantial evidence because disagreements may remain between Frontier and the Department and because it lacked stipulated facts;
- Frontier’s issuance of bill credits to customers and refunds to former customers for overcharges or other service quality impacts provided by the Proposed Settlement may be invalid under Minn. Stat. § 16A.151; and
- The Commission may lack authority to accept Frontier’s proposal to issue bill credits and refunds because the Commission lacks authority to order entities subject to regulation under chapter 237 to provide remedial relief.⁷

The August 21 Comments also recommended that the Commission propose a timeframe for the Department to complete its investigation on the issues excluded from the Proposed Settlement and for the Department and Commission to exercise their ongoing authority under the Reserved Matters section of the Proposed Settlement.⁸

The Department respectfully disagrees with the legal arguments raised by the August 21 Comments as applied to the Proposed Settlement. The Department believes the Proposed Settlement is in the public interest and supported by substantial evidence. The Department also

(Footnote Continued from Previous Page)

notice. *See* Comments of Frontier Commc’ns of Minn., Inc. and Citizens Telecomm. Co. of Minn., Inc. (Aug. 20, 2018). These reply comments do not address Frontier comments.

⁵ August 21 Comments at 1-2, 16-19.

⁶ *See id.* at 7-16.

⁷ *See id.* at 8-12.

⁸ *See id.* at 16 (referencing Proposed Settlement section VII.J and K).

requests that the Commission allow the Department to complete its investigation on the remaining issues.

A. The Record Contains Substantial Evidence Upon Which the Commission May Base A Decision to Approve the Proposed Settlement.

The August 21 Comments raised concerns regarding the substantial-evidence standard in Minn. Stat. § 237.076.⁹ The comments appeared to take issue with the Proposed Settlement’s lack of stipulated facts and appeared to argue that any continued disagreement between the Department and Frontier weighs against a substantial-evidence finding.

Minn. Stat. § 237.076 provides, “The commission may accept a settlement upon finding that to do so is in the public interest and is supported by substantial evidence.” This requirement is similar to the general requirement that administrative agency decisions be based on substantial evidence, as an appellate court may reverse an agency decision if it is “unsupported by substantial evidence in view of the entire record as submitted.”¹⁰

The Department agrees that the Commission’s decision to accept a settlement must be based on substantial evidence, as must all Commission decisions. However, no support is provided for the proposition that ongoing disputes between settling parties weigh against a substantial-evidence finding. Nor is there a requirement that a proposed settlement under section 237.076 contain stipulated facts. Rather, the Commission must determine whether the entire record provides substantial evidence to support a proposed settlement.¹¹

⁹ *See id.* at 8-9.

¹⁰ Minn. Stat. § 14.69 (2018).

¹¹ *See* Minn. Stat. § 237.076 (2018); Minn. Stat. § 14.69.

The current record contains substantial evidence upon which the Commission may base a decision to approve the Proposed Settlement and which supports accepting the Proposed Settlement. The substantial evidence in the record includes:

- Thousands of pages of customer complaints, comments, and Speak Up! submissions, which are compiled in the Record of Subscriber and Public Complaints and Comments;¹²
- The Department's report on its investigation and attachments that include more than 30 information request (IR) responses from Frontier;¹³
- Frontier's response to the Department Report and attachments;¹⁴
- Transcripts of seven public hearings with exhibits;¹⁵ and
- The Administrative Law Judge's report on the public hearings.¹⁶

Past proposed settlements have been approved based on significantly less robust records.¹⁷ The Department supports the development of a robust record upon which the Commission may base its decisions, but also appreciates that the Commission must balance the time required to build the record, the added benefit that can be derived from the additional time to build the record, and the need for expedient relief to customers that have, or are, experiencing

¹² See Filing Letter for Record of Subscriber and Public Complaints and Comments (Jan. 18, 2019).

¹³ See Report of the Minn. Dep't of Commerce (Jan. 4, 2019) (hereinafter "Department Report").

¹⁴ See Response to the Report of the Dep't of Commerce of Frontier Commc'ns of Minn., Inc. and Citizens Telecomm. of Minn., LLC (Mar. 5, 2019) (hereinafter "Frontier Response").

¹⁵ See Public Hearing Transcripts for Ely, Wyoming, McGregor, Slayton, and Lakeville and Public Hearing Exhibits (Oct. 16, 2018).

¹⁶ See Report on Public Hearings (Nov. 16, 2018).

¹⁷ See, e.g., *In re Complaint of PrairieWave Commc'ns, Inc. (f/k/a McLeodUSA Telecom Dev., Inc.) Against Qwest Corp. Regarding the Payment of Switched Access Charges*, MPUC Docket No. P-421/C-02-1439, Order Approving Settlement and Closing Docket (Dec. 11, 2003).

harm. In addition, it has not been the Commission's practice to require that parties submit stipulated facts with settlement proposals.¹⁸

In this matter, section III of the Proposed Settlement generally tracks the subsections and topics in the Department Report, which in turn contains references to consumer complaints and comments, public hearing transcripts and exhibits, and Frontier's IR responses. Frontier had the opportunity and did respond to the Department Report, at times contesting the Department's and consumers' statements, but at other times acknowledging facts stated in the Department Report.¹⁹ In short, the Proposed Settlement is supported by the substantial and voluminous evidence in the record.

B. The Suggestion that Permitting Frontier to Credit Customers or Refund Former Customers Overcharges Through the Proposed Settlement Is Unlawful Reflects an Incorrect Understanding of Minnesota Law.

The Department disagrees with the suggestion that the Proposed Settlement's process for Frontier to issue customer credits or refunds for past overcharges and future remedies violates Minnesota law. Specifically, the August 21 Comments recommend 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

¹⁸ See *id.*; *In re Velocity Telephone, Inc. Complaint Against Qwest Corp. for Breach of Interconnection Agreement and Anticompetitive Conduct*, MPUC Docket No. P-5986/C-09-545, Order Approving Settlement and Closing Docket (Nov. 10, 2009). Although the CenterPoint rate case settlement cited to prefiled testimony, it did not include stipulated facts. See *In re the Application by CenterPoint Energy Res. Corp., d/b/a CenterPoint Energy Minn. Gas for Authority to Increase Nat. Gas Rates in Minn.*, MPUC Docket. No. G-008/GR-17-285, Order Accepting and Adopting Agreement Setting Rates (July 20, 2018), Offer of Settlement (Mar. 7, 2018).

¹⁹ See, e.g., Frontier Response at 63 (acknowledging that Frontier did not meet the objectives in its previous AFORs regarding customer service answering time).

prohibited by Minnesota Statutes section 16A.151.”²⁰ Such an interpretation of section 16A.151 would render improper numerous routine actions that the Commission, Department, and OAG regularly take to protect ratepayers and consumers and to regulate public utilities and telephone utilities like Frontier.

Minn. Stat. § 16A.151, subdivision 1 provides, “notwithstanding any law to the contrary,” and subject to six²¹ exceptions:

(b) A state official may not commence, pursue, or settle litigation,²² or settle a matter that could have resulted in litigation, in a manner that would result in money being distributed to a person or entity other than the state.

(c) Money recovered by a state official in litigation or in settlement of a matter that could have resulted in litigation is state money and must be deposited in the general fund.

The Proposed Settlement does not provide that a government agency, such as the Department, Commission, OAG, or any other state official will recover money from Frontier.²³ Rather, the Proposed Settlement provides a process by which customers and former customers may submit claims to Frontier seeking bill credits or refunds for incorrect charges and service quality problems.²⁴ Frontier will then remit credits or refunds directly to customers or former customers.

²⁰ August 21 Comments at 11.

²¹ See Minn. Stat. § 16A.151, subd. 2(a)-(e) (2018); 2019 Minn. Laws ch. 63, art. 1 (adding subdivision 2(f) to allow for money to be placed in a separate treasury account if the state prevails in litigation against opioid manufacturers or distributors).

²² The statute defines “litigation” as including “civil, criminal, and administrative actions.” Minn. Stat. § 16A.151, subd. 3(1).

²³ Regulators will have access to the Frontier reports on claims payments, which Frontier must file with the Commission in eDockets.

²⁴ See Proposed Settlement, Section II.

Because state officials will not recover money from Frontier under the Proposed Settlement, subdivision 1(c) does not apply in this docket.²⁵ Further, adopting the view that subdivision 1(b) prohibits the Commission from commencing, pursuing, or settling any “matter that could have resulted in litigation” whenever customers or former customers bill payments would be reduced by bill credits and refunds or changed by rates, could preclude many of the Commission’s commonplace statutory duties.

For example, the theory being put forward would appear to preclude agency intervention in contested proceedings involving disputes over reasonableness of rates, including tariffed rates, that once determined, would result in “money being distributed” from utilities to customers (or vice versa). This theory’s application would also appear to preclude customers from paying money to rate regulated utilities whose rates are determined via contested rate cases “commenced” by the Commission or “pursued” by regulatory agencies charged with ensuring reasonableness of rates. Other Commission actions that could be improper under the theory advanced here include:

- Interim rate refunds required by Minn. Stat. § 216B.16, subd. 3(c) (2018).
- Refunds to customers returning savings resulting from the Tax Cuts and Jobs Act.²⁶

²⁵ The cases cited in support of the position taken in the August 21 Comments concerned only subdivision 1(c) of section 16A.151. Particularly, the court of appeals decision in *In re Qwest’s Performance Assurance Plan* involved a Commission order directing Qwest to distribute money from a fund to K-12 schools in the form of telecommunications grants. *See* 783 N.W.2d 571, 574-75 (Minn. Ct. App. 2010). The court permitted the plan to proceed because the money in the fund was not recovered “in litigation,” but without regard to the Commission’s ongoing participation in the grant program. *See id.* at 577-78.

²⁶ *See In re Comm’n Investigation into the Effects on Elec. and Nat. Gas Util. Rates and Servs. of the 2017 Fed. Tax Act*, MPUC No. E,G-999/CI-17-895, Order Approving Compliance Filings and Requiring Rate Reductions and Refunds (May 10, 2019) (ordering most public electric and gas utilities to refund surplus revenues following reductions in the federal corporate tax rate).

- Refunds to customers pursuant to Minn. Stat. § 216B.23 (2018) following a determination that a public utility charged an unlawful rate.
- Refunds to customers of additional interim rate refund interest following billing and refunding errors.²⁷

Minn. Stat. § 16A.151 is not applicable to the Proposed Settlement and finding otherwise could lead to absurd results.²⁸

C. The Suggestion that the Commission Cannot Accept a Proposed Settlement Containing a Utility’s Commitment to Issue Bill Credits or Refund Overcharges Because the Commission Cannot Order Restitution Misunderstands the Mechanics of Minn. Stat. § 237.076 and the Nature of Settlements.

The August 21 Comments “question[] whether the Commission has the legal authority to accept the Proposed Settlement if the Commission itself could not order such relief or, arguably, modify a proposal under section 237.076 to require such relief.”²⁹ This inquiry misunderstands both the nature of settlements and the mechanics of Minn. Stat. § 237.076.

The Department acknowledges that the 8th Circuit held that the Commission could not order Qwest to pay restitution to its wholesale customer/competitors as a remedy for creating discriminatory conditions on resale.³⁰ However, the suggestion that the Commission, or any other government agency or tribunal, cannot accept a company proposal to correct its past errors

²⁷ See *In re Application by CenterPoint Energy for Authority to Increase Nat. Gas Rates in Minn.*, MPUC No. G-008/GR-17-285, Order Directing Refunds, Requiring Reporting, and Requiring Compliance Filings (June 17, 2019).

²⁸ See Minn. Stat. § 645.17(1) (2018) (providing the presumption when ascertaining legislative intent that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”). The August 21 Comments imply that there could be a challenge to the Proposed Settlement under section 16A.151 but appear to also suggest that an exception (i.e. subdivision 2(a) of section 16A.151) applies to the Proposed Settlement. See August 21 Comments at 17. Using this exception could lead to undesired outcomes in other contexts, and section 16A.151 should not be read to apply at all.

²⁹ See August 21 Comments at 11-12.

³⁰ See *id.*; *Qwest Corp. v. Minn. Pub. Utils. Comm’n*, 427 F.3d 1061, 1064, 1067 (8th Cir. 2005).

as described in a proposed settlement fails to appreciate the nature of settlement agreements, which are to be judged by whether the proposal is in the public interest.³¹

It also is incorrect to assert that the Commission, under section 237.076, subdivision 2, may not modify a proposed settlement that includes terms the Commission could not order over a party's objection. Because, under section 237.076, the parties have ten days after the entry of the order modifying the settlement to reject or adopt the modification, the Commission is not ordering a party to take the action the Commission prefers. Instead, the Commission is proposing a modification to which a party may or may not agree. In either case, the Commission is not acting outside its authority if the parties agree to measures that the Commission cannot order directly.³²

D. Should a Timeframe Be Imposed to Resolve the Excluded Issues and Reserved Matters Even if it Would Not Benefit Frontier's Customers by Limiting the Commission's Investigation?

The Commission's request for comments asked what actions, if any, the Commission should take on the issues raised, but not resolved, in the Proposed Settlement. The August 21 Comments addressed how the unresolved issues in the Proposed Settlement relate to the Commission's public-interest determination.³³

Among the unresolved issues, section VII of the Proposed Settlement includes two subsections, J and K. Section VII.J lists several issues excluded from the Proposed Settlement, while section VII.K makes clear that the Proposed Settlement does not restrict the authority of

³¹ See Minn. Stat. § 237.076. See also 15A C.J.S. Compromise & Settlement § 4 ("The parties to a dispute may ordinarily settle on any terms that they agree on.").

³² Negotiated and non-negotiated interconnection agreements ("ICAs") are similar. State commissions can order provisions contemplated by federal and state law, while negotiated ICAs can contain any provisions the parties agree upon, so long as the state commission finds that the provision is not contrary to the public interest. See 47 U.S.C. § 252 (2018)

³³ August 21 Comments at 16.

the regulatory agencies on matters not included in the Proposed Settlement and does not affect the Department or Commission's ability to address any matters raised by individuals:

J. Excluded Issues: The issues excluded from this Proposed Settlement are: (i) issues relating to internet service (Section III.T above); (ii) issues relating to the Commission's November 9, 2018 Notice Requesting Comments on Frontier Communication's Billing Practices not otherwise addressed in this Proposed Settlement (Section III.S above); (iii) issues relating to use of Connect America Funds (Section III.U above); (iv) the pending investigation by the Office of Attorney General (Section III.X above); and (v) issues related to denial of customer requests to cancel phone service and maintain internet service.

K. Reserved Matters: The Proposed Settlement does not include matters that are subject to the authority of the Department or Commission, but are not resolved in the Commission Order accepting this Proposed Settlement. The Parties further agree that nothing in this Proposed Settlement or any Commission Order accepting this Proposed Settlement shall preclude the Department from conducting any investigation and providing any comments to the Commission, or preclude the Commission from taking action, in relation to any matters, raised by any individual customers or any other issues that were not analyzed in the Department Report or the subject of a Department recommendation in the report.

The August 21 Comments are unclear regarding what actions the Commission should take on issues not resolved in the Proposed Settlement. The comments initially recommend that the Commission "accept the Department's offer to continue its investigation into the Excluded Issues and Reserved Matters."³⁴ But later, the comments state that the Commission "should note that the parties' proposal fails to propose a timeframe during which the Excluded Issues and Reserved Matters would be decided," and indicate that this fact weighs against a public-interest determination.³⁵

³⁴ *Id.* at 2.

³⁵ *See id.* at 16.

The Commission does not need to establish a fixed timeframe to resolve the outstanding issues in connection with its public-interest determination. First, the Department anticipates that the criticism of the lack of timeframe was limited to the Excluded Issues in section VII.J. Because the Reserved Matters, in section VII.K, preserve the authority of regulators to address issues raised by individual customers and matters not resolved in the Proposed Settlement, placing a timeframe on the Reserved Matters could greatly harm customer interests. Second, the Department reiterates that throughout its investigation there has been an increasing understanding and appreciation of customer concerns and the root causes of those concerns, which has required continued investigation of Frontier through information requests and follow-up information requests, correspondence with complainants, and intensive analysis of data provided by Frontier. For this reason, the Department's investigation on the Excluded Issues is not complete and additional fact development is needed to determine what further proceedings and relief may be appropriate regarding the Excluded Issues. Requiring the Department to rush its remaining investigation could harm the public interest by not allowing it to fully understand the root causes of the Excluded Issues and potentially impede its ability to build a robust record.

Although the Department believes it best that the Commission not establish dates for completion of the investigation on the Excluded Issues, it reiterates that it will make its best efforts to comply with any schedule set forth by the Commission. The Department emphasizes, however, that the Commission should not order any limitation on the timeline of the Reserved Matters as this section recognizes the preservation of the regulators' authority to address issues raised by customers and otherwise exercise their statutory obligations.

III. RECOMMENDATIONS

The Department recommends that the Commission approve the Proposed Settlement as supported by substantial evidence and in the public interest. The Department also recommends that the Commission not set completion dates on investigation of the outstanding issues identified in the Department's August 2 Comments.

Dated: September 4, 2019

Respectfully submitted,

KEITH ELLISON
State of Minnesota
Attorney General

/s/ Katherine Hinderlie
KATHERINE HINDERLIE
Assistant Attorney General
Atty. Reg. No. 0397325

LINDA S. JENSEN
Assistant Attorney General
Atty. Reg. No. 0189030

445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
(651) 757-1468 (Voice)
(651) 297-1235 (Fax)
katherine.hinderlie@ag.state.mn.us

ATTORNEYS FOR MINNESOTA
DEPARTMENT OF COMMERCE