

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Formal Complaint of )  
Kimberly and David Boger (Cali ) DOCKET NO. 14-041-01  
Cochitta B&B) against Frontier ) ORDER DISMISSING COMPLAINT  
Communications of America, Inc. )  
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ISSUED: September 16, 2014

SYNOPSIS

The Commission dismisses the Kimberly and David Boger (Cali Cochitta B&B) complaint against Frontier Communications of America, Inc. for failure to state a claim upon which relief can be granted.

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ORDER OF DISMISSAL

I. BACKGROUND

1. On July 7, 2014, Kimberly and David Boger of Cali Cochitta B&B (the Bogers) filed a formal complaint against Frontier Communications of America, Inc. (Frontier or Company).<sup>1</sup> The Bogers allege Frontier would not assist when the Bogers tried to port their telephone service to another carrier. The Bogers allege Frontier's actions resulted in loss of business to their bed and breakfast located in Moab, Utah. The Bogers request the Commission fine Frontier and require the Company to reimburse the Bogers for lost business.

2. On August 4, 2014, in response to a Commission action request, the Division of Public Utilities (Division) filed a memorandum recommending the Commission dismiss the complaint.<sup>2</sup> The Division provides the following review and recommendation:

<sup>1</sup> See Formal Complaint of Kimberly and David Boger of Cali Cochitta B&B, filed July 7, 2014.

<sup>2</sup> See Division Memorandum, filed August 4, 2014.

“Based on the Company’s response, the Division concludes that the complaint is over [a] porting issue which falls under the Federal Communications Commission’s jurisdiction. The Division therefore recommends that the [f]ormal [c]omplaint against the Company be dismissed.”<sup>3</sup>

3. On August 4, 2014, Frontier filed a response and motion to dismiss the Bogers’ complaint.<sup>4</sup> In sum, Frontier argues that dismissal is appropriate because the Bogers have failed to allege a violation of law, commission rule or tariff.<sup>5</sup> Frontier filed its certificate of service on August 26, 2014.

4. On August 28, 2014, the Commission issued a courtesy notice, notifying the Bogers of the Company’s motion.<sup>6</sup> The notice states, in part: “In accordance with Rule R746-100-4 of the Utah Administrative Code, Complainants Kimberley and David Boger (Cali Cochitta B&B) have until 5:00 p.m., Wednesday, September 10, 2014, to file a response to Frontier’s filing.”<sup>7</sup> A copy of this notice was sent to the Bogers and the Company.<sup>8</sup>

5. On August 28, 2014, the Bogers filed a response to Frontier’s motion.<sup>9</sup> The response states: “No we do not want this dismissed. [Frontier] should be made liable and no we do not feel it should be dismissed. The Emery Telecom installers can verify that they were holding the switch.” Nothing further was filed with this response.<sup>10</sup>

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<sup>3</sup> Id. at 2.

<sup>4</sup> See Response and Motion to Dismiss, filed August 4, 2014.

<sup>5</sup> See id. at 3.

<sup>6</sup> See Notice of Filing of Response and Motion to Dismiss, issued August 28, 2014.

<sup>7</sup> Id. at 1.

<sup>8</sup> Id. at 2.

<sup>9</sup> See E-mail from Cali Cochitta B&B, to the Public Service Commission (Aug. 28, 2014; 11:41 AM).

<sup>10</sup> See id.

6. The deadline for responding to the Company's motion to dismiss has elapsed.<sup>11</sup>

## II. STANDARD OF REVIEW

Rule 12(b)(6) of the Utah Rules of Civil Procedure, which is incorporated by reference by Utah Admin. Code R746-100-1(C), permits a party to file a motion to dismiss for "failure to state a claim upon which relief can be granted."<sup>12</sup> In ruling on a motion to dismiss for failure to state a claim, the Commission construes the complaint in the light most favorable to the complainant and indulges all reasonable inferences in its favor.<sup>13</sup>

## III. DISCUSSION

### *The Bogers Have Failed to State a Claim Upon Which Relief Can Be Granted*

Viewing the facts in the light most favorable to the complainant, the Bogers have failed to specify "the law or a rule or order of the commission" the Company allegedly violated.<sup>14</sup> Even assuming the truth of all the facts the Bogers allege, the Commission sees no apparent violation in their complaint. Further, the Bogers' response, stating they do not want this matter dismissed, is not responsive to the Company's motion to dismiss, claiming in part the Bogers have failed to allege a violation of law, commission rule, or tariff. "Absent a response or reply, the Commission may presume . . . there is no opposition."<sup>15</sup> Accordingly, we dismiss the Bogers' complaint for failure to state a claim upon which relief can be granted. Further, because

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<sup>11</sup> See Notice of Filing of Response and Motion to Dismiss, issued August 28, 2014. See also Utah Admin. Code R746-100-4(D).

<sup>12</sup> Utah R. Civ. P. 12(b)(6) (LexisNexis 2010).

<sup>13</sup> Cf. Munteer v. Utah Power & Light Co., 823 P.2d 1055, 1058 (Utah 1991).

<sup>14</sup> Utah Code Ann. § 54-7-9(2) (LexisNexis 2010).

<sup>15</sup> See Utah Admin. Code R746-100-4(D).

we dismiss based upon Rule 12(b)(6) – for failure to state a claim upon which relief can be granted, it is unnecessary for us to address the issue, raised by the Division, of federal versus state jurisdiction over porting.

IV. ORDER

For the foregoing reasons, the Commission grants the Company's motion to dismiss the Bogers' complaint.

DATED at Salt Lake City, Utah, this 16<sup>th</sup> day of September, 2014.

/s/ Ron Allen, Chairman

/s/ David R. Clark, Commissioner

/s/ Thad LeVar, Commissioner

Attest:

/s/ Gary L. Widerburg  
Commission Secretary  
DW#260650

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on the 16<sup>th</sup> day of September, 2014, a true and correct copy of the foregoing was served upon the following as indicated below:

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