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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

_____)	
Formal Complaint of SRR Partners, LLC d/b/a)	Docket No. 19-041-01
Sorrel River Resort & Spa against Frontier)	
Communications)	
)	
Formal Complaint of Jayne Dillon May against)	Docket No. 19-041-02
Frontier Communications)	
)	
Investigation of Citizens Telecommunications)	Docket No. 19-041-04
Company of Utah d/b/a Frontier Communications)	
of Utah)	Petition for Review or Rehearing
)	of April 24, 2020 Order Denying
)	Motion to Compel Compliance
)	with the Public Service
)	Commission of Utah’s
)	November 27, 2019 Order
)	Granting in Part Motion to
)	Compel
_____)	

Pursuant to Utah Code §§ 63G-4-301, 54-10a-301, 54-7-15 and UTAH ADMIN. CODE r. 746-1-101 through 801, the Office of Consumer Services (“OCS”) respectfully files this Petition for Review or Rehearing of the April 24, 2020 Order Denying Motion to Compel Compliance with the Public Service Commission of Utah’s (“PSC”) November 27, 2019 Order Granting in Part Motion to Compel. The OCS concedes that the arguments presented in this Petition do not

vary greatly from the arguments presented in its OCS' Motion to Compel and that the PSC has significant discretion in ruling on discovery disputes. However, the OCS files this Petition in the hope that the PSC reconsiders crediting Citizens Telecommunications Company of Utah dba Frontier Communications of Utah's ("Frontier") assertions given the impact of the PSC' ruling on the OCS' ability to prosecute this investigation.

Specifically, the OCS requests the PSC to reconsider its ruling that Frontier answered the OCS' discovery request seeking documents evidencing that Frontier keeps trouble reports from sources other than a designated 800 number by crediting Frontier's claim that the trouble reports that Frontier previously provided to the OCS include customer complaints from emails and all other sources of communication. Rather, the OCS requests a ruling that Frontier did not answer the subject discovery requests and that Frontier produced no evidence that it keeps trouble reports from complaints communicated to Frontier by email or means other than the designated 800 number. Frontier's assertion is not supported by an affidavit or other evidentiary material but is based solely on a lawyer's argument, first made 231 days after the first opportunity to present this claim, and directly conflicts with the sworn testimony of Mr. Giles, Local Manager and Operations Supervisor of Frontier.

Moreover, by adopting Frontier's claim, the PSC creates significant difficulties to the ongoing investigation that may compel the OCS to terminate its participation in this case—difficulties in terms of the OCS' ability to rely on sworn corroborated and uncontested testimony and other uncovered evidence, the OCS' ability to demonstrate evasive discovery responses and the OCS' ability to prosecute this case given the long delay in presenting Frontier's new claim. Accordingly, the OCS respectfully request the PSC to reconsider its order and rule that Frontier

did not answer the subject discovery requests and has produced no evidence contradicting the sworn testimony of Mr. Giles.

At the risk of being pedantic, the OCS briefly restates the *evidence* gathered to this point on this issue. In the hearing conducted in the Sorrel River Ranch docket, Mr. Giles, Local Manager and Operations Supervisor of Frontier, unambiguously testified that Frontier does not keep records of service problems communicated to Frontier by emails or means other than the designated 800 number.¹

This testimony is bolstered by additional evidence. Specifically, the record establishes that the 800 number directs calls to a centralized call center and the call center initiates the procedures to create a trouble report. Docket 19-041-01, Hearing Transcript at 56. These reports indicate that in a twelve-month period Sorrel River only initiated

¹Q. Will you look at page 4, 7 Request 1-5?

A. Okay. I'm there.

Q. And that provides that "Frontier made only one dispatched service to Sorrel River Ranch in response to a trouble ticket in the past 12 months."

A. Correct.

Q. "There were an additional 6 technician visits in response to Owner and/or Managing Director emails over the past 5 months."

A. Correct.

Q. Help me out here. Does that mean the six technicians in the past five months were dispatched without a reporting on your repair ticket?

A. That is correct. Those were visits made to the site in response to either something that we observed or an email from SRR. We made visits out to the site to start monitoring their PRI circuit which provides their voice.

Q. But the email didn't generate a formal --

A. No, did not. This was on our -- this was us taking active -- proactive -- I guess reactive to the email, but proactive stance to go out and visit, check with the front desk to make sure they hadn't had any dropped calls, and to retrieve data from our device out on site there and look at the previous week's report.

Q. Is there any specific record that deals with your response to email requests that don't go through the 800 number?

A. No.

Docket 19 041-01, Hearing Transcript at 58-59.

one formal trouble report even though other documents provide that in that same period Frontier's technicians were dispatched to Sorrel River Ranch six additional times. Docket 19-041-01, Hearing Transcript at 58-59. Some of these dispatches were in response to emails sent by Sorrel River to Frontier's local office, not the centralized call center that initiates the procedures to create trouble reports, and no formal trouble reports were made. *Id.*

Nevertheless, Frontier now claims that it keeps trouble reports generated from complaints from emails and all other sources and has provided these reports to the OCS. Frontier's Response to Second Motion to Compel at pg. 3-4. However, Frontier does not submit any evidence supporting this claim, such as affidavits from workers at the centralized call center stating that they receive trouble reports from sources other than the 800 number. Moreover, Frontier first offers this argument 231 days after their first opportunity to make this claim.

Specifically, Frontier produced a spreadsheet of trouble reports with its first production in response to the OCS' Second Set of Discovery Requests and could have made its contention that the spreadsheet included reports of problems communicated to Frontier from sources other than the 800 number at that time. Response to First Motion to Compel, exhibit B at 8. Frontier did not. Nor did Frontier make this claim in response to the initial Meet and Confer letter, in its response to the first Motion to Compel or in its supplemental productions in response to the PSC' November 27th Order. Second Motion to Compel, exhibit B at ¶ 3; Response to First Motion to Compel, exhibit B at 8. Nor did Frontier make this claim in its second Meet and Confer conference prior to the filing of the second Motion to Compel. Second Motion to Compel, exhibit A at ¶ 26. Rather,

Frontier waited 231 days to make this claim, for the first time, in its response to the second Motion to Compel. Again, without any evidentiary support.

Although the PSC found that these undisputed facts were insufficient to demonstrate that Frontier's contention regarding trouble reports is not creditable, the OCS wishes the PSC to consider the following.

First, a lawyer's unsupported argument cannot override the sworn corroborated and uncontested testimony of a witness, particularly its own witness. *State v. Houston*, 2015 UT 40, ¶ 76, 356 P.3d 55 (lawyer's "arguments is not evidence"); *State v. Christianson*, 2014 UT App. 166, ¶ 33, 331 P.3d 1128 ("lawyers' statements and arguments are not evidence.") Here, crediting the unsupported arguments of counsel over the sworn testimony of Frontier's own witness creates unique difficulties with the investigation.

As local manager for Frontier, Mr. Giles is a central witness in this case. However, the PSC adopted a contention offered without any evidentiary support whatsoever that Frontier keeps trouble reports for complaints communicated from all sources, a contention that explicitly conflicts with Mr. Giles' sworn testimony. This presents the possibility that it is now the law of the case that testimony from Mr. Giles' has been determined by the PSC to be uncreditible and incapable of providing reliable evidence. Given Mr. Giles central position in this case, this fact has significant impact on the investigation. Indeed, it is not clear that it would be of any use to gather additional evidence conflicting with Frontier's dubious and unsupported claim.

More to the point, if the OCS cannot rely on sworn testimony of Frontier's managers, evidence that is corroborated and uncontested, then it is difficult to see how the OCS can meaningfully contribute to an investigation. What use is it to gather

evidence if the evidence uncovered can be dismissed by an unsupported lawyer's argument? By issuing an order that prevents the OCS' ability to rely on direct corroborated and uncontested evidence, the PSC creates significant impediments to the OCS' ability to prosecute this case.

Second, the PSC' order creates significant doubt as to whether the OCS could ever demonstrate that any future claims by Frontier are not creditable and evasive. Because discovery is the manner the parties obtain evidence, discovery disputes are necessarily decided on limited evidence. Given this, the OCS believes it is highly unlikely that if this case proceeds the OCS will be able to develop a more compelling case of uncreditable and evasive assertion in a discovery dispute than those described above. Accordingly, what the OCS believes is ongoing conduct of dilatory and evasive conduct by Frontier appears likely go uncorrected by the PSC. It is hard to justify continuing the investigation under these circumstances.

Third, the PCS' ruling accepting the claim that Frontier has responded to the subject discovery requests despite the long delay in making this claim significantly impacts the OCS' ability to move this case forward at a manageable pace. Frontier offers no explanation for its failure to make this claim until 231 days after its first opportunity. And the PSC apparently requires none. However, to demonstrate how such a long delay will continue to impact the investigation, the PSC should consider that the OSC propounded follow up discovery requests on January 27, 2020 and February 28, 2020. The OCS believes that there are issues with these discovery responses as well. If it takes 231 days to resolve these discovery issues, these issues will be resolved on September 23, 2020 and October 26, 2020. Therefore, it would take approximately one year and three

months to get responses to the first set of substantive discovery requests and follow up discovery requests. This investigation simply cannot proceed at such a pace.

Finally, although not controlling because the OCS has not moved for formal discovery under the Utah Rules of Civil Procedure and has not moved for sanctions, by way of comparison Utah Courts have issued the harshest sanction for discovery abuse of issuing a default judgment under circumstances similar to those presented in this case. For example, in *Schoney v. Memorial Estates Inc.*, 790 P.2d 584 (Utah 1990), the Utah Supreme Court upheld the extreme sanction of issuing a default judgment because plaintiff failed to timely respond to discovery requests although, like Frontier's arguments presented for the first time in a response to motion to compel, the plaintiff filed discovery responses prior to the hearing on the motion for sanctions. *Id.* at 585-86.²

Similarity, in *WW & WB Gardner Inc. v. Park West Village Inc.*, 568 P.2d 734 (Utah 1977), the Supreme Court upheld a sanction of a default judgment despite the fact that, like the instant case, the late discovery was provided prior to the hearing on sanctions, when there had been a long delay of 11 months in responding to the discovery.

While *Schoney* and *WW & WB Gardner* are not precisely analogous to the present situation, they do stand for a proposition that is relevant to these proceedings, uncreditable and long delayed discovery responses work to frustrate the judicial process and require action by the courts, or in this case the PSC, to enforce the good faith timely answers to discovery requests. *WW & WB Gardner*, 568 P.2 at 735; *Schoney*, 790 P.2d

²² The Court held the extreme sanction of a default judgment was justified, in part, because of the significant time the case was pending and defendant inability to file follow up discovery of the late filed discovery requests due the discovery cut-off date. *Id.*

at 585-86. These cases do not demonstrate that courts or the PSC should be draconian or punitive in ruling on discovery issues. Rather, they stand for the proposition that without good faith and timely responses to discovery request, the parties' substantive rights can be defeated in the procedural aspect of the case.

This is the situation here. Given the PSC' crediting Frontier's argument, the OCS is unlikely to obtain necessary and useful information through discovery which calls into question the efficacy of the investigation—where Frontier's argument: (1) is completely unsupported by any evidence and conflicts with all evidence available, (2) is made under facts that the OCS believes present a compelling case of uncreditable evasive discovery responses that are not likely to be repeated in such stark terms, and (3) is made after an unexplained and uncriticized delay of 231 days. Thus, the PSC' discovery ruling may work as a de facto dismissal of this action. Accordingly, the OCS seeks an Order from the PSC reconsidering it ruling crediting Frontier's claims.

CONCLUSION

The OCS respectfully submits this Petition for Review or Rehearing of the April 24, 2020 Order Denying Motion to Compel Compliance with the PSC November 27, 2019 Order Granting in Part Motion to Compel, arguing that under the facts of this case, crediting Frontier's argument could possibly lead to the OCS terminating its participation in this investigation.

Respectfully submitted May , 2020.

/s/ Robert J. Moore
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Services*