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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Consolidated Matter of:
Application of E Fiber Moab LLC and E
Fiber San Juan LLC for Certificate of Public
Convenience and Necessity to Provide
Facility—Based Local Exchange Service and
be Designated as Carriers of Last Resort in
Certain Rural Exchanges

Docket No. 20-2618-01

The Office of Consumer Services’
Supplemental Memorandum In Opposition to
Frontier Communication’s Rule 56(a) Motion
for Partial Summary Judgement

Pursuant to Utah Code § 54-10a-301, UTAH ADMIN. CODE r. 746-1-101 through 801 and Utah Rule of Civil Procedure 56(a)(2)-(4), the Office of Consumer Services (“OCS”) submits this Supplemental Memorandum in Opposition to Citizens Telecommunications Company of Utah d/b/a Frontier Communications’ (“Frontier”) Motion for Partial Summary Judgment (“SJM”).

RULE 56(a)(3), Utah R. Civ. P., STATEMENT OF BACKGROUND FACTS

On April 20, 2020, E Fiber Moab LLC and E Fiber San Juan LLC (collectively “E Fiber”) filed applications, pursuant to Utah Code § 54-8b-2.1, seeking—Certificates of Public Convenience and Necessity for competitive entry into local exchanges presently served by

Frontier as an incumbent telecom, designation as “rate-of-return” regulated carriers of last resort (“COLR”), and an order that the E Fiber companies will be eligible to receive distributions from the Universal Public Telecommunications Service Support Fund (“UUSF”). E Fiber Moab LLC Application at ¶¶ 15,19; E Fiber San Juan LLC Application ¶¶ 15,19. (“applications”).

On July 27, 2020, Frontier filed its SJM making four arguments. One, that because the applications seek to provide service utilizing voice over the internet protocol (“VoIP”), federal law preempts the PSC from exercising subject matter jurisdiction over the applications. SJM at 7-8. Two, also because the applications seek to utilize VoIP, Utah Code § 54-19-103(1) prevents the PSC from regulating the applications’ proposed service and therefore prevents the E Fiber companies from being designated rate-of-return regulated COLR eligible to receive disbursements from the UUSF. *Id.* at 9-10. Three, the E Fiber companies do not meet the definition of COLR because they will not be able to immediately serve all customers or groups of customers that request service within the local exchange and proposes to use line extension tariffs to serve extremely remote customers. *Id.* at 11-12. And four, Utah Code § 54-8b-15 and UTAH ADMIN. CODE r. 746-8-401 provide the exclusive criteria for determining a telecom’s eligibility to draw from the UUSF and the PSC does not have the statutory authority to impose additional criteria in making a determination that Frontier may not recover from the UUSF. *Id.* at 12-17.

On August 25, 2020, the OCS filed a Rule 56(d), Utah R. Civ. P., Motion and Declaration for a Continuance of the PSC ruling on Frontier’s first two arguments pending discovery (“Rule 56(d) Motion”). Specifically, the Rule 56(d) Motion argued not all voice services that utilize VoIP are preempted by federal law or exempt from PSC regulation under

section 54-19-103(1). Rule 56(d) Motion at 4-8. Rather, the issues of preemption and exemption from regulation turn on the nature of the service offered and the technology employed in providing voice service using internet protocol. *Id.* at 5-8. Accordingly, the OCS argued that it is entitled to conduct discovery into these issues prior to the PSC ruling on Frontier's first two arguments. *Id.*

In addition, the OCS filed a Memorandum in Opposition to Frontier's SJM addressing the two issues in the SJM that did not depend on the technology used in providing VoIP service. Also on August 25, 2020, the Division of Public Utilities, the Utah Rural Telecom Association and the E Fiber companies filed Memorandums in Opposition to Frontier's SJM. With their Memorandum, the E Fiber companies filed the Declaration of Brock Johansen, the Chief Executive Officer of Emery Telecom HC, the sole member of the E Fiber LLCs (the "Johansen Declaration"). The Johansen Declaration described the type of technology and service the E Fiber companies proposed to employ if their application is granted.

On September 1, 2020, the parties filed a Joint Stipulation and Request for Scheduling Conference and Request for Expedited Treatment, providing that each of the parties "either supports or does not oppose the motion filed by OCS pursuant to Utah Rule of Civil Procedure 56(d)." Joint Stipulation at 2. Accordingly, the parties requested "that the Commission enter an order granting OCS's motion pursuant to Rule 56(d) that will allow all Parties to conduct discovery related to the subject matter of Frontier's Motion for Partial Summary Judgment" and requested a scheduling conference to set the dates for supplemental briefing. *Id.* at 3. The Joint Stipulation was approved that same day and a scheduling conference was set for September 3, 2020. After conducting the scheduling conference, the PSC issued a September 3rd, Scheduling

Order and Notice of Hearing, setting September 25, 2020 as the date for filing Supplemental Opposition Memorandums and October 9, 2020, for Frontier to file a reply.

The OCS has since conducted discovery and now files this Supplemental Opposition Memorandum addressing the first two issues in Frontier’s SJM arguing that although the E Fiber companies will utilize internet protocol in transmitting voice signals in a part of its network, the companies do not propose to utilize the type of VoIP service that are preempted by federal law or exempted from regulation by section 54-19-103(1). Thus, because of this conclusion and the arguments presented in the OCS’s August 25, 2020 Opposition Memorandum, Frontier’s SJM must be denied.

FRONTIER’S STATEMENT OF FACTS NOT GENUINELY IN DISPUTE

1. In each of the Local Exchanges, Frontier is the incumbent local exchange carrier and is a rate-of-return regulated carrier of last resort.

Undisputed.

2. E Fiber Moab and E Fiber San Juan are each Utah limited liability companies organized on February 15, 2020.

Undisputed.

3. E Fiber seeks a certificate of public convenience and necessity (“CPCN”) to construct, install, and operate fiber facilities to provide telecommunications services in the Local Exchanges.

Undisputed.

4. E Fiber also requests that it be designated as a rate-of-return regulated carrier of last resort in the Local Exchanges and, in connection, seeks approval to receive disbursements from the UUSF.

Undisputed.

5. E Fiber requests that it be declared “eligible for UUSF support if they provide voice service or wholesale broadband Internet access service and their reasonable costs to provide such services exceed their revenue.”

Undisputed.

6. E Fiber proposes to offer two services—wholesale broadband internet service and retail Voice over Internet Protocol (“VoIP”) voice service.

Undisputed but only to the extent that the E Fiber’s proposed service uses internet protocol packet-based technology at some points in the network to transmit or transport the voice signals. (Johansen Declaration, ¶ 5).

7. E Fiber does not “currently have fiber facilities constructed to enable them to provide service to **all customers**, or classes of customers who request service in the Local Exchanges.”

Undisputed.

8. E Fiber proposes to conduct a “phased in” approach to building its fiber network and providing service to customers in the Local Exchanges.

Undisputed.

9. E Fiber further states that even after its proposed fiber facilities are completely built out, certain remote locations “may still be subject to line extension tariffs.”

Undisputed.

10. E Fiber’s application requests that the Commission declare Frontier ineligible to receive UUSF funding under any circumstances based on a proposed ten-factor public policy test.

Undisputed.

STATEMENT OF ADDITIONAL MATERIAL FACT

1. E Fiber proposes to offer the same voice service that is offered to all customers in the Exchanges of Emery, Carbon and Wayne counties by Emery Telecom, Carbon/Emery Telecom, Inc. and Hanksville Telecom Inc. (Johansen Declaration, ¶ 4.)

2. E Fiber’s proposed that their customers will connect to the network at a fixed location in their homes using traditional analog telephone connected through copper wire into a RJ-11 port on an Optical Network Terminal (“ONT”). (Johansen Declaration, ¶ 10).

3. The ONT is a device that converts electric analog signals transmitted to and from the customer’s traditional analog telephone into IP data packets that are then transported to and from E Fiber’s network. (E Fiber’s Response to OCS DR 2.1, attached as Exhibit A.)

4. The ONT will be located on the outside of the customer’s home . (E Fiber’s Response to Frontier’s DR 3.1(b), attached as Exhibit B).¹

5. The RJ-11 port is the interface between the customer’s inside wiring and E Fiber’s network and is the juncture at which E Fiber’s responsibilities end and customer control begins. (E Fiber’s Response to OCS DR 2.2, attached as Exhibit A.)

6. The ONT is proprietary network property, owned, controlled, managed, repaired

¹ E Fiber’s DR response provides that the ONT can be place inside or outside the customer’s home, but also provides: “If the Commission determines that the location of the ONT is critical to the classification of the service, E Fiber commits to installing the ONT where ever needed to ensure its service is classified as a regulated public telecommunication service.” E Fiber’s Response to Frontier’s DR 3.1(b). For purposes of summary judgment, and to the extent it is relevant, the OCS postulates that the ONT will be located on the outside of the consumer’s home.

and replaced by E Fiber at no cost to the customer and the customers does not pay for nor lease the ONT from E Fiber. (E Fiber's Response to OCS DRs 2.5, 2.6, attached as Exhibit A.)

7. The E Fiber voice service does not rely on, require, or utilize a broadband connection at the customer's location. (Johansen Declaration at ¶ 9).

ARGUMENT

This Supplemental Memorandum addresses the first two arguments in Frontier's SJM, i.e., because E Fiber's proposed service uses internet protocol packet-based technology at some points in the network, the service constitutes the type of VoIP service that is (1) preempted by federal law and (2) exempted from regulation by section 54-19-103(1). The other two arguments presented in Frontier's SJM are addressed in the OCS's August 25, 2020 Opposition Memorandum and the OCS reasserts those argument, by reference, in this Memorandum. As noted above, the OCS now argues that the applications' proposed service is not the type of VoIP service that is preempted by federal law or exempted from regulation by section 54-19-103(1).

A. Standard of Decision

Rule 56(a), Utah R. Civ. P., which is persuasive authority in PSC proceedings pursuant to UTAH ADMIN. CODE r. 746-1-105, provides that the PSC "shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law." On "summary judgment, the adjudicator may look outside the pleading to survey the available evidence, drawing all reasonable inferences in the light most favorable to the non-movant, to determine whether any issues of [material] fact exist to be resolved at trial or hearing." *Application of Dominion Energy Utah for Approval of a Natural Gas Clean Air Project and Funding for the Intermountain Industrial Assessment Center,*

Docket No. 19-057-33, Order Denying Office of Consumer Services' Motion to Dismiss Application, or In the Alternative, Motion for Summary Judgment Denying Application, at 5 (Utah P.S.C., April 27, 2020). "A disputed fact is material if it affects the rights and liabilities of the parties." *Alliant Techsystems, Inc. v. Salt Lake Bd. Of Equalization*, 2012 UT 4, ¶ 31, 270 P.3d 441.

B. Federal Preemption

In its SJM, Frontier argues federal law preempts state regulation of E Fiber's proposed use of internet protocol packet-based technology in delivering its voice service and accordingly the PSC lacks subject matter jurisdiction over the applications. SJM at 6-8. Frontier bases this contention on two cases, *In the Matter of the Request for Agency Action of Carbon/Emery Telecom, Inc. v. 8x8, Inc.*, Docket No, 12-2302-01, Order of Dismissal for Lack of Jurisdiction (Utah P.S.C., Nov. 27, 2012) ("*8x8, Inc.*") and *Charter Advance Ser. (MN), LLC v. Lange*, 903 F.3d 715, 720 (8th Cir. 2018). *SJM at 6-8. 8x8, Inc.* is one of the *Vonage* line of cases which deals with the distinction between nomadic VoIP, state regulation of which is always preempted, *8x8, Inc.*, at 15, and fixed VoIP, state regulation of which may be preempted, *Charter*, 903 F.3d at 720, or may not be preempted, *In the Mater of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Service Are Exempt from Access Charges*, 19 FCC Rcd. 7457, 7465 ¶ 12 (2004) ("*In-the-Middle Ruling*"), depending on the technology employed. The OCS addresses these issues in turn.

Nomadic vs. Fixed VoIP – Vonage Ruling

Frontier argues that in *8x8, Inc.* the PSC has previously ruled that federal law preempts its authority to regulate VoIP service. SJM at 7. However, *8x8, Inc.* deals with “nomadic” VoIP. As mentioned above, state regulation of nomadic VoIP is always preempted. E Fiber on the other hand, proposes to offer “fixed” VoIP service, i.e., service “tethered to the user’s home.” *Charter*, 903 F.3d at 717. Accordingly, the ruling in *8x8, Inc.* does not impact the question of whether federal law preempts state regulation of E Fiber’s proposed service.

In *8x8, Inc.* the PSC based its ruling on the similarity of facts in that case and the facts in the recent Federal Communications Commission’s (“FCC”) case of *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd. 22404 (2004), *affirmed*, *Minnesota Pub. Utilities Comm’n v. F.C.C.*, 483 F.3d 570 (8th Cir. 2007)(“*Vonage*); *8x8, Inc.*, at 14 (“8x8’s uncontested affidavit testimony establishes that 8x8’s service is like the service at issue in *Vonage*.”) And the pivotal factual issue in *Vonage*, was the characteristics of nomadic VoIP as opposed to fixed VoIP.

As the name suggests, nomadic VoIP is a service that offers the user mobility. “[Nomadic VoIP] harnesses the power of the Internet to enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they may find a broadband connection, and to manage their communications needs from any broadband connection. The Internet’s inherently global and open architecture obviates the need for any correlation between Vonage’s [nomadic VoIP] service and its end users’ geographic locations.” *Vonage*, 19 FCC Rcd. at 22419 ¶ 24; *8x8, Inc.*, at 15 (“Customers using 8x8 service can, therefore, relocate to any geographical area where broadband exists and still use 8x8’s services. This is what makes the services nomadic rather than fixed”).

The FCC relied on this mobile nature of nomadic VoIP in concluding that federal law preempts state regulation of nomadic VoIP. Specifically, the FCC ruled that while the Communications Act allows for dual federal and state regulation of “telecommunication service” but preempts most regulation of “information service,” the FCC need not determine if nomadic VoIP should be characterized as telecommunication or information service. Rather, the FCC based its ruling on the “impossibility exception” of 47 U.S.C. § 152(b), which provides that the FCC can preempt state regulation of a service that otherwise would be subject to dual regulation if it is impossible or impractical to separate the service's intrastate and interstate components and the state regulation interferes with valid federal rules or policies. *Vonage*, 19 FCC Rcd. at 22423-24 ¶ 31; *see also*, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368, (1986) (indicating the FCC can preempt state law “where compliance with both federal and state law is in effect physically impossible”).

Traditionally, in separating a telecom’s intrastate and interstate components for purposes of state and federal regulation, the FCC employs “its so-called “end-to-end analysis” based on the physical end points of the communication.” *Vonage*, 19 FCC Rcd. at 22413 ¶ 17. However, this approach is not possible for nomadic VoIP where, because it is usable from any place with a broadband connection, there is no correlation between the VoIP service and the end users’ geographic location.² *Id.* In determining the breath of its ruling, the FCC observed “the practical inseparability of other types of IP-enabled services having basic characteristics similar

² In addition to the impossibility of segregating a telecom’s state from federal components, the FCC ruled that state regulatory authority would interfere with the policies of promoting the development of vigorous competition in the telecom market and/or the policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2); *Vonage*, 19 FCC Red. at 22416 ¶¶ 20-21.

to [Vonage’s nomadic VoIP] would likewise preclude state regulation to the same extent as described herein.” *Id.* at 22424 ¶ 32.

The facts elicited from E Fiber in this case place the service proposed in the applications outside the scope of *Vonage* and therefore *8x8, Inc.* Rather than nomadic VoIP, with its inherent problems with inseverability, E Fiber proposes “fixed” voice service, i.e., service “tethered to the user’s home.”³ *Charter*, 903 F.3d at 717. Indeed, the evidence before the PSC demonstrates that E Fiber’s proposed that their customers will connect to the network at a fixed location in their homes using traditional telephones connected into a RJ-11 port. Statement of Additional Material Fact (“SAMF”) ¶ 2. Accordingly, the proposed service does not present the problem of inseverability because the service is fixed to a specific geographical location. Therefore, E Fiber’s proposed fixed VoIP service fall outside the preemptive breath of *Vonage* and *8x8, Inc.*⁴

Telecommunication vs. Information Service – Charter Case

Frontier also argues that federal law preempts the PSC jurisdiction over E Fiber’s proposed service under the eighth circuit case of *Charter Advance Ser. (MN), LLC v. Lange*, 903 F.3d 715, 720 (8th Cir. 2018). SJM at 8. *Charter* deals with “fixed” VoIP, which may or may not be preempted depending on the technology employed. Here, the service that E Fiber

³ Of note, however, is that fact that while nomadic VoIP requires broadband connection, E Fiber’s proposal does not rely on, require, or utilize a broadband connection at the customer’s location. SAMF ¶ 7.

⁴ The continued validity of *Vonage* has been cast into considerable doubt by the more recent FCC cases of *Interim Contribution Methodology Order*, 21 FCC Rcd 7518, 7544 ¶¶ 50,51 (2010) and *In the Matter of Universal Service Contribution Methodology*, 25 FCC Rcd 15651, 15651 ¶¶ 1, 15 (2010), which developed a method of segregating interstate and intrastate revenues from nomadic VoIP providers. However, this does not impact the analysis of this Memorandum. Frontier’s SJM is predicated on the PSC case of *8x8, Inc.*, which did not address the impact of the Methodology Orders on the *Vonage* ruling. Rather, *8x8, Inc.* analysis was based on the concept of the inseverability of nomadic VoIP and its distinction from fixed VoIP. Because Frontier’s SJM focused on *8x8, Inc.* and *8x8* does not recognize the impact the Methodology Order have on the *Vonage* Order, the OCS relies on FCC law existing at the time of the *Vonage* ruling.

proposes is subject to dual state and federal regulation because the net protocol conversion, i.e.—the point where the electronic analog signal is converted into “internet protocol data ‘packets’” for transmission over E Fiber’s fiber network—occurs on E Fiber’s side of the demarcation point and therefore occurs within E Fiber’s network. *See, id.* at 717, 719-20; *In-the-Middle Ruling*, 19 FCC Rcd. at 7465 ¶ 12.

Initially, however, the OCS notes that *Charter* is not directly applicable to E Fiber’s proposed service. As argued in E Fiber’s and the Division of Public Utilities’ (“DPU”) August 25, 2020 Memorandums in Opposition to Frontier’s SJM, *Charter* deals with a specific type of VoIP service, interconnected VoIP. *Charter*, 903 F.3d at 717-18. The FCC defines interconnected VoIP as service that: “(i) Enables real-time, two-way voice communications; (ii) Requires a broadband connection from the user’s location; (iii) Requires internet protocol-compatible customer premises equipment (CPE); and (iv) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.” 47 C.F.R. § 9.3.

E Fiber’s proposed service lies outside of this definition because E Fiber’s service does not rely on, require, or utilize a broadband connection at the user’s location. 47 C.F.R. § 9.3 (ii); SAMF ¶ 7. Moreover, as discussed below, E Fiber’s proposed service uses traditional phone equipment as their CPE and therefore do not require “internet protocol-compatible customer premises equipment.” 47 C.F.R. § 9.3 (ii); SAMF ¶ 2. These differences meaningfully distinguish E Fiber’s service from the service at issue in *Charter*, for the reasons outlined in E Fiber’s and the DPU’s Opposition Memorandums. Accordingly, the decision in *Charter* does not apply to E Fiber’s proposed service and the OCS incorporates by reference the arguments

presented in E Fiber’s and the DPU’s August 25, 2020 Opposition Memorandums into the instant Memorandum.

However, even if *Charter* were to apply to the instant case, the reasoning of the case inevitably leads to the conclusion that E Fiber’s proposed service constitutes “telecommunication service” subject to dual state and federal regulation because the protocol conversion occurs on E Fiber’s side of the demarcation point. *See infra* p. 16-17. The type of service at issue in *Charter*, on the other hand, constitutes “information service,” that is exempt from most state and federal regulation because in *Charter* the protocol conversion occurs on the customer’s side of the demarcation point. *Id.*

Specifically, in cases dealing with the issue of preemption of fixed VoIP, the FCC and the courts have focused on the question of whether the service at issue constitutes “telecommunication service” or “information service” as defined by the Telecommunications Act of 1996 (“1996 Act”). *See In-the-Middle Ruling*, 19 FCC Rcd. at 7465 ¶ 12; *Charter*, 903 F.3d at 718.⁵ Under the 1996 Act: “The term ‘telecommunications service’ means the offering

⁵ Despite several opportunities to do so, the FCC has yet to definitively ruled that VoIP service constitute “telecommunication” or “information” service under the 1996 Act. *See Charter*, 903 F.3d at 718 & n. 2. However, it must be noted that the federal courts have held that Congress has delegated the interpretive authority over the 1996 Act to the FCC. *Vonage Holdings Corp. v. Fed. Comm’n Comm’n*, 489 F.3d 1232, 1240 (D.C. Cir. 2007). Therefore, questions impacting statutory construction must view through the lens of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That is, unless Congress has explicitly and unambiguously spoken to the precise issue, the FCC’s interpretation will not be overturned unless it is arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 844. Here, where the FCC has not spoken to the specific issue, given this deference, federal courts must determine what the FCC would do given the FCC’s precedent. *See generally, Charter*, 903 F.3d at 719 (“In the absence of direct guidance from the FCC explicitly classifying VoIP services, the district court interpreted the Act with reference to prior FCC orders”); see also, *Id.* at 719-20 (*Charter* court relying exclusively on FCC orders). It follows that, absent a *Chevron* challenge, any conflict between federal courts and FCC orders must be resolved in favor of the FCC’s order. For the same reasons, an FCC interpretation of a statute or rule is of greater weight than an interpretation based on a reading of the statute or rule without reference to FCC guidance.

of telecommunications for a fee directly to the public, . . . , regardless of the facilities used.” 47 U.S.C. § 153 (53).⁶ The term ‘information service’ means the offering of a capability for generating, . . . transforming, . . . information via telecommunications” 47 U.S.C. § 230(b)(2). As mentioned above, while telecommunication service is subject to dual state and federal regulation, any state regulation of “information service,” conflicts with the federal policy of nonregulation of the internet and is therefore generally preempted by federal law. 47 U.S.C. § 230(b)(2); *Charter*, 903 F.3d at 718.

47 U.S.C. § 153 (24), includes a statutory exemption from informational service for operation and management of telecommunication service. In addition, the FCC carved out three additional services from the definition of “informational service:”

- 1) services involving communications between an end user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; 2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE) and 3) involving internetworking (conversions taking place solely within the carrier’s network to facilitate provision of a basic network service, that result in no net conversion to the end user).

Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, As Amended, 11 FCC Rcd 21905, 21957-58 ¶ 106 (“*Non-Accounting Safeguards Order*”); *see also*, *Charter*, 903 F.3d at 720.

The *Charter* court in determining that the service at issue in that case constitutes “information service” focused on the term “transformation” in 47 U.S.C. § 153 (24). “[T]he touchstone of the information service inquire is whether [the service at issue] acts on the consumer’s information—here a phone call—in such a way as to ‘transform’ that information.”

⁶ “The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153 (50).

Charter, 903 F.3d at 719 (internal quotations omitted). The court held that this transformation occurred upon “net protocol conversion,” i.e., when voice calls analog electric signals are converted into internet protocol packages for transportation through a fiber network. *Id.* (the service “offers ‘net’ protocol conversion . . . information [is sent] into a network in one protocol and . . . exist[s] the network in a different protocol”).

This holding is somewhat cryptic, however, because *Charter’s* majority opinion inexplicitly fails to mention the *In-the-Middle Ruling*, a controlling FCC case, although the case is cited prominently in the dissent. *Charter*, 903 F.3d at 722 (Grasz dissenting). In the *In-the-Middle Ruling*, the FCC ruled that when protocol conversion occurs within the telecom’s network, it does not convert the service to information service. “To the extent that protocol conversion associated with AT&T’s specific services takes place within its network, they appear to be ‘internetworking’ conversions, which the Commission has found to be telecommunication services.” *In-the-Middle Ruling*, 19 FCC Rcd. at 7465 ¶ 12.

Accordingly, to understand the holding of *Charter*, the case must be read in conjunction with the *In-the-Middle Ruling*, which leads to the conclusion that it is not just “that” a protocol conversion occurs but “where” the protocol conversion occurs that determines whether a service is, or is not, an information or a telecommunication service. The *Charter* court’s analysis on the FCC’s exemptions to the information service’s definition reveals that the precise holding in *Charter* is that if the protocol conversion occurs in a device that constitutes a CPE (consumer premise equipment) then the service is considered an information service.

Specifically, the *Charter* court held that the FCC’s second exemption to informational service did not apply, i.e., the exemption of services that include “the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with

existing CPE).” Because in *Charter*, the protocol conversion occurred in a device that itself constituted a CPE rather than a device requiring protocol conversion to maintain compatibility with an existing CPE. *Charter*, 907 F.3d at 718, 720. Likewise, the *Charter* court held that the “internetwork” exception did not apply because the “FCC defines CPE as falling outside a carrier’s network.” *Id.* at 720.

Therefore, the determinative issue of whether E Fiber’s service constitute information service, under the rationale of *Charter*, is whether the protocol conversion occurs in a device that can be characterized as a CPE. This is a simple task because, as the *Charter* court noted, the FCC has defined “CPE as ‘equipment that falls on the customer side of the demarcation point between customer and network facilities.’” *Charter*, 907 F.3d at 720, quoting, *In re Federal—State Joint Bd. On Universal Services*, 18 FCC Rcd 10958, 10967 ¶ 18 (2003). *In re Federal—State Joint Bd. On Universal Services* also defines “demarcation point” as the interface between the telephone network “and the inside wiring, and is the juncture at which the telecommunications carrier’s responsibilities end and the customer’s control begins.” *Id.* at 10967 ¶ 18 n. 53.⁷

Thus, *Charter* only preempts state regulation of VoIP service involving protocol conversion that occurs in equipment that is located on the customer side of the interface between

⁷ See also, 47 C.F.R. § 68.3, “Demarcation point (also point of interconnection). As used in this part, the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber’s premises;” 47 C.F.R. § 54.612(2), “Support is available to extend service provider deployment of facilities up to the “demarcation point,” which is the boundary between facilities owned or controlled by the service provider, and facilities owned or controlled by the customer” (emphasis added).

the customers inside wiring and the carrier's network equipment.⁸ This is not the case with E Fiber's proposed service. In E Fiber's proposed service, the place where protocol conversion take place is within the Optical Network Terminal ("ONT"), which is *not* located "on the customer side of the demarcation point" and therefore is *not* a CPE. SAMF ¶¶ 3, 4, 5, 6.

Here, the ONT will be located on the outside of the customer's home. SAMF ¶ 4. The demarcation point where the customer's wiring interfaces with E Fiber's network is the RJ-11 port on the ONT. SAMF ¶¶ 3, 5, 6. The ONT itself is unquestionably part of E Fiber's network. It is proprietary network property, owned, controlled, managed, repaired and replaced by E Fiber at no cost to the customer and the customers does not pay for nor lease the ONT from E Fiber. SAMF ¶ 5, 6. Accordingly, the holding in *Charter* does not encompass the facts presented by the applications which are governed, instead, by the holding in the *In-the-Middle Ruling*.

Moreover, the facts presented in the application also establish that the proposed service constitutes telecommunication service, under the exceptions to information service promulgated by the FCC in *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58 ¶ 106. First, E Fiber's proposed service offers protocol conversion from within E Fiber's network to enable CPE's consisting of traditional phone equipment to connect with the new fiber system. SAMF ¶¶ 2, 4, 5. This precisely fits within the second exception in set out in the *Non-Accounting Safeguards Order*, i.e., services "in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE)." *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58 ¶ 106. Moreover, because the

⁸ The dissent criticized this result by noting: "The only practical difference between Charter's network and AT&T's network [the carrier in the *In-the-Middle Ruling*] is whether the first converter box is inside or outside the customer's homes." *Charter*, 903 F.3d at 722 (Grasz dissenting).

protocol conversion occurs within E Fiber’s network, the service falls within the third exception to the definition of information service, services that “involving internetworking (conversions taking place solely within the carrier’s network to facilitate provision of a basic network service, that result in no net conversion to the end user).” *Id.* Here, the protocol conversion takes place within E Fiber’s network and there is no net conversion to the end user because the user’s CPE consist entirely of traditional analog phone equipment. SAMF ¶¶ 2, 5, 6. Thus, under the reasoning of both the *In-the-Middle Ruling* and the *Non-Accounting Safeguards Order*, the E Fiber proposed service constitutes “telecommunication service” subject to the PSC’s jurisdiction.

In sum, federal law does not preempt the PSC regulation of E Fiber’s proposed service under the *Charter* case. The *Charter* case deals with a specific FCC defined type of VoIP service, interconnected VoIP, which does not include the type of service offered by E Fiber. Moreover, even if *Charter* were to apply to this case, the reasoning of *Charter*, the *In-the-Middle Ruling* and the *Non-Accounting Safeguards Order* inevitably lead to the conclusion that the service proposed by E Fiber constitute “telecommunication service,” and therefore the PSC’s regulation of this service is not preempted by federal law.

1. Valid Regulation of VoIP Service – Universal Service Fund Exception

Regardless of whether E Fiber’s proposed service should be characterized as telecommunication or information service, the PSC may exercise regulatory authority over the applications to the extent authorized by the FCC’s exception to non-regulation of information service for purposes of promoting universal service.

In *In the Matter of Connect America Fund*, 26 FCC Rcd. 17663 (2011) *pet. for review denied*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), the FCC granted access to federal universal service subsidies to VoIP providers, and ruled that it could impose conditions as to how

these subsidies could be used, concluding that it had the authority to do so regardless of whether the VoIP service is characterized as telecommunication service or information service. *Id.* at 17684-86, ¶¶ 62-64, n. 67, 17688-90, ¶¶ 67-71. Rather than basing its authority on its recognized power to regulate telecommunication service, which would require the FCC to determine that VoIP service generally constitute telecommunication service, the FCC based its authority on 47 U.S.C. § 254(c)(1) and (e), of the Federal Universal Service statute. *Id.*, *see also*, *In re FCC 11-161*, 753 F.3d at 1046-47. The *In the Matter of Connect America Fund* ruling followed the FCC’s ruling that it had authority under 47 U.S.C. § 254(d) to require VoIP providers to contribute to the federal Universal Service Fund. *USF Contribution Order*, 21 FCC Rcd. 7518, 7536--49 ¶¶ 34-- 62 (2006), *pet. for review denied in relevant part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1235-41 (D.C. Cir. 2007). Together *In the Matter of Connect America Fund* and *USF Contribution Order* generally bring VoIP service under the auspices of the federal Universal Service Support programs, pursuant to the authority granted to the FCC under the federal Universal Support statute, 47 U.S.C. § 254.

The reasoning behind these FCC orders can be, and has been, applied to the states. First, 47 U.S.C. § 254(f), of the federal Universal Service Support statute, provides: “A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service.” In accordance with section 254(f), the FCC, in extending the *USF Contribution Order* to the states, has proclaimed, “we advance the goals of universal service by ruling . . . that states may extend their universal service contribution requirements to future intrastate revenues of . . . Voice over the Internet Protocol (VoIP) service providers, so long as a state’s particular requirements do not conflict with federal law or policies.” *In the Matter of Universal Service Contribution Methodology*, 25 FCC Rcd 15651, 15659 ¶ 19 (2010).

Specifically, the FCC ruled “that the application of state universal service contribution requirements to interconnected VoIP providers does not conflict with federal policies, and could, in fact, promote them.” *Id.* at 15658 ¶ 16. VoIP “providers benefit from state universal service funds, just as they benefit from the federal Universal Service Fund, because their customers value the ability to place calls to and receive calls from users of the [public switched telephone network].” *Id.* Moreover, “extending state contribution requirements to . . . VoIP providers promotes the principle of competitive neutrality by reducing the possibility that carriers with universal service obligations will compete directly with providers without such obligations.” *Id.* (quotations and brackets omitted). Accordingly, states are *not* preempted from regulating VoIP providers to the extent that the regulations relate to the assessing contribution to the state’s Universal Service Support funds and the regulations do not conflict with federal law or policies.

While the FCC has not yet taken the next step and expressly ruled that state can regulate VoIP providers in connection with allowing VoIP providers access to state Universal Service Support funds, the reasoning of *In the Matter of Connect America Fund, USF Contribution Order* and *In the Matter of Universal Service Contribution Methodology* compel the conclusion that the type of service proposed in the applications would be consistent with federal law and policy and therefore would not be preempted.

First, the policy of nonregulation of the internet applies equally to state and federal law. 47 U.S.C. § 230(b)(2) (“It is the policy of the United States-- . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”) If federal law regulating VoIP providers in connection with granting VoIP providers access to the federal Universal Service Support Fund does not violate this policy it follows that state law regulating VoIP providers in connection with

granting access to state Universal Service Support Funds also does not violate this policy. Clearly, the policy of providing universal service is furthered by allowing VoIP providers access to Universal Support Funds. *See* 47 U.S.C. § 151; *In the Matter of Connect America Fund*, 26 FCC Rcd. 17663, ¶¶ 1-16; *In the Matter of Universal Service Contribution Methodology*, 25 FCC Rcd 15651, ¶ 1. Finally, it makes little sense for the PSC to be preempted from granting VoIP providers access to the Utah fund but not be preempted from in accessing Utah fund support from VoIP providers. Particularly when granting E Fiber access to the fund “does not conflict with federal policies, and could, in fact, promote them.” *In the Matter of Universal Service Contribution Methodology*, 25 FCC Rcd at 15658 ¶ 16.

Accordingly, the relief requested in the applications is not preempted by federal law under the universal service exemption to the federal policy of nonregulation of the internet, regardless of whether E Fiber’s service constitute telecommunications or informational service.

C. Utah Code § 54-19-103(1)

Frontier also argues that the service proposed by E Fiber is exempt from the PSC’s regulatory authority under Utah Code § 54-19-103(1). SJM at 9-10. This argument is easily dealt with because after Frontier filed its motion, E Fiber produced evidence that its proposed service does not rely on, require, or utilize a broadband connection at the customer’s location and uses traditional analog telephone equipment to originate and terminate its voice service. SAMF ¶¶ 2, 6. These facts are fatal to Frontier’s argument.

Specifically, section 54-19-103(1) provides: “A state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol-enabled service or voice over Internet protocol services.” “Voice over Internet protocol service” is defined as any service that:

- (a) enables real time, two-way voice communication *originating from or terminating at the user's location in Internet protocol or a successor protocol;*
- (b) *uses a broadband connection form the user's location;* and
- (c) permits a user to receive a telephone call that originates on the public switched telephone network and to terminate a call to the public switched telephone network .

Utah Code § 54-19-102(2) (emphasis added). Because E Fiber service does not use a broadband connection at the customer's location and because the voice service originate and terminate with traditional analog phone equipment, E Fiber's proposed voice service fall outside of subsections (a) and (b) of section's 54-19-102(2) definition of voice over Internet protocol service. Thus, E Fiber's service is not the type of VoIP service exempted from regulation by section 54-19-103(1).

CONCLUSION

For the reasons presented above, Frontier has failed to demonstrate that E Fiber's proposed service is preempted by federal law or exempt from regulation under section 54-19-103(1). Accordingly, the PSC must deny Frontier's SJM with regards to the motion's first two arguments. The entire SJM must be denied on the bases stated in this Supplemental Opposition Memorandum and the OCS's August 25, 2020 initial Opposition Memorandum and the parties should be allowed to proceed with E Fiber's section 54-8b-2.1 application.

Respectfully submitted, September 25, 2020.

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OCS Exhibit A

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Consolidated Matter of the Applications of)
E Fiber Moab, LLC and E Fiber San Juan, LLC)
For Certificates of Public Convenience and) Docket No. 20-2618-01
Necessity to Provide Facilities-Based Local)
Exchange Service and Be Designated as Carriers)
Of Last Resort in Certain Rural Exchanges)

**RESPONSES OF E FIBER MOAB, LLC AND E FIBER SAN JUAN, LLC TO THE
OFFICE OF CONSUMER SERVICES' SECOND SET OF DATA REQUESTS**

2.1 Please confirm that the Optical Network Terminal (“ONT”) (as described in Brock Johansen’s Declaration) alters the format of voice calls between an analog electrical signal—as transmitted by the customer’s handset—and the IP data packets transmitted over E Fiber’s fiber network.

Response: Confirmed. Analog voice calls are received by the customer’s telephone as electrical signals. The electrical signal enters the ONT from the telephone through the RJ-11 port and the electrical signals are converted to IP data packets which exit the ONT on a separate VLAN using a private IP address and are transported over E Fiber’s fiber network to Carbon/Emery Telcom’s class 5 switch. See also Exhibit DPU DR 1.7 – Service Over Fiber, previously provided.

2.2 If the demarcation point is defined as the interface between E Fiber’s network and the customer’s inside wiring, where is the demarcation point in a standard E Fiber installation? Please provide a diagram.

Response: The demarcation point in a standard E Fiber fiber installation is at the RJ-11 port on the ONT. The ONT is E Fiber’s proprietary network equipment owned, controlled, managed, repaired, and replaced by E Fiber at no cost to the customer. As required by federal law, the ONT has an RJ-11 demarcation port, which is connected directly to the public switched telephone network via E Fiber’s fiber network. The RJ-11

port on the ONT is the actual point of demarcation between the customer inside wiring and the E Fiber fiber network. This is the point where E Fiber's fiber network interfaces with the customer's inside wiring. See Exhibit DPU DR 1.7 – Services Over Fiber, previously provided.

2.3 Is the ONT located on the customer side of the demarcation point, or the E Fiber side of the demarcation point?

Response. The ONT is E Fiber's proprietary network equipment and is on the E Fiber side of the demarcation point. See Exhibit DPU DR 1.7 – Services Over Fiber.

2.4 Does this change if the ONT is located inside the house or outside the house?

Response: No. The RJ-11 port on the ONT is the point of interconnection between E Fiber's fiber network facilities and the customer's inside wiring, regardless of whether the ONT is located inside or outside the home. The customer can plug a telephone directly into this RJ-11 port, or this port can be connected to the copper NID to allow for the customer's inside wiring to be used. See Exhibit DPU DR 1.7 – Services Over Fiber.

2.5 Confirm that after E Fiber enters into contracts with customers in the subject exchanges, E Fiber will own all of the equipment on its side of the demarcation point. Does the customer have any control of the ONT?

Response: E Fiber's affiliates do not currently, and E Fiber will not, require contracts with the customers unless a line extension is required. E Fiber owns, controls, maintains, repairs, and replaces all of the equipment on the E Fiber side of the demarcation point, including, but not limited to the ONT. The E Fiber customers have no control of, or responsibility for, the ONT.

2.6 Does the customer pay for or lease the ONT from the Company?

Response: No. The ONT is E Fiber proprietary network equipment. The customer is only charged for the ONT if the customer refuses to return the ONT after terminating service.

2.7 Does the customer have to return the ONT to E Fiber when it terminates service?

Response: Yes. E Fiber will ask the customer to return the ONT to E Fiber upon termination of service. If the customer fails to return the ONT to E Fiber, an E Fiber technician will go to the customer's residence or place of business and retrieve the ONT. If the customer fails to return the ONT to E Fiber, then the customer will be charged a fee to replace the ONT.

2.8 Define the term “Ethernet” (as used in the Brock Johansen’s Declaration) and distinguish the term “ethernet” from the terms “internet protocol,” “Internet,” and “broadband connection,” and “broadband Internet access.”

Response:

(1) **“Ethernet,”** as used in Brock Johansen’s Declaration, means a way of connecting computers together in a local area network (LAN) enabling the computers to communicate with each other via a set of rules or common network language (protocol). The basic idea of ethernet’s design is that multiple computers have access to it and can send data at any time. Systems communicating over ethernet divide a stream of data into shorter pieces called frames or packets. Each packet contains a source and destination address.

(2) **“Internet protocol”** is a set of rules for routing and addressing packets of data so that they can travel across interconnected networks and arrive at the correct destination. The main task and purpose of Internet protocol is the delivery of packets of information from the source computer to the receiving computer. Each packet contains the address (IP address) of the receiving computer. The IP address may be a public IP address, used to access the Internet; or a private IP address. Private IP addresses are not routed to the Internet, rather they are used to route packets of data within a LAN.

(3) **“Internet”** means a vast network that connects computers all over the world. The most common use of the Internet is the World Wide Web, with its millions of publicly viewable websites.

(4) **“Broadband connection”** means a high-speed access to the Internet that is always on. The FCC currently defines broadband as 25Mbps download and 3 Mbps upload speeds.

(5) **“Broadband Internet access.”** For non-rate of return carriers, broadband Internet access service is the broadband connection identified in (4) above. For rate of return regulated carriers, broadband Internet access is a wholesale service they offer to internet service providers (ISPs) to enable ISPs to provide broadband connections (as defined above) to end-users (also known as “wholesale broadband internet access service” as defined in U.C.A. Section 54-8b-15(g)).

In the context of Brock Johansen’s Declaration, “ethernet” either refers to (a) the method of connecting computers in a LAN and is the physical and data link layers over which packets of data are transported within E Fiber’s fiber network, or (b) when used in the context of “ethernet port,” refers to the RJ-45 port on the ONT. Internet protocol is the set of rules used for routing the packets of data so they can travel across the E Fiber network. It is important to understand that internet protocol does not automatically mean the data is routed to the public Internet. Rather, internet protocol can include giving data packets public IP addresses that route the data packets to the public

Internet, or giving the data packets private IP addresses that route the data packets to a private LAN.

2.9 You have indicated that your affiliate will provide Internet service (aka broadband). Will the Internet traffic travel on the same network as your voice traffic? If not, please explain.

Response: The Internet traffic and voice traffic will originate on separate copper networks within the customer's home. The Internet traffic will enter the E Fiber network IP through the RJ-45 port on the ONT. The E Fiber voice traffic will enter the E Fiber network analog through the RJ-11 port on the ONT. The Internet traffic will have a public IP address and will be routed through a separate virtual local area network data links (VLANs) along the fiber to the Public Internet. The voice traffic will be converted at the ONT to IP data packets, will be given a private IP address, and will be routed through a separate VLAN to the Carbon/Emery switch which is a class 5 switch that is registered with the Local Exchange Routing Guide and is considered part of the PSTN..

2.10 What call features will be included in E Fiber's basic local exchange service?

Response: No Custom Local Area Signaling Services (CLASS) will be included in the basic local exchange service.

2.11 Do any of the features identified in 2.10 require or use a broadband connection?

Response: No.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2020, I served a true and correct copy of Applicant's Responses to the DPU's First Set of Data Requests via e-mail transmission to following persons at the e-mail addresses listed below:

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OCS Exhibit B

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Consolidated Matter of the Applications of)
E Fiber Moab, LLC and E Fiber San Juan, LLC)
For Certificates of Public Convenience and) Docket No. 20-2618-01
Necessity to Provide Facilities-Based Local)
Exchange Service and Be Designated as Carriers)
Of Last Resort in Certain Rural Exchanges)

**RESPONSES OF E FIBER MOAB, LLC AND E FIBER SAN JUAN, LLC TO
FRONTIER COMMUNICATIONS' THIRD SET OF DATA REQUESTS**

3.1 In your response to Frontier data request 2.1, you state that E Fiber will connect its fiber optic network to homes and businesses using an Optical Network Terminal (ONT).

a. Please state whether you will require the customer's permission to access the property to install the ONT.

Response: E Fiber will obtain the customers permission prior to accessing the customer's property to install the service drop and the ONT, as per industry standards.

b. Please state whether the ONT will be installed inside or outside the home or business.

Response: The ONT can be installed inside or outside the home and business depending on the circumstances. If the Commission determines that the location of the ONT is critical to the classification of the service, E Fiber commits to installing the ONT wherever needed to ensure its service is classified as regulated public telecommunications service.

c. Please state whether the ONT will be powered by electricity from the home or business and who—E Fiber or the customer—will be responsible for installing backup batteries to operate the ONT in the case of a power outage.

Response: The ONT will be powered by electricity from the home or business. E Fiber is responsible for installing backup batteries to the ONT in the case of a power outage.

3.2 Will E Fiber own the ONT installed at the customer’s home or business?

Response: Yes. See E Fiber Response to DPU DR 1.1 and OCS DR 2.1.

3.3 Will E Fiber impose any charge on the customer for the use of the ONT installed at the customer’s home or business?

Response: No. See E Fiber Response to DPU DR 1.1; and E Fiber Response to OCS DR 2.1 and 2.6.

3.4 Please identify the IP protocol that will be used to carry data packets for either voice or internet service between the ONT at the customer’s home/business and the OLT.

Response: E Fiber objects to this question as vague and ambiguous. Subject to and without waiving this objection, the voice traffic provided by E Fiber will be transported using Session Initiation Protocol (SIP) from the customer to the switch and will travel from the ONT to the OLT using ONT Management Control Interface (OMCI) with a private IP address on a VLAN dedicated for voice traffic; and the Internet service provided by ET&V will be transported using IPV4 and/or IPV6 from the customer to the Public Internet and will travel from the ONT to the OLT using OMCI with a public IP address on a separate VLAN

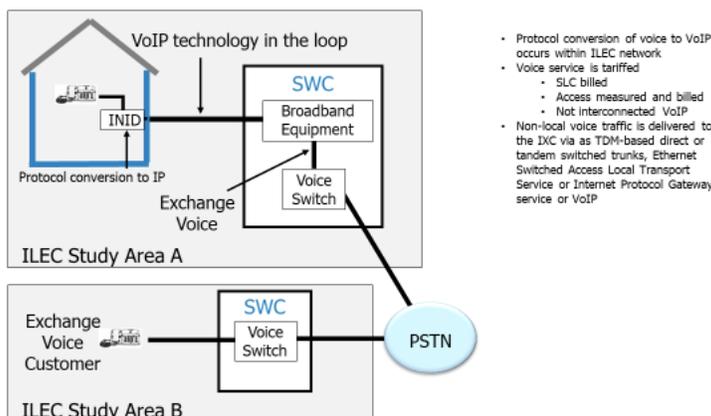
See E Fiber Response to DPU DR 1.7 and OCS 2.9.

The E Fiber voice will be provided as a telecommunications service following the National Exchange Carrier Association (NECA) Reporting Guideline outlined in 8.11 “Providing Local Exchange Telephone Service Using Voice over Internet Protocol (VoIP) Technology,” attached as Exhibit FTR DR 3.4 – NECA Reporting Guideline 8.11. This guideline states:

“NECA member companies may provide a variety of voice service offerings that involve the use of VoIP technology. The following descriptions outline three common scenarios, which are further illustrated in diagrams attached to this NRG: 1. The ILEC provides voice telephone exchange service to the end user using VoIP technology between the switch and the customer premises. Except for the use of VoIP technology in the loop, no change is made in the way the service is offered to the end users. The ILEC bills the end users its local exchange service tariff rate as well as an interstate SLC charge, and assesses originating and terminating access charges on non-local (interexchange) traffic. (Attachment, Figure 1)”

Scenario 1

Regulated voice service provisioned using VoIP



The E Fiber companies agree to follow this guideline in the provision of voice service. The diagram provided earlier in Exhibit DPU DR 1.7 – Service Over Fiber outlines this exact scenario.

3.5 Please identify the IP protocol that will be used to carry data packets for either voice or internet service between the OLT and the PTSN (for voice) and between the OLT and the public internet (for internet).

Response: E Fiber objects to this question as vague and ambiguous. Subject to and without waiving this objection, see E Fiber Response to DR 3.4 above.

3.6 In your response to Frontier data request 2.2, you state that “[f]or areas of fiber infrastructure constructed or to be constructed with grant funds by ET&V, E Fiber will purchase voice capacity from ET&V to provide its voice service.”

a. Please state whether ET&V has received permission to sell voice capacity to E Fiber.

Response: ET&V does not believe permission to sell capacity for an ancillary voice service is required. To the extent such permission is required, ET&V will obtain such permission. E Fiber does not intend to overbuild the ET&V Fiber network that will be constructed with grant funds.

b. Please produce any communications between ET&V and the relevant federal agency regarding this plan to sell voice capacity to E Fiber.

Response: ET&V had one telephone conversation with Peter Aimable, Deputy Assistant Administrator at the USDA in March 2020 about the possible assignment of the ET&V grant assets to the E Fiber companies. Mr. Aimable indicated that such an assignment could happen pursuant to the agreement if permission were obtained from USDA, but that it would be easier for the E Fiber companies to just provide the voice service across the ET&V network.

3.7 At the conclusion of E Fiber’s proposed 5-year plan to install fiber broadband infrastructure, what portion of the line extensions in each of the Local Exchanges will be capable of being served by infrastructure installed pursuant to federal grants obtained by ET&V?¹

Response: E Fiber objects to this question as vague and ambiguous. Subject to, and without waiving the foregoing objection, see the attached Exhibit FTR DR 3.7 – Grant Build Out Maps, which show the proposed grant build out locations.

3.8 In your response to Frontier data request 2.10(a), you state that “[t]he real-time, two-way voice communication for E Fiber’s customers originates or terminates at their location in analog form, not in Internet Protocol.” Please state what you understand to be the “user’s location” in responding to that data request, particularly in light of the fact that the ONT is located at the user’s home.

Response: See E Fiber Response to OCS DR 2.2. The point of demarcation between E Fiber’s network and the customer’s inside wiring is the RJ-11 port in the ONT. Further, see DR 3.4 above, such service will be provided in accordance with the NECA guidelines.

3.9 In your response to Frontier data request 2.10(b), you state that “E Fiber’s voice telephone service does not use a broadband connection from the end user’s location.”

a. Please state what you understand to be the “end user’s location” in responding to that data request, particularly in light of the fact that the ONT is located at the user’s home.

Response: See E Fiber Response to OCS DR 2.2. The point of demarcation between E Fiber’s network and the customer’s inside wiring is the RJ-11 port in the ONT.

b. Please confirm that the ONT utilizes a broadband connection.

Response: Denied. See E Fiber Response to OCS DR 2.8. When a customer takes only voice service, there is no broadband connection at the end user’s location. See E Fiber Response to DPU DR 1.1, 1.5, 1.7 and OCS DR 2.9 and 2.11.

3.10 In your response to Frontier data request 2.12, you state that “[t]he E Fiber network does not use Internet protocol at the end-users location to provide telephone service as explained DR 2.4.” Frontier data request 2.12 did not make reference to the use of Internet protocol at the “end-users location.” Rather, Frontier data request 2.12 asked “whether the proposed E Fiber network uses Internet protocol or a successor protocol that enables an end-user to send or

¹ This data request is modified slightly from Frontier data request 2.9. This version is intended to address the capability of the installed plant, rather than the intentions of the customers in the area.

receive voice, data, or video communications.” Please respond to the following:

a. Does the E Fiber network use Internet protocol or a successor protocol?

Response: See E Fiber Response to DPU DR 1.7 and OCS DR 2.1 and 2.8 and DR 3.4 above.

b. Does the E Fiber network’s use of Internet protocol or a successor protocol enable an end-user to send or receive voice, data, or video communications?

Response: See E Fiber Response to DPU DR 1.7 and OCS 2.1 and 2.8. E Fiber will provide voice telephone exchange service to the end user using VoIP technology between the switch and the customer premises. Except for the use of VoIP technology in the loop, no change will be made in the way the service is offered to the end users. E Fiber will bill the end users its local exchange service tariff rate as well as an interstate SLC charge, and assesses originating and terminating access charges on non-local (interexchange) traffic. The E Fiber voice service will originate and terminate at the customer location as an analog signal. Such voice service will be provided according to the NECA guidelines. See DR 3.4 above.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2020, I served a true and correct copy of Applicant’s Responses to Frontier’s First Set of Data Requests via e-mail transmission to following persons at the e-mail addresses listed below:

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/s/Kira M. Slawson

CERTIFICATE OF SERVICE

Docket Nos. 20-2618-01

I CERTIFY that on September 25, 2020, a true and correct copy of the foregoing Supplemental Memorandum In Opposition to Frontier Communication's Rule 56(a) Motion for Partial Summary Judgement by the Office of Consumer Services was served by electronic mail to the following:

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