

Decision 22-05-030

May 19, 2022

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Frontier Communications Parent, Inc., Frontier California Inc. (U 1002 C), Citizens Telecommunications Company of California Inc. (U 1024 C), Frontier Communications of the Southwest Inc. (U 1026 C), Frontier Communications Online and Long Distance Inc. (U 7167 C), and Frontier Communications of America, Inc. (U 5429 C) for Rehearing of Resolution T-17734.

Application 21-11-004

ORDER MODIFYING RESOLUTION T-17734 AND
DENYING REHEARING AS MODIFIED

I. INTRODUCTION

In Resolution T-17734, the Commission adopted an Enforcement Program to ensure that Frontier complies with its obligations under Decision (D.) 21-04-008 (Restructuring Decision). The Restructuring Decision approved Frontier's Application for Corporate Restructuring pursuant to Public Utilities Code section 854 (Restructuring Application). Frontier's Restructuring Application was filed after Frontier had filed a joint plan of reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York, Case No. 20-22476. The reorganization plan's effective date was contingent on the approval of Frontier's Restructuring Application before the Commission.

Frontier's challenge to Resolution T-17734 (Resolution) chiefly focuses on potential additional penalties adopted in the Resolution for failure to meet standard "out-of-service" standards as defined by General Order (G.O.) 133-D. Frontier argues that the Resolution exceeds the authority delegated by the Restructuring Decision, expands penalties without proper notice, is an impermissible collateral attack on G.O. 133-D,

contains conclusions not supported by findings nor by substantial evidence in violation of Public Utilities Code section 1757, and relies on arbitrary and capricious reasoning that constitutes an abuse of discretion. In addition, Frontier contends that the Resolution violates the United States and California Constitutions because it sets up a framework for the imposition of excessive fines, was adopted without sufficient due process, is contrary to the right to equal protection, and is unconstitutionally vague. No responses to the application for rehearing were filed.

We have carefully considered all the arguments presented by Frontier and have determined that we will modify the Resolution to eliminate the penalties adopted in the Resolution for out-of-service restoral. Frontier's application for rehearing of the Resolution, as modified in today's order, is denied.

II. DISCUSSION

A. Whether the Resolution exceeds the scope of the Restructuring Decision and contradicts the expectations of the parties to the Settlement Agreement between Frontier, Cal Advocates, TURN, and CWA

Frontier contends that the Resolution adopts a penalty scheme that is beyond the scope of the Restructuring Decision and contradictory to the Settlement Agreement that was approved by the Restructuring Decision. Frontier further argues that the Resolution's deviation from the Restructuring Decision renders it a failure to "proceed in the manner required by law" and an "abuse of discretion." (Pub. Util. Code, §§ 1757(a)(2), 1757(a)(5).)

In the Restructuring Decision, the Commission concluded that three settlement agreements, which Frontier had entered into with various parties, were in the public interest and, thus, satisfied the requirements of Commission Rule of Practice and Procedure 12.1(d). However, the Commission also imposed additional conditions that were not included in the restructuring plan nor in any of the three settlement agreements.

Among other things, the Commission required the appointment of an independent Compliance Monitor to ensure that Frontier complies with the numerous

requirements and conditions of the settlement agreements “and the additional mandates of this decision.” (Restructuring Decision, p. 57; see also Restructuring Decision, p. 25.) Ordering Paragraph (O.P.) 4 of the Restructuring Decision (pp. 68-74) sets forth the terms, requirements, and conditions to be met for approval of the restructuring plan. O.P. 4(e) deals with the Compliance Monitor, while O.P. 4(f) directs the Communications Division (CD) to propose an Enforcement Program. (Restructuring Decision, pp. 69-70.)

The out-of-service penalties in the Resolution were adopted pursuant to O.P. 4. As stated in the Resolution, these penalties are in addition to penalties adopted in G.O. 133-D. G.O. 133-D established uniform minimum standards of service to be observed in the operation of public utility telephone corporations. The standards measure the following: Installation Interval, Installation Commitments, Customer Trouble Reports, Out of Service (OOS) Repair Interval, and Answer Time. Carriers are assessed fines if they fail to meet the standards for three consecutive months. The OOS repair interval measures the time a customer is without service. As stated in the G.O. 133-D, carriers must meet the minimum OOS measure on a monthly basis. If a carrier does not meet this standard for three (3) consecutive months, it will be assessed a fine based on adjusted results, beginning in the third month, and will be considered to be in chronic failure status.

To illustrate, the base daily fine amount for OOS is \$25,000. For the purpose of calculating the fine, a month consists of 30 days. For example, if a carrier that had 60% of total access lines initially failed to meet the standard for three consecutive months, the fine for the third, and each subsequent month, would be \$750,000 per month [multiplied by] the carrier’s scaling factor of .6, for a total of \$450,000 per month. (G.O. 133-D, Rule 9.3.)¹

¹ G.O. 133-D also has a provision which allows carriers to request to suspend any fine and invest no less than twice the amount of their annual fine in a project which improves service quality in a measurable way. (G.O. 133-D, ¶ 9.7.)

The Settlement Agreement approved in the Restructuring Decision also deals extensively with service quality. Among other things, the agreement requires Frontier to make capital expenditures within California over four calendar years (2021 to 2024) of \$1.75 billion, with at least \$222 million “for service quality and network enhancements to meet [G.O. 133-D] standards and improve service quality, network redundancy, and reliability for existing facilities.” (Settlement Agreement, p. 5.)

Frontier will ramp up to come into compliance with the OOS metric in 2021 and will commit to achieve 80% OOS disaggregated by California ILEC and by copper plant in 2022 and 90% disaggregated by California ILEC and by copper plant in 2023 and 2024. If Frontier fails to meet the applicable G.O. 133-D OOS standard disaggregated by California ILEC and by copper plant in any month in any of these three years (2022 – 2024), the applicable California ILEC will be subject to an incremental tiered penalty beyond G.O. 133-D requirements of: up to \$7 million/year if one or more of the three California ILECs misses the metric by more than 10%; or up to \$3.5 million/year if any of the three California ILECs misses the metric by 10% or less. . . . Unlike G.O. 133-D, where a penalty arises only after a chronic failure, the penalty in this paragraph 6 applies each month that a California ILEC fails to meet the metric. This penalty shall be deployed as incremental expenditures targeted at service quality, in addition to the aggregate capital expenditure commitments discussed in paragraph 1 above and in addition to the current penalty/investment structure in G.O. 133-D.²

(Attachment 1 Settlement Agreement, ¶ 6, p. 8.)³

Resolution T-17734 adopts fines for failing to resolve a minimum of 90% of OOS trouble reports within 24 hours. This standard applies to each of Frontier’s California ILECs: Frontier CA, Citizens CA, and Southwest. These fines are in addition

² Frontier’s California incumbent local exchange carriers (ILECs) are Frontier California Inc. (Frontier CA), Citizens Telecommunications Company of California Inc. (Citizens CA), and Frontier Communications of the Southwest Inc. (Southwest).

³The “penalties” under the Settlement Agreement are to be used as incremental expenditures targeted at service quality. This is in contrast to penalties imposed by G.O. 133-D, which are paid to the General Fund, or which may be reinvested if approved by the Commission.

to fines assessed under G.O 133-D and fines set forth in paragraph 6 of the Settlement Agreement.

[T]his Resolution does not alter commitment #6 within the settlement agreement between Frontier, Cal Advocates, TURN, and CWA. This Resolution also does not alter the requirements under G.O. 133-D, section 9. This Resolution simply adds another set of consequences among the panoply of other consequences for which Frontier will be responsible.

As a hypothetical example, Frontier would be accountable for the sum of nine million dollars for failing to restore 90 percent of service outages within 24 hours under the following simultaneous scenario: a) one million dollars pursuant to a fine assessed under G.O. 133-D, b) two million dollars in reinvestment monies per commitment #6 within the settlement agreement between Frontier, Cal Advocates, TURN, and CWA, and c) one million dollars pursuant to a fine assessed per this Resolution.

(Resolution T-17734, p. 3, fn. 4.)

According to the Resolution, the penalties would apply if a quarterly report shows that less than 90% of the service outages had a restoral time of more than 24 hours for a given month. The maximum penalty for failing to timely restore services outages for all three Frontier telephone corporations combined would be thirty-six million dollars annually (three million dollars per month). However, this is only if each company had an OOS repair interval of 60% to 70%. As the repair interval percentage goes up, the penalty goes down. (See Resolution T-17734, p. 5.)

In addition, the Resolution also adopts penalties for failure to file required reports in a timely manner (\$1,000 per day), and for failure to timely and completely respond to data requests (\$1,000 per data request), and a monthly late payment fee of 10%. The Resolution sets up other processes related to implementation of an enforcement program that are not relevant to the application for rehearing.

Regarding Frontier's Application for Rehearing, we are not convinced that the Resolution exceeds authority delegated to CD by the Restructuring Decision. And we reject Frontier's argument that O.P. 4(f) only refers to enforcement of the settlement

agreements. However, given the totality of the circumstances, and the substantial alternate penalties that exist, we have decided to eliminate the additional OOS penalties that are set forth in the Resolution at this time. This refers only to section I.A. of the Resolution, entitled “Timely Restoring Service Outages.” (Resolution. pp. 4-6.) These penalties are a third layer of penalties on top of GO 133-D and the Settlement Agreement.

Because we are modifying the Resolution to eliminate the additional OOS penalties, we need not address most of Frontier’s other issues pertaining to those penalties.

B. Whether the Prescribed Penalties for Future Data Request Responses are Unconstitutionally Vague

Frontier asserts that the Resolution’s penalties for failure to comply with future data requests are void for vagueness under the due process clauses of the state and federal constitutions. (See U.S. Const. 14th amend., § 1; Cal. Const., art. I, § 7.)

The Resolution provides that Frontier shall pay “\$1,000 per day for each of its utility numbers [sic] for each late or incomplete submission of responses to a data request.” (Resolution, p. 7.) Frontier argues that this requirement is unconstitutionally vague because the Resolution does not define “data request,” “late,” or “complete.”

Staff data requests usually set a due date that provides a reasonable time for a utility to respond. Here, the Resolution establishes a five-day grace period from the date the data response is due before any penalties are triggered. (Resolution, p. 7.) We also note Frontier has the opportunity to appeal any fine in the event Frontier disagrees with staff’s determination to assess a penalty because a response is late or incomplete.

Frontier’s claim is without merit because a vagueness challenge must be judged by the particular facts involved once penalties are levied. The vagueness doctrine is based on the fundamental principle that laws regulating persons or entities must give “fair notice of conduct that is forbidden or required.” (*FCC v. Fox Television Stations, Inc.* (2012) 567 U.S. 239, 253.) As Frontier points out, vagueness prohibitions have been applied to administrative regulations. (See, e.g., *Cranston v. City of Richmond* (1985) 40 Cal. 3d 755.)

However, as also pointed out in *Cranston v. City of Richmond*, *supra*, “It is well-established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” (*Id.* at p. 764, citations and internal quotation marks omitted.) A void for vagueness challenge is examined in the light of the conduct with which a person is charged or penalized. Courts are not obliged to consider every conceivable situation which might arise under the language of the statute or rule. If the language of a statute may be given “a reasonable and practical construction in accordance with the probable intent of the Legislature” and if the conduct of a defendant “clearly falls within its bounds,” then a defendant cannot complain of vagueness. (*Id.* at p. 764-765, citations and internal quotations marks omitted.)

In other words, unless First Amendment freedoms are involved, which clearly is not the case here, this particular rule can only be challenged on vagueness grounds when applied to specific conduct in light of the specific facts and circumstances involved. Thus, Frontier’s request for rehearing on the data request penalties is denied.

C. Request for Oral Argument

In connection with its Application for Rehearing, Frontier requests oral argument pursuant to Rule 16.3 of the Commission’s Rules of Practice and Procedure.

Rule 16.3(a) provide that oral argument is appropriate on rehearing where the application raises issues of “major significance” to the Commission because the challenged decision: (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation; (2) changes or refines existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or (4) raises questions of first impression that are likely to have significant precedential impact. (See Rule 16.3(a).) Frontier contends that the legal errors identified by Frontier satisfy each of these elements.

First, the Commission has discretion to determine the appropriateness of oral argument in any particular matter. (See Rule 16.3(a).) Second, because we are

eliminating the Resolution's OOS penalties, there is no need for oral argument. Therefore, the request for oral argument is denied.

III. CONCLUSION

For the reasons states above, we will modify Resolution T-17734 to eliminate the additional penalties in the Resolution for the failure to meet OOS restoral standards. We will deny Frontier's Application for Rehearing of Resolution T-17734 because, as modified, Frontier has not demonstrated legal error.

THEREFORE, IT IS ORDERED THAT:

1. Resolution T-17734 is modified to eliminate the additional penalties adopted in the Resolution for Frontier's failure to meet out-of-service restoral standards that are described in section I.A. of the Resolution, entitled "Timely Restoring Service Outages," at pages 4-6.

2. Rehearing of Resolution T-17734, as modified, is denied.

3. Proceeding A.21-11-004 is closed.

This order is effective today.

Dated May 19, 2022, at San Francisco, California

ALICE REYNOLDS

President

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

DARCIE L. HOUCK

JOHN R.D. REYNOLDS

Commissioners