

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Formal Complaint of  
Susan Hilliard against Frontier  
Communications

DOCKET NO. 15-041-01  
ORDER ON MOTION TO DISMISS

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ISSUED: November 20, 2015

**I. Procedural background.**

On September 17, 2015, Susan Hilliard (Ms. Hilliard) filed with the Public Service Commission of Utah (Commission) a formal complaint against Frontier Communications (Frontier), a public telecommunications utility. On October 19, 2015, Frontier answered the complaint and filed a motion to dismiss it. The parties have fully briefed Frontier's motion to dismiss.

In her briefing, Ms. Hilliard suggested that Frontier's motion might be more appropriately viewed as a motion for summary judgment. In addition, Ms. Hilliard requested leave to conduct discovery and to amend her complaint, should the Commission require additional detail as to the facts that might support Ms. Hilliard's claim for relief.

A motion to dismiss "should be granted ... only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim."<sup>1</sup> In this case, as further set forth below, the Commission is able to apply the standard for dismissal without more detailed argument from the parties. Therefore, the Commission analyzes Frontier's motion to dismiss as presented, denies Ms. Hilliard's request for leave to amend her complaint, and denies Ms. Hilliard's request for discovery.

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<sup>1</sup> *Am. W. Bank Members, L.C., v. State*, 342 P.3d 224, 230 (Utah 2014) (quoting *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990)).

**II. Facts.**

1. Ms. Hilliard first subscribed to service with Frontier on or about October 17, 2007. At that time, Ms. Hilliard's property, which is remote, isolated, and vacant for months at a time, was served by approximately five miles of open wire.
2. In October of 2009, a flood destroyed the poles and open wire facilities that provided service to Ms. Hilliard's property. Frontier restored service by laying a temporary ground wire.
3. On September 23, 2010, Ms. Hilliard's service was terminated.
4. After Ms. Hilliard's service was terminated, severe weather destroyed the temporary ground wire.

**III. Parties' positions.**

Frontier brings its motion to dismiss pursuant to its Commission-approved tariff. Frontier's tariff sets forth specific circumstances in which Frontier may deny an application for service, and Frontier relies on these provisions in moving for dismissal of Ms. Hilliard's complaint.

The tariff language cited by Frontier establishes three circumstances in which the utility may deny an application for service, as follows:

1. Frontier may deny service if the utility would incur unreasonable expenses to obtain the necessary rights, including easements over private property and permits within government-owned land.<sup>2</sup>

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<sup>2</sup> The applicable language is in Schedule No. AC, Rule No. 3, Subsection (A3)(B1) of Frontier's tariff and states: "The utility's obligation to furnish service is dependent upon its ability to secure and retain without unreasonable

2. Frontier may deny service if the utility would have to construct facilities costing more than \$500 and/or provide connection equipment costing more than \$2,500, unless the customer agrees to pay additional costs, which in certain cases may be apportioned between the utility and the customer according to Commission rule.<sup>3</sup>
3. Frontier may deny service if, according to Frontier's judgment, a condition exists that is "unsafe or hazardous to the applicant, the general population, or the utility's personnel or facilities."<sup>4</sup>

Frontier anticipates that establishing service to Ms. Hilliard's property would require private easements, as well as permits from the Bureau of Land Management and/or the Forest Service. Frontier considers that the associated costs would be unreasonable.

In addition, Frontier estimates that it would cost approximately \$80,000 to construct the facilities necessary to extend service to Ms. Hilliard's property. Therefore, Frontier argues that Ms. Hilliard must agree to pay the majority of those costs before the utility is obligated to take any steps toward establishing service. To date, Ms. Hilliard has declined to bear any costs.

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expense suitable facilities and rights for the construction and maintenance of the necessary pole lines, circuits, and equipment."

<sup>3</sup> The applicable language is in Schedule No. A-2 of Frontier's tariff. Subsection (A1)(B2)(C1) states: "The utility will construct at its expense up to \$500.00 of outside plant facilities per applicant." Subsection (A1)(B3) states: "In those circumstances where extension to outside plant facilities exceeds \$2,500.00 ... [and exceeds] twice the state wide loop investment ... the customer must bear all remaining costs, except as ordered by the Commission." Subsection (A1)(B3) also references Commission rule R746-360-9, which provides for a one-time distribution of up to \$10,000 from the Utah Universal Service Fund in order to offset the cost of establishing service to a rural location.

<sup>4</sup> The quoted language is in Schedule No. AC, Rule No. 3, Subsection (A13)(B1)(C2) of Frontier's tariff.

Finally, Frontier argues that rugged terrain and severe weather pose an unreasonable risk to physical wires, making satellite service the more reasonable solution. Frontier has offered to serve Ms. Hilliard's property with a satellite system. To date, Ms. Hilliard has declined the offer.

Ms. Hilliard disputes that the tariff provisions cited by Frontier apply in her case. Specifically, Ms. Hilliard argues that, in times past, she has had telephone service from Frontier. Therefore, Ms. Hilliard does not consider herself to be applying for service; rather, she considers herself to be an existing account holder who is entitled to have her service restored.

Ms. Hilliard further disputes Frontier's estimates regarding both the total cost that would be incurred to establish service and the cost of obtaining the necessary easements and permits, complaining that Frontier has not provided her with documentation to support its contentions. Ms. Hilliard also urges the Commission to discount Frontier's stated concerns about the terrain and the weather, arguing that where service has been established previously, it can be established again without undue risk.

#### **IV. Analysis.**

The Commission largely agrees with Frontier's analysis of the tariff provisions it cites. Specifically, the Commission agrees that, where there are no poles or other wire-based facilities within approximately five miles of Ms. Hilliard's property, the total cost to provide a landline would exceed Frontier's maximum obligation of \$3,000.<sup>5</sup> In addition, there can be no dispute that

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<sup>5</sup> The Commission understands Ms. Hilliard's desire to see data in support of Frontier's claims regarding the costs that would be required to establish service to her property. Such data would be helpful in establishing an exact total cost. However, such data is not necessary in order to conclude that the costs would exceed \$3,000. In drawing this conclusion, the Commission notes Ms. Hilliard's briefing, in which she emphasizes that facts outside the pleadings may not be considered when a tribunal evaluates a motion to dismiss. However, this administrative matter is governed by the Utah Administrative Procedures Act, which allows the Commission to take notice "of technical or scientific facts within the agency's specialized knowledge." Utah Code §63G-4-206(1)(b)(iv). The total cost of

the weather and terrain pose an ongoing risk to wire-based facilities. Therefore, the dispositive question before the Commission is whether Frontier may treat Ms. Hilliard's request for service as an application.<sup>6</sup>

In arguing that she is not an applicant for service and, therefore, not subject to the associated tariff provisions, Ms. Hilliard cites to Schedule A-2, Subsection (B10)(C2) of Frontier's tariff. This Subsection is titled "Reuse of facilities" and states, in relevant part:

Where a customer is disconnected for any reason and subsequently reapplies for service from the same premises, the customer will not be required to pay any additional line extension charges in addition to his total original obligation.

Limiting this language to the section in which it is found, the Commission concludes that it operates only in circumstances where a customer has paid for a line extension that remains available for reuse. No such circumstances exist in this case, rendering this section of the tariff inapplicable.<sup>7</sup>

Ms. Hilliard also cites to Schedule No. AC, Rule No. 9, Subsection (A1)(B1)(C1)-(C2) of Frontier's tariff, which states:

Except as otherwise provided in these rules, the utility will, at its own expense furnish, install and maintain all facilities necessary

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establishing wire-based service over five miles of rural terrain is a technical fact as to which the Commission has specialized knowledge. The total cost would exceed \$3,000. In fact, Frontier's estimate of \$80,000 is not unreasonable.

<sup>6</sup> The Commission also credits Frontier's position that it would be necessary to obtain easements and permits in order to lay wire to Ms. Hilliard's property. However, Frontier has not provided an estimate regarding the associated expenses. Without an estimate, the Commission cannot evaluate whether the expense would be unreasonable.

<sup>7</sup> Even if the tariff language cited by Ms. Hilliard applied here, she would still be required to "reapply" for service, with the application being subject to all tariff provisions not in conflict with Schedule A-2(B10)(C2). In such circumstances, Frontier would not be able to charge Ms. Hilliard for usable infrastructure she previously funded. However, Ms. Hilliard could not claim to be exempt from any other provision set forth in the tariff.

to service applicants or customers in accordance with its lawful rates, rules and current construction standards.

Ms. Hilliard argues that this language bars Frontier from seeking a financial contribution from her, either to furnish and install necessary facilities or to maintain the facilities that previously serviced her property.

In making this argument, Ms. Hilliard does not cite the introductory phrase "[e]xcept as otherwise provided in these rules[.]" As established above, Frontier's tariff provides at least three circumstances in which the utility will not bear the full expense of establishing service in response to an application. Two of those exceptions apply here. Therefore, Frontier's duty to "furnish" and "install" facilities at its sole expense is superseded. The language requiring Frontier to "maintain" facilities returns the Commission to the question of whether, on September 23, 2010, Ms. Hilliard suspended her service, as she argues, or disconnected it, as Frontier argues. If Ms. Hilliard disconnected her service, she lost any claim to maintenance.

In order to prevail, Ms. Hilliard must show that Frontier has the duty, on request, to suspend a customer's service indefinitely and then reinstate service on demand, without reapplication, and without consideration of current circumstances. If Frontier has no such duty, then Ms. Hilliard has no claim for relief. In her briefing, Ms. Hilliard has not cited to a tariff provision that allows for suspension of service. Nor has she cited to any provision that allows for reinstatement of service without reapplication. Frontier represents that its tariff does not provide for either, and the record supports Frontier's representation. Therefore, the Commission finds and concludes that Frontier is correct to consider Ms. Hilliard as an applicant for service, to evaluate all known conditions, and to apply its tariff accordingly.

Frontier has demonstrated that it cannot serve Ms. Hilliard's property with its existing facilities, and that construction of the necessary facilities would exceed \$3,000. Frontier has further demonstrated that existing conditions in and around Ms. Hilliard's property threaten any form of wired service on an ongoing basis. Therefore, Ms. Hilliard may not claim the relief she seeks within Frontier's tariff. The Commission may not order Frontier to act outside of its tariff; consequently, the Commission must dismiss Ms. Hilliard's complaint.

The Commission recognizes that dismissing a complaint is a serious measure, and does not take this action casually. In determining to dismiss Ms. Hilliard's complaint, the Commission has considered whether, if granted a hearing, Ms. Hilliard might be able to provide evidence (a) that Frontier agreed to suspend her service despite having no such provision within its tariff; and (b) that under such agreement Ms. Hilliard retained a right to ongoing maintenance despite paying no ongoing fees.

The Commission is able to take notice of the fact that there is no statute or rule that requires a utility to suspend service or to maintain facilities that are not in use. Therefore, it appears that the only evidence Ms. Hilliard might bring at hearing would be her testimony as to the conversation she had with Frontier's agent on September 23, 2010—over five years ago—when she terminated her service. Such testimony would constitute hearsay evidence as to a contested fact. Therefore, even if Ms. Hilliard were given the opportunity to testify, the Commission would not be able to find in her favor. *See* Utah Code § 63G-4-203(3).<sup>8</sup>

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<sup>8</sup> If Ms. Hilliard in fact has non-hearsay evidence as to the understanding and agreement reached by the parties on September 23, 2010, she is invited to make the Commission aware of those circumstances by filing a motion for agency review of this order.

**ORDER**

Frontier's motion to dismiss is **GRANTED**.

If Ms. Hilliard wishes to pursue obtaining landline service rather than subscribing to Frontier's satellite system, she has the option to apply to the Commission for a one-time distribution from the Utah Universal Service Fund, pursuant to Utah Administrative Code R746-360-9. If the Commission agrees that it is appropriate to use the Utah Universal Service Fund to support a landline to Ms. Hilliard's property, it would order Frontier to conduct a cost study so as to fix Ms. Hilliard's share of the total initial cost. Based on the information in this docket, it appears that Ms. Hilliard might be required to pay as much as \$67,000.

DATED at Salt Lake City, Utah, this 20<sup>th</sup> day of November, 2015.

/s/ Jennie T. Jonsson  
Administrative Law Judge

Approved and confirmed this 20<sup>th</sup> day of November, 2015 as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg  
Commission Secretary  
DW#270630



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 20<sup>th</sup> day of November, 2015, a true and correct copy of the foregoing was delivered upon the following as indicated below:

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