

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

Formal Complaint of SRR Partners, LLC d/b/a Sorrel River Ranch Resort & Spa against Frontier Communications	<u>DOCKET NO. 19-041-01</u>
Formal Complaint of Jayne Dillon May against Frontier Communications	<u>DOCKET NO. 19-041-02</u>
Investigation of Citizens Telecommunications Company of Utah dba Frontier Communications of Utah	<u>DOCKET NO. 19-041-04</u> <u>ORDER GRANTING IN PART MOTION TO COMPEL</u>

ISSUED: November 27, 2019

Procedural Background

The PSC opened Docket No. 19-041-04 (the “Investigation”) to examine service quality issues with respect to Citizens Telecommunications Company of Utah d/b/a/ Frontier Communications of Utah (“Frontier”). At the parties’ request, the PSC has consolidated the Investigation with two customer complaint dockets (Docket Nos. 19-041-01 and 19-041-02).

The Office of Consumer Services (OCS) filed a request for agency action on May 17, 2019, prompting the Public Service Commission (PSC) to open the Investigation. The PSC held a Scheduling conference on June 4, 2019, during which Frontier declined to discuss a proposed schedule until it had filed a response to the request for agency action. On June 28, 2019, after Frontier had filed a response, the PSC issued an Order and Action Request, which directed the OCS and the Division of Public Utilities (DPU) to submit a proposed process and schedule for the Investigation by July 8, 2019, and allowed Frontier to comment by July 15, 2019.

The DPU and the OCS subsequently submitted a proposal suggesting the Investigation take place in two phases. During the first phase, the parties would take initial discovery until

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September 16, 2019, after which the PSC would hold a scheduling conference to determine a schedule for the second phase. Frontier filed no response to the proposed schedule. The PSC issued a Scheduling Order and Notice of Status and Scheduling Conference on July 19, 2019, setting a 10-day discovery turnaround time for data requests through September 16, 2019 and noticing a scheduling conference for September 17, 2019.

At the scheduling conference, held September 17, 2019, the parties stipulated to extending the time for completion of discovery. The OCS represented that it had experienced some difficulty obtaining discovery from Frontier. The PSC granted the parties' request, extending the time for discovery and noticing a status and scheduling conference for January 22, 2020.

On October 1, 2019, the OCS filed a Motion to Compel Complete Answers to the OCS's Second Set of Data Requests ("Motion"), asserting Frontier had objected to numerous data requests and refused to produce responsive documents. On October 16, 2019, Frontier filed a response ("Response to Motion"). On October 28, 2019, the OCS filed a reply ("OCS's Reply").

Discussion and Conclusions on Specific Requests

In proceedings before the PSC, the Utah Administrative Code requires parties to "attempt to complete informal discovery through written requests for information and records (data requests)." Utah Admin. Code R746-1-501. Where parties believe informal discovery procedures will not be sufficient, they may move the PSC for formal discovery to be governed under the Utah Rules of Civil Procedure with some enumerated modifications. *Id.*

No party has sought formal discovery here, but the PSC concludes a motion for formal discovery is not prerequisite to a motion to compel. If the information is otherwise discoverable,

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the PSC may compel production when a party refuses to produce the information in response to an informal data request.

We address separately below each disputed request, each of which is numbered and identified as it was in the OCS's Second Set of Data Requests.

Request 2.1:

Provide copies of all versions of residential landline telephone service contracts used by [Frontier] for residential customers served by the Moab exchange, separately identifying customers in Castle Valley, from 2012 to the present.

Frontier objected to this request to the extent it seeks data "separately identifying" customers in Castle Valley beyond those records already produced to the OCS. Frontier asserted that it collects data at the wire center/exchange level, and data from individual customers, but it does not collect data for neighborhoods or locations below the wire center level. (Motion at Ex. B.) Frontier argues fulfilling this component of the request would "therefore require a special study or analysis to produce." (*Id.*) Frontier provided, in response to the request, a link to its current "Terms and Conditions of Service," representing that these generally apply regardless of the customer's location. (*Id.*)

In its Motion, the OCS represents "Frontier has only identified a link to the current 'terms and conditions' governing residential contracts and stated that the 'terms and conditions' constitute the customers' contracts." (Motion at 12-13.) The OCS argues the response is deficient, providing a link only to the current "terms and conditions" and the next most recent version. (*See id.* at 13.)

In the response it filed with the PSC, Frontier represents that it has produced "what exists in its system of records" and that it knows its Business Terms and Conditions were updated in

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July 2017, as stated on page 26 of the same. (Response to Motion at 6.) Frontier represents the “terms and conditions” are updated as needed, not on any particular schedule. (*Id.*)

In its reply, the OCS notes that Frontier must keep copies of all versions of its “terms and conditions” for purposes of contract litigation and argues Frontier’s assertion that it has searched its records is not credible.

Frontier’s residential landline telephone service contracts and “terms and conditions” are plainly discoverable, including pre-existing versions of them. The OCS’s motion to compel a response to Request 2.1 is granted. Frontier shall produce copies of all versions of any (1) residential landline telephone service contract it has used since 2012, including reasonable identification of the period during which such contract was used; and (2) “terms and conditions” applicable to residential landline telephone service customers that have been in effect since 2012, including reasonable identification of the period during which such version was in effect. If Frontier has no responsive documents, Frontier must explain the reason it has failed to keep copies, electronic or otherwise, of these documents. Frontier need only separately identify documents applicable to customers in Castle Valley to the extent such customers were subject to a different version of its contract or “terms and conditions.”

Request 2.3:

If [Frontier] has landline contracts and “terms of conditions” specifically for small business customers provide: a) copies of all versions of small business landline telephone service contracts used by [Frontier] for small business customers served by the Moab exchange, separately identifying customers from Castle Valley, from 2012 to the present; b) copies of all versions of small business landline telephone “terms and conditions” used by [Frontier] for small business served by the Moab exchange, separately identifying customers from Castle Valley, from 2012 to the present.

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In responding to this request, Frontier again simply referred the OCS to a link to its current “Business Terms and Conditions of Service.” (Motion at Ex. B.) Frontier later represented it “considers the Business Terms and Conditions of Service to be its contract with small businesses.” (Response to Motion at 7.)

Frontier’s small business landline telephone service contracts and “terms and conditions” are plainly discoverable, including pre-existing versions of them. The OCS’s motion to compel a response to Request 2.3 is granted. Frontier shall produce copies of all versions of any (1) small business landline telephone service contracts it has used since 2012, including reasonable identification of the period during which such contract was used; and (2) “terms and conditions” applicable to small business landline telephone service customers that have been in effect since 2012, including reasonable identification of the period during which such version was in effect. If Frontier has no responsive documents, Frontier shall explain the reason it has failed to keep copies, electronic or otherwise, of these documents. If Frontier does not and has not, in the pertinent period, employed specific contracts or “terms and conditions” for small business landline telephone customers, Frontier shall identify what versions of these documents are and have been applicable to small business customers. Frontier need only separately identify documents applicable to customers in Castle Valley to the extent such customers were subject to a different version of its contract or “terms and conditions.”

Request 2.4:

If [Frontier] does not have landline contracts and “terms of conditions” specifically for small businesses provide a) copies of all versions of business landline telephone service contracts used by [Frontier] for business customers served by the Moab exchange, separately identifying customers in Castle Valley, from 2012 to the present; b) copies of all versions of business landline telephone “terms and

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conditions” used by [Frontier] for business customers served by the Moab exchange, separately identifying customers from Castle Valley, from 2012 to the present.

In responding to this request, Frontier again simply referred the OCS to a link to its current “Business Terms and Conditions of Service.” (Motion at Ex. B.)

Frontier’s business landline telephone service contracts and “terms and conditions” are plainly discoverable, including pre-existing versions of them. The OCS’s motion to compel a response to Request 2.4 is granted. Frontier shall produce copies of all versions of any (1) business landline telephone service contracts it has used since 2012, including reasonable identification of the period during which such contract was used; and (2) “terms and conditions” applicable to business landline telephone service customers that have been in effect since 2012, including reasonable identification of the period during which such version was in effect. If Frontier has no responsive documents, Frontier shall explain the reason it has failed to keep copies, electronic or otherwise, of these documents. If Frontier does not and has not, in the pertinent period, employed specific contracts or “terms and conditions” for business landline telephone customers, Frontier shall identify what versions of these documents are and have been applicable to small business customers. Frontier need only separately identify documents applicable to customers in Castle Valley to the extent such customers were subject to a different version of its contract or “terms and conditions.”

Request 2.5:

Request 2.5 quotes language from Frontier’s “terms and conditions,” which the OCS pulled from Frontier’s website, providing customers take service on an “as is” or “as available” basis with no warranty “of workmanlike effort or lack of negligence” and language from

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Frontier's tariff limiting Frontier's liability "except in cases of actionable negligence." The request asks the following questions about these provisions in four subparts:

- a) Do you contend that the "terms and conditions" ... are consistent with Frontier's limitation of liability terms in its tariff? If so, explain how the above quoted "terms and conditions" are consistent with the tariff.
- b) If you contend that the "terms and conditions" ... are inconsistent with Frontier's limitation of liability terms in its tariff, do you contend that the "terms and conditions" or tariff govern? Please explain.
- c) If you contend that the "terms and conditions" ... are inconsistent with Frontier's limitation of liability terms in its tariff and the terms of the tariff govern, please explain what purpose do the inconsistent terms in the "terms and conditions" serve?
- d) If the "terms and conditions" ... are inconsistent with Frontier's limitation of liability terms in its tariff and the terms of the tariff govern, do you contend that the customers are not likely to be confused by this inconsistency and what is the basis of your contention?

In responding to subparts (a) through (d), Frontier refers the OCS to its online "terms and conditions," which "set out the precedence of the contract language as opposed to tariff language." (Motion at Ex. B.)

The OCS contends Frontier's response is "ambiguous and incomplete." (Motion at 7.) In its response to the Motion, Frontier argues its response is sufficient and objects to "answering questions of ... law to be determined by the [PSC]" and "to providing positions on contested issues in litigation while such positions are currently under development and will ultimately be presented ... in due course in accordance with the procedural schedule." (Response to Motion at 4-5.)

Frontier's objection is well founded. The contract language speaks for itself, and the PSC will not require Frontier to make legal arguments or take legal positions in response to a discovery request. The OCS's motion to compel a response to Request 2.5 is denied.

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Request 2.6:

Provide copies of all descriptions of your inspection and testing program that you have [filed] with the [PSC], pursuant to Utah Admin. Code [R746-340-5(C)], from 2012 to the present.

Frontier objected to this request on the grounds that “the OCS has equally available access to any records” Frontier has filed with the PSC but represented it has “a variety of preventive maintenance and inspection programs, and is in the process of reviewing them to see which of these is responsive to this data request and will produce responsive documents as they are identified.” (Motion at Ex. B.) In its response to the Motion, Frontier represented it “has recently produced a variety of responsive documents … including a copy of Frontier’s filing … establishing that Frontier is in compliance” with the applicable rule. (Response to Motion at 5.) In its reply, the OCS points out the recently disclosed document is seventeen years old, outside of the time period identified in the discovery request. The OCS asks the PSC to compel Frontier to disclose whether it has any other responsive documents.

Given that Frontier represented it would produce any responsive documents in its initial discovery response and later supplemented its response with a responsive document, the PSC finds no reason to believe Frontier has failed to comply with this request. Frontier should understand it is under a continuing duty to supplement the request to the extent it locates additional responsive documents. The OCS’s motion to compel a response to Request 2.6 is denied.

Request 2.7:

Request 2.7 quotes Utah Admin. Code R746-340-5(B)(1), explaining telecommunications corporations’ duty to provide for the “receipt of customer trouble reports at

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all hours,” to “make a full and prompt investigation of and response to each complaint,” and to “maintain a record” of such reports that includes detail specified in the rule. The request then asks the following in three subparts:

- a) Provide copies of all records of trouble reports of residential landline telephone customers separately for each exchange served by [Frontier] specifically identifying customers in Castle Valley, from 2012 to the present.
- b) If you provide services specifically for small business landline telephone customers, provide copies of all records of trouble reports of small business landline telephone customers separately for each exchange served by [Frontier] specifically identifying customers in Castle Valley, from 2012 to the present.
- c) If you do not provide services specifically for small business landline customers, provide copies of all records of trouble reports from business landline customers served separately for each exchange served by [Frontier] specifically identifying customers in Castle Valley, from 2012 to the present.

Frontier objected to all three subparts “to the extent it seeks information in a form or of a type that Frontier does not keep in the ordinary course of business.” (Motion at Ex. B.)

Notwithstanding its objection, Frontier initially produced a file that “provides ticket details from [January] 2017 to July 2019.” (*Id.*) Frontier asserted “[p]rior year’s tickets are archived and unavailable.” (*Id.*) Frontier also explained the file indicated whether the ticket pertained to a “residential” or “business” customer and asserted Frontier does not distinguish tickets between “large and small business.” (*Id.*) Frontier also explained “Castle Valley is served from the Moab exchange with zip code 84532,” implying the OCS could identify Castle Valley trouble reports using this information. (*Id.*)

The OCS argued in its Motion that prior years’ data being archived is an insufficient basis to withhold the discovery and asserted Frontier provided the data in a pdf format with print “so small that it was almost unreadable.” (Motion at 11.) The OCS requested Frontier be

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compelled to provide a complete response for the entire requested period and to do so in an Excel spreadsheet. (*Id.* at 12.)

In its response to the Motion, Frontier represented it had “received from archives and produced additional trouble report records from 2015 and 2016” and had provided a list of complaints to the OCS through responses to discovery propounded by another party. (Response to Motion at 6.) Frontier also argued it “should not be required to reformat its records or provide existing data in its system of records in a format dictated by the OCS.” (*Id.*)

In its reply, the OCS points out Frontier’s supplemental production was in the form of Excel worksheets, indicating Frontier possesses the data in that format. (OCS’s Reply at 10.)

Frontier’s objection that “archived” data is unavailable has no merit, by definition. Additionally, the PSC notes the file name description in its initial discovery response identifies the file with an “.xlsx” suffix, suggesting the native files are executable in Excel. While the OCS may not unreasonably dictate the format of production such that it becomes disproportionately burdensome, the OCS is entitled to a production in the native file format where that format is legible and the alternative file format is not.

Accordingly, the OCS’s motion to compel a response to Request 2.7 is granted. Frontier will provide all documents in its possession, custody, or control, including archived documents, that are responsive to the request for the entirety of the period requested. If the responsive documents are stored as an executable spreadsheet or other form more conducive to review than a pdf, then Frontier shall provide the information in the native file format.

Request 2.8:

Request 2.8 contains a preface, explaining a witness for Frontier previously testified before the PSC that Frontier does not keep trouble reports of customer complaints communicated to Frontier by means other than a designated “800 number.” The request then asks the following in three subparts:

- a) [P]rovide all records of any type indicating residential landline telephone customer complaints and/or [Frontier’s] response to residential landline telephone customer complaints for residential landline telephone customers, separately for each exchange served by [Frontier], specifically identifying customers in Castle Valley, from 2012 to the present, other than complaints using a designated 800 number.
- b) If you provide services specifically for small business landline telephone customers, provide all records of any type indicating small business landline telephone customer complaints and/or [Frontier’s] response to small business landline telephone customer complaints from small business landline telephone customers, separately for each exchange served by [Frontier], specifically identifying customers in Castle Valley, from 2012 to the present, other than complaints using a designated 800 number.
- c) If you do not provide services specifically for small business landline telephone customers, provide all records of any type indicating business landline telephone customer complaints and/or [Frontier’s] response to business customer complaints from business landline telephone customers, separately for each exchange served by [Frontier], specifically identifying customers in Castle Valley, from 2012 to the present, other than complaints using a designated 800 number.

Frontier objected to this request “to the extent it requests data not kept by Frontier in the ordinary course of business” and disputed the OCS’s characterization of the testimony of Frontier’s witness. (Motion at Ex. B.) Frontier represented its customers “may contact Frontier by phone, by cell phone, via email, through a real-time chat, or via social media to report complaints or issues with service.” (*Id.*) Frontier also referred the OCS to a production it had made in response to a discovery request served by another party.

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In its response to the Motion, Frontier argues “the context and credibility of witness testimony … should be determined by the [PSC] after the proceedings (and record) are closed.” (Response to Motion at 5.) In its reply, the OCS argues Frontier’s assertion that it accepts complaints from multiple sources “cannot be reconciled” with the prior testimony of Frontier’s witness. (OCS’s Reply at 8.) The OCS further argues that, notwithstanding Frontier’s objection to the characterization of the testimony, Frontier has produced no responsive documents and should be compelled to do so.

The PSC concludes the prefatory language in Request 2.8 is unnecessary and appears to have caused unnecessary confusion and argument. Subparts (a) through (c) each pose specific and relevant requests for information independent of the prefatory language. The OCS’s motion to compel a response to Request 2.8 is therefore granted, but Frontier may disregard the language in the request preceding subpart (a). Frontier shall produce any responsive documents in its possession, custody, or control, including archived documents.

Request 2.13:

If [Frontier’s] parent company or its parent company’s other [subsidiaries] that provide landline telephone services currently or in the period of 2012 to the present, has been under investigation by states or federal governmental authorities in regards [to] its landline telephone services, identify the investigations with sufficient specificity to allow the [OCS] to easily access public information regarding the investigation.

Frontier objected to this request “to the extent it seeks information regarding any location outside Utah, which would fall outside the jurisdiction of the [PSC], and is therefore irrelevant and not calculated to result in the discovery of admissible evidence.” (Motion at Ex. B.)

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In its Motion, the OCS represents it “has uncovered numerous news articles reporting on service quality issues with [Frontier’s parent company or one of] its subsidiary’s rural landline service” in Florida, Minnesota, New York, North Carolina, and West Virginia. (Motion at 5, attaching Exhibits D-H.) The OCS further asserts discovery “reveals that Frontier has been losing millions of dollars from its Utah operations for several years” and, “[t]herefore, it is likely that Frontier is dependent on its parent corporation for its continued operation in Utah.” (*Id.*)

Additionally, the OCS claims “financial publications assert that [Frontier’s parent company] is also in financial distress.” (*Id.*, attaching Exhibit J.) Finally, the OCS quotes the transcript of a quarterly earnings call, arguing statements of the parent company’s CEO suggest it “is not planning to make investment to address the wide ranging problems with landline service, rather [it] just intend[s] to cut costs to increase revenue.” (Motion at 6, attaching Exhibit K.)¹

In its response to the Motion, Frontier argues its parent company is not a public utility in Utah nor are its affiliates operating outside this state. (Response to Motion at 2-3.) Frontier characterizes the request as an “invitation for the PSC to operate beyond its jurisdiction.” (*Id.* at 3.) Frontier also disputes the OCS’s characterization of the statements made on the quarterly earnings call.

In reply, the OCS argues its request is not “a fishing expedition” but “seeks to uncover whether Frontier’s service quality issues are explained by systemic problems with [Frontier’s

¹ To be clear, the language quoted here is the OCS’s characterization of what is inferable from the call, not language quoted from the transcript.

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parent's] business model ... or Frontier and [its parent's] financial ability to adequately service its customers." (OCS's Reply at 2 (internal quotation omitted).)

The PSC concludes Frontier's objection has no merit. In addition to its broad powers to regulate and supervise public utilities, the PSC has the enumerated statutory power to require utilities to deliver records "in any way relating to its property or affecting its business."² Utah Code Ann. § 54-3-21(3). While the PSC does not have jurisdiction to regulate Frontier's parent company, conditions at the parent or its affiliates plainly have the potential to affect Frontier's business. We interpret the OCS request as not asking Frontier to produce documents within the custody of its parent company or its affiliates; rather we conclude the OCS merely asks Frontier to "identify the investigations with sufficient specificity" such that OCS may, on its own efforts, obtain public information about them. The PSC finds and concludes the OCS's inquiry into any such investigations is relevant to this matter and its request is reasonable, proportional, and well within the authority of the PSC to grant.

The OCS's motion to compel a response to Request 2.13 is granted. Frontier shall identify, with reasonable specificity, any and all investigations by state or federal authorities concerning the landline telephone services of its parent company or any subsidiary of its parent company from January 1, 2012 to the present to the extent that information is in Frontier's possession, custody, or control, including archived documents.

² Utah Code Ann. § 54-3-21(3) ("Whenever required by the [PSC] every public utility shall deliver to the [PSC] copies of any or all ... contracts, agreements, franchises, reports, books, accounts, papers and records in its possession or in any way relating to its property or affecting its business").

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Order

As described in the foregoing, the PSC grants the OCS's Motion, in part. Frontier shall, on or before **Monday, December 16, 2019**, produce the documents and information the PSC has directed it to produce in this Order.

DATED at Salt Lake City, Utah, November 27, 2019.

/s/ Michael J. Hammer
Presiding Officer

Attest:

/s/ Gary L. Widerburg
PSC Secretary
DW#311256

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CERTIFICATE OF SERVICE

I CERTIFY that on November 27, 2019, a true and correct copy of the foregoing was served upon the following as indicated below:

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