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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Application of E Fiber Moab LLC for a Certificate of Public Convenience and Necessity to Provide Facility—Based Local Exchange Service and be Designated as a Carrier of Last Resort in Certain Rural Exchanges	Docket No. 20-2618-01
Application of E Fiber San Juan LLC for a Certificate of Public Convenience and Necessity to Provide Facility—Based Local Exchange Service and be Designated as a Carrier of Last Resort in Certain Rural Exchanges	Docket No. 20-2619-01 Office of Consumer Services' Comments

Pursuant to Utah Code § 54-10a-301, UTAH ADMIN. CODE r. 746-1-101 through 801 and the Public Service Commission of Utah's ("PSC") two April 21, 2020 Notices of Filing and Comment Period in dockets 20-2618-01 and 20-2619-01, the Office of Consumer Services ("OCS") submits these initial comments. Dockets 20-2618-01 and 20-2619-01 involve the applications of E Fiber Moab LLC and E Fiber San Juan LLC to operate as carriers of last resort ("COLR") in territories currently served by another COLR Citizens Telecommunications

Company of Utah dba Frontier Communications of Utah (“Frontier”). The PSC’s April 21st Notices establish a comment period on the application and provide that if no party files comments in opposition then the dockets will be adjudicated informally.

The OCS files these comments to present its views on the public interest issues that the PSC must decide before it can approve the applications. Specifically, these filings present the untenable possibility of two COLRs both potentially drawing from the Utah Universal Telecommunications Service Support Fund (“UUSF”) in the same service territory to build telecom infrastructure to provide redundant services. Procedurally, this potential presents significant public policy concerns that may require factual development and are more suited for a formal proceeding, pursuant to the procedures set out in Utah Code §§ 63G-4-204 through 208 and rules 746-1-101 through 801. Substantively, this potential requires the PSC to develop criteria to ensure that only one COLR be allowed to draw from the UUSF to provide services in one defined territory, as a prerequisite to a finding that the subject applications are in the public interest.

BACKGROUND

On April 20, 2020, E Fiber Moab and E Fiber San Juan both filed applications for Certificate of Public Convenience and Necessity to provide facility based local exchange service and be designated as a COLR in rural exchanges currently served by Frontier—an incumbent telephone corporation and COLR. Utah Code § 54-8b-15(1)(b)(i). The applications aver that both E Fiber Moab and E Fiber San Juan are newly formed subsidiaries of Emery Telecom HC, which in turn is a whole owned subsidiary of Emery Telcom, a telecom that provides local exchange services in Emery County, Utah. E Fiber Moab Application pg. 2; E Fiber San Juan

Application pg. 2 (E Fiber Moab and E Fiber San Juan, are collectively referred to as “Emery”). The applications assert that Emery seeks designation as a COLR to obtain UUSF funding to build out and operate a state-of-the-art fiber network in these rural territories. E Fiber Moab Application pg.7; E Fiber San Juan Application pg. 6. In addition, Emery asserts that Frontier does not currently provide such service nor does it presently draw from the UUSF. E Fiber Moab Application pg. 5-8 and n. 3; E Fiber San Juan Application pg. 5-8 and n 3.

POLICY CONSIDERATIONS

Utah Code § 54-8b-2.1 read in conjunction with Utah Code §§ 54-8b-15(1)(b)(ii) and 54-8b-15(4)(a)(ii) seems to contemplate that more than one COLR can draw from the UUSF to provide telecom services in the same territory.¹ However, section 54-8b-2.1, which allows for competitive entry into the territory of an incumbent telephone corporation, requires that before the competitive entry is approved, the PSC must determine that the entry “is in the public interest.” Section 54-8b-2.1(2)(b). Moreover, Utah Code § 54-8b-11 provides: “In administering this title, the commission shall endeavor to make available high-quality, universal telecommunications services at just and reasonable rates for all classes of customers throughout the state.”

¹ Section 54-8b-15(4)(a) provides: “A rate-of-return regulated *carrier of last resort* is eligible for payment from the Universal Public Telecommunications Service Fund” (emphasis added). Section 54-8b-15(1)(b) provides: “‘Carrier of last resort’ means: (i) an incumbent telephone corporations; or (ii) a telecommunications corporation that, under Section 54-8b-2.1: (A) has a certificate of public conveniences and necessity to provide local exchange services; and (B) has the obligation to provide public telecommunications service to any customer or class of customers that requests services with the local exchange.” Finally, section 54-8b-2.1 provides for competitive entry into a territory of an incumbent telephone company and imposes “an obligation upon the competitive telecommunication corporation to provide public telecommunications services to any customer or class of customers who requests service within the local exchange.”

These provisions create a tension between allowing competitive entry and the potentially negative public policy implications of having two providers eligible to draw UUSF to serve the same geographic area. Taken to extreme, these implications could lead to the depletion of the UUSF, potentially raising rates for all customers, only to provide for the build out of duplicative, and therefore unnecessary, telecom infrastructure within the same territory. Indeed, without balancing competitive entry with the negative policy implications of depleting the UUSF, section 54-8b-2.1 would lead to the absurd result of allowing numerous telecoms all drawing from the UUSF to build an array of redundant infrastructure within the same territory.

Here, the applications allege facts that might be viewed as supporting Emery's position that the competitive entry is in the public interest. Specifically, Emery alleges that by building a "state-of-the-art" fiber network it will provide superior service than the services presently provided by Frontier. E Fiber Moab Application pg. 5-8 and E Fiber San Juan Application pg. 5-8. In addition, Emery points out that Frontier presently does not draw from the UUSF. E Fiber Moab Application pg. 8 n. 3; E Fiber San Juan Application pg.8 n 3. However, Frontier may dispute the first contention and the fact that Frontier does not presently draw from the Fund does not preclude the possibility that it will do so in the future. This demonstrates that the public interest determination is dependent on the facts of a particular case and competitive entry under section 54-8b-2.1 should not be granted routinely on an informal basis to a telecom seeking to be designated a COLR.

Moreover, to the OCS' knowledge, this is the first time a telecom company has applied for competitive entry under section 54-8b-2.1 and sought designation as a COLR under 54-8fb-15(4)(a). Therefore, sufficient time and attention should be granted the parties to develop the

proper public policy standard to adjudicate competitive entry in such circumstances.²

Specifically, the parties need to present the PSC with sufficient factual, legal and policy argument to enable the PSC to develop criteria to ensure that competitive entry under section 54-8b-2.1 does not result in situations that are clearly not in the public interest, i.e. multiple COLR drawing from the UUSF to build out their own infrastructure to provide redundant telecom services to customers within the same designated territory.

Accordingly, in cases such as the instant cases, where telecoms seeks competitive entry under section 54-8b-2.1, designation as a COLR and announce the intention of drawing from the UUSF, the question of whether competitive entry is in the public interest is dependent on the PSC crafting an order that only allows one COLR to draw from the UUSF to build out infrastructure in the same territory. In determining whether to issue such an order, the PSC should examine the circumstances on a case by case basis. The decision should not be based on a single factor but rather on the totality of the circumstances. As these cases demonstrate, factors to be considered include whether the incumbent telecom presently draws from the UUSF, whether the incumbent telecom has the intention and ability to draw from the fund in the future, the service quality history of the incumbent telecom and whether the competing telecom will offer superior services. Because of the clear public interest in prohibiting more than one telecom from drawing on the UUSF to develop unneeded and duplicative telecom infrastructure, absent the development of criteria needed to ensure only one COLR can draw on UUSF funds to serve

² For example, to what extent is it in the public interest for a competing telecom to pick and choose which exchanges within a larger geographical area they compete in, essentially “cherry picking” among the exchanges even though section 54-8b-2.1(4) precludes “cherry picking” within the exchanges

one territory, these applications must be denied under section 54-8b-2.1(2)(b) as against the public interest.

OCS POSITION

OCS has reviewed the applications and asserts that the record is not well enough developed for it to provide specific recommendations regarding the public interest of the applications. In general, OCS believes that the PSC should evaluate each application of this nature on a case by case basis. Since these are the first such applications, adequate time and process must be given to the issues. OCS concedes that the circumstances of the instant applications may warrant approving a competitive COLR into these areas. However, the record must be further developed to ensure that a complete set of facts and public interest recommendations are available to the PSC in making its determination. At a minimum, the PSC must provide specific criteria to ensure that the UUSF is not used to support multiple telecom infrastructures in the same exchange.

CONCLUSION

For the above reasons, the OCS requests that dockets 20-2618-01 and 20-2619-01 be conducted formally through the procedures set out in sections 63G-4-204 through 208 and rules 746-1-101 through 801 and also requests the PSC to set a scheduling conference. These proceedings should enable to PSC to develop criteria to ensure that competitive entry under section 54-8b-2.1 does not lead to more than one COLR drawing on the UUSF to provide duplicate services in the same designated territory. Absent such criteria, these applications must be denied.

Respectfully submitted May 20, 2020.

/s/ Robert J. Moore
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Services*