

ROBERT J. MOORE (5764)
Assistant Attorney General
Utah Attorney General
160 East 300 South, Fifth Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0312
Facsimile: (801) 366-0101
E-mail: rmoore@agutah.gov
Attorney for Utah Office of Consumer Services

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 a Certificate of Public Convenience and Necessity to Provide Facilities-Based Local Exchange Service and Be Designated as a Carrier of Last Resort in Certain Rural Exchanges

Docket No. 20-2618-01

RESPONSE IN SUPPORT OF E FIBER MOAB, LLC AND E FIBER SAN JUAN, LLC'S PETITION FOR REVIEW, REHEARING OR RECONSIDERATION OF THE COMMISSION'S DECEMBER 16, 2020 ORDER

Pursuant to Utah Code §§ 54-7-15, 54-10a-301, 63G-4-301 and UTAH ADMIN. CODE r. 746-1-801, the Utah Office of Consumer Services ("OCS") submits this response in support of E Fiber Moab, LLC and E Fiber San Juan LLC's (collectively "E Fiber") Petition for Review, Rehearing or Reconsideration of the Public Service Commission of Utah's ("PSC") December 16, 2020 Order. ("E Fiber's Petition for Review"). The OCS asserts that the PSC erred in ruling that E Fiber's proposed services "enables real time, two-way voice communication originating from or terminating at the user's location in Internet protocol or a successor protocol" and therefore are exempted from the PSC's regulatory authority, pursuant to Utah Code § 54-19-103. In addition, the OCS contends that E Fiber's services do not constitute "Internet protocol-enabled

services” as the PSC ruled provided a second reason to exempt E Fiber services from PSC jurisdiction.

ARGUMENT

In its December 16, 2020 Order, the PSC denied E Fiber a Certificate of Public Convenience and Necessity on the grounds that E Fiber’s proposed services are exempted from the PSC’s regulatory authority by Utah Code § 54-19-103. Section 54-19-103 provides: “A state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol enabled services or voice over the Internet protocol services.” Section 54-19-102(2) defines voice over Internet protocol (“VoIP”) 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 at the user’s location; and
- (c) Permits a user to receive a phone call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.

Concluding that E Fiber’s propose services satisfies all these elements, the PSC ruled that because the proposed services constitute VoIP and denied E Fiber’s Application pursuant to the statute. December 16, 2020 Order at 7-8. The OCS writes separately to emphasis that accepted rules of statutory construction compel the conclusion that E Fiber’s services do **not** enable “two way voice communication originating from or terminating at the user’s location” and therefore do not satisfy the requirements of section 54-19-102(2)(a) and are not excluded from the PSC’s jurisdiction pursuant to section 54-19-103(1).

“When interpreting a statute, it is axiomatic that this court's primary goal is to give effect to the legislature's intent in light of the purpose that the statute was meant to achieve. And as we

have often noted, the best evidence of the legislature's intent is the plain language of the statute itself.” *Monarrez v. Utah Dep't of Transp.*, 2016 UT 10, ¶ 11, 368 P.3d 846 (quotations omitted); see also, *State v. Rushton*, 2017 UT 21, ¶ 11, 395 P.3d 92. Moreover, the PSC must “read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters. [Avoiding any] interpretation which renders parts or words in a statute inoperative or superfluous in order to give effect to every word of a statute.” *Monarrez*, 2016 UT 10, ¶ 11 (quotations omitted); see also, *Rushton*, 2017 UT 21, ¶ 11.

Applying the plain meaning of the language read in context and giving effect to all words in the statute results in an interpretation of section that is in irreconcilable conflict with the PSC construction. Specifically, in ruling whether E Fiber services satisfy section 54-19-102(2)(a), the PSC ruled:

The PSC acknowledges that the user will hear an analog signal when making or receiving a phone call. However, **the signal that E-Fiber’s network understands, and that originates and terminates at E-Fiber’s ONT installed at the user’s home, is Internet protocol.** This signal is converted to analog so that it can travel through the existing house wiring in the user’s home, to connect the call to the user. The fact that a user hears an analog signal when making or receiving a call neither make the call “dial up” or “analog” service. Nor supports E Fiber contention that that its voice service originates and terminates in analog. The evidence shows that E Fiber proposed **services in its applications to provide voice service over a FTTH network,** not over dial up connections. For these reasons, we find that E-Fiber’s voice **service originates from and terminates at the user’s location (at the ONT) in Internet protocol,** and therefore conclude that it satisfies this part of the definition of VoIP service under the VoIP Statute.

December 16, 2020 Order at 7-8 (citations omitted) (emphasis added). Essentially, the PSC ruled that a finding that E Fiber’s “services originates from and terminates at the ONT,” satisfies the requirements of section 54-19-102(2)(a).

Regardless of the validity of this finding, this finding does not satisfy the prerequisite conditions set out by the plain language of section 54-19-102(2)(a). The statute provides that “**voice communication**” must originate or terminate from the user’s location. Under the plain meaning of the terms, E Fiber’s services enables “voice communication” that “originates” from the analog phone equipment not from the ONT. The ONT serves only to convert voice communications transmitted by analog signals into voice communications transmitted by internet protocol, and conversely, voice communications transmitted by internet protocol signals to voice communications transmitted by analog signals. It is not technically possible for a user to “initiate” or “originate” “voice communication” using the ONT. In other words, for outgoing calls, the ONT acts to convert pre-existing analog voice communications to internet protocol. Because the analog voice communications pre-exist in analog form before they reach the ONT, the voice communications cannot “originate” at the ONT.

Similarly, the PSC finding that E Fiber’s network terminates at the ONT does not mean that the “voice communication” enabled by E Fiber’s proposed services terminate or originate at the ONT. Again, the plain meaning of the terms “voice communication,” “originate” and “terminate,” read in context and giving effect to every word of the statute, refers to a user’s actions of employing the analog phone equipment connected to the ONT, that is when the “voice communication” originates or terminates. The PSC’s assertion that E Fiber’s services originate or terminate at the ONT impermissibly reads the term “voice communication” out of the statute, changing the grammatical structure of the provision and changing its meaning. As such, the PSC interpretation conflicts with the manner the PSC must construe statutory provisions. *Rushton*, 2017 UT 21, ¶ 11; *Monarrez*, 2016 UT 10, ¶ 11.

In sum, clearly the “voice communication” enabled by E Fiber’s proposed services do not “originate” or “terminate” in internet protocol and therefore the services do not satisfy the requirement of section 54-19-102(2)(a) and are not exempted from the PSC’s regulatory authority under 54-19-103.

The PSC also relied on Utah Code § 54-19-102(1) to support its ruling that it did not have authority to regulate E Fiber’s proposed services. Section 54-19-102(1) defines “Internet protocol-enabled service” as “any service, functionality, or application that uses Internet protocol or a successor protocol that enables an end-user to send or receive voice, data, or video communications.” Internet protocol-enabled services are also exempted from PSC regulation under section 54-19-103(1). Specifically, the PSC ruled

[section 54-19-102(1)] is broader than the VoIP service definition in the VoIP Statute. The facts we reference above, which support our finding that E-Fiber’s voice service is VoIP service that we cannot regulate under the VoIP Statute and that we incorporate here, also support our finding that E- Fiber’s voice service meets the statutory definition of “Internet protocol-enabled service,” and is therefore also barred from regulation under [section 54-19-102(1)].

December 16, 2020 Order at 16. E Fiber’s Petition for Review effectively disposes of this argument.

The definition of “Internet protocol-enabled services” contained in section 54-19-102(1) cannot be read so broadly that it completely encompasses the definition of VoIP services contained in section 54-19-102(2). To do so would impermissibly render section 54-19-102(2) superfluous and inoperable. *Gustafson v. Alloyd Co., Inc.*, 513 US 561,576 (1995); *Rushton*, 2017 UT 21, ¶ 11; *Monarrez*, 2016 UT 10, ¶ 11. Rather, statutes must be construed in manner

that give meaning and import to all statutory terms.¹ Here, the PSC acknowledges that its broad interpretation of section 54-19-102(1) encompasses the definition of VoIP services defined in 54-19-102(2). Therefore, this interpretation is violative of controlling rules of statutory construction prohibiting interpretations that render parts of a statute inoperative and must be rejected.

Rather, sections 54-19-102(1) and 54-19-102(2) must be interpreted in the manner proposed in E Fiber's Petition for Review. Section's 54-19-102(2), definition of VoIP services can only apply to services that permit a user to receive a telephone call that originates on or terminates to the public switched network ("PSTN"). See Section 54-19-102(2)(c) (VoIP service permit connection to the PSTN). The IP Enabled voice service would be other types of voice service that are not connected to the PSTN (for example, voice service offered in gaming, FaceTime, Microsoft Teams, or Zoom). Under this required interpretation, because E Fiber's voice service require connects to the PSTN, E Fiber service cannot be considered IP Enabled voice services, as defined by section 54-19-201(1).

Thus, because E Fiber proposed services do not originate and terminate in internet protocol, they do not constitute the type of VoIP services defined in section 54-19-102(2). In

¹ For example, *Rushton* involved a statute which provided for both mandatory joinder of charge against a criminal defendant, under certain circumstances, and allowed permissive joinder of criminal charges under other circumstances. A defendant appealed a conviction arguing that the mandatory joinder statute should be interpreted broadly and therefore charges that he had been convicted of should have been joined in a prior action. The Supreme Court held:

Mr. Rushton's argument that the phrase 'single criminal objective' is broad enough to encompass an objective as broad as misappropriation of any money he had power over . . . We conclude that such a broad interpretation of the phrase "single criminal objective" would render the permissive joinder statute inoperative, which would violate our principles of statutory interpretation.

Rushton, 2017 UT 21, ¶ 12.

addition, in order to give section 54-19-102(2) operative effect, section 54-19-102(1) definition of IP Enabled service must not encompass voice phone service that “permits a user to receive a telephone call that originates on the [PSTN] and to terminate a call to the [PSTN].” Section 54-19-102(2)(c). Because E Fiber services connect to the PSTN, they do not fall under the definition of IP Enabled services as defined by 54-19-102(1). It follows that E Fiber’s proposed services are not the type of VoIP or IP Enabled service that section 54-19-103 exempts from the PSC’s jurisdiction. Accordingly, the PSC should reconsider its denial of E Fiber’s Application for a Certificate of Public Convenience and Necessity for competitive entry into the subject rural exchanges.

CONCLUSION

For the above reasons, the PSC should reconsider its December 16, 2020 Order and grant E Fiber’s Application.

Respectfully submitted, February 1, 2021.

 /s/ Robert J. Moore
Robert J. Moore
Assistant Attorney General
Attorney for the Utah Office of Consumer

CERTIFICATE OF SERVICE

Docket Nos. 20-2618-01 & 20-2619-01

I CERTIFY that on February 1, 2021, a true and correct copy of the foregoing Response in Support of E Fiber Moab, LLC and E Fiber San Juan, LLC's Petition for Review, Rehearing, or Reconsideration of the Commission's December 16, 2020 Order by the Office of Consumer Services was served by electronic mail to the following:

E FIBER MOAN AND E FIBER SAN JUAN

Kira Slawson kiraM@blackburn-stoll.com
Brock Johansen bjohansen@emerytelcom.com

DIVISION OF PUBLIC UTILITIES

Christ Paker chrisparker@utah.gov
Artie Powell wpowell@utah.gov
Ron Slusher rslusher@utah.gov
Justin Jetter jjetter@agutah.gov
dpudatarquest@utah.gov

CITIZENS TELECOMMUNICATIONS COMPANY OF UTAH DBA FRONTIER COMMUNICATIONS

Gregory C Brubaker gregory.c.brubaker@ftr.com
Phillip J Russell prussell@jdrslaw.com

URTA

Kira Slawson kiraM@blackburn-stoll.com
Brett Anderson brettA@blackburn-stoll.com

/S/ *Alyson Anderson*

Alyson Anderson, Utility Analyst
Office of Consumer Services