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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

APPLICATIONS OF E FIBER MOAB, LLC AND E FIBER SAN JUAN, LLC FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY DOCKET NO. 20-2618-01 TO PROVIDE FACILITIES-BASED LOCAL EXCHANGE SERVICE AND BE DESIGNATED AS CARRIERS OF LAST RESORT IN CERTAIN RURAL EXCHANGES	Docket No. 20-2618-01 **DIVISION RESPONSE TO THE COMMISSION'S FEBRUARY 10, 2021 NOTICE**

Pursuant to Utah Code 54-4a-1 and Utah Admin. Code r.746-1 the Utah Division of Public Utilities ("Division") files this response to the Commission's February 10, 2021 Notice in this docket. The Public Service Commission of Utah ("PSC" or "Commission") in its February 10, 2021 Notice directed the Division to answer questions regarding the Utah Universal Service Support Fund ("UUSF") and how the Commission might manage the distributions with more than one carrier of last resort ("COLR") in an exchange. The Division continues to support the competitive entry of the E-Fiber companies and offers its opinions and analysis of how the Commission might address the UUSF issues in this Response.

INTRODUCTION

The Commission in its February 10, 2021 Notice provided notice to the parties in this docket that, pursuant to Utah Code 54-7-14.5 it intends to modify its December 16, 2020 Order granting summary judgment. As part of that notice the Commission directed the Division to respond to the following questions:

> • Can E-Fiber become a carrier of last resort (COLR) to fewer than all of the current customers of Citizens Telecommunications Company of Utah d/b/a Frontier Communications ("Frontier") in the subject service territory? If so, is it in the public interest?
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> • Can the PSC divide potential future UUSF funding between E-Fiber and Frontier, assuming Frontier qualifies for UUSF funds? If so, how would the PSC divide the funding between the two carriers? If not, and assuming E-Fiber does not become a COLR to all of the current customers of Frontier in the subject service territory, how would the PSC decide which COLR should receive the UUSF funding, assuming again Frontier qualifies for UUSF funding?

DISCUSSION

Can E-Fiber become a carrier of last resort (COLR) to fewer than all of the current customers of Citizens Telecommunications Company of Utah d/b/a Frontier Communications ("Frontier") in the subject service territory?

To the extent that "subject service territory" phrase is used consistent with the boundaries of the exchange territories that E-Fiber is seeking competitive entry to, a CPCN may not be granted to E-Fiber for less than all of the customers that Frontier has an obligation to serve in the same exchange. Under Utah law a carrier of last resort obligation must be imposed on a competitive entrant for each entire exchange of the incumbent carrier that the competitive entrant seeks to provide service in - at least so far as the obligation exists for the incumbent. Utah Code

§ 54-8b-2.1(4) has little flexibility on this requirement. If E-Fiber is granted competitive entry, "the commission shall impose an obligation…[on E-Fiber] to provide public telecommunications services to any customer or class of customers who requests service within the local exchange."

The qualification on this conclusion is that an ILEC such as Frontier serves more than one exchange.[1] It is plausible that E-Fiber might amend its application and seek competitive entry to fewer than all of Frontier's currently served exchanges or the Commission might grant entry to less than all of the requested exchanges. In that instance the Commission would not be obligated to impose a COLR obligation on E-Fiber for the exchanges it is not granted competitive entry to.

As the Division understands E-Fiber's application, E-Fiber intends to serve all customers that it has a COLR obligation to provide service to, and that will include the entirety of the currently served areas in each exchange. The central dispute regarding the COLR obligation revolves around whether E-Fiber would be violating or failing to meet its COLR obligation if it cannot serve all the customers immediately. The premise of requiring *immediate* service is not found in Utah law and should not bar the Commission from granting competitive entry.

If the Commission does favor a phased in approach that roughly follows the facility construction and service, it must do so on an exchange-by-exchange basis rather than some form of split territory that is less than the exchange boundaries. The only alternative route to require a COLR obligation of less than a complete exchange consistent with §54-8b-2.1 would be to also

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[1] This answer is not intended to be a pedantic hyper-technical response. It is intended simply as a complete answer to address some of the possible outcomes where the Commission might grant a partial approval to less than all of the requested exchanges as well as recognize that Frontier serves exchanges such as those in northern Utah that are not included within the exchanges E-Fiber is seeking entry.

relieve Frontier of its COLR obligations for the same areas that E-Fiber is relieved of. The Division opposes this alternative because it would leave customers without a COLR.

Rather than impose a geographically phased COLR obligation, the Division supports recognition that the COLR obligation is not a requirement for immediate service. In the Division's August 25, 2020 Memorandum Opposing Frontier's Motion for Partial Summary Judgment, set forth its analysis concluding that the obligation to serve as set forth in Utah Code § 54-8b-15(1)(B)(ii)(b) or §54-8b-2.1 does not require E-Fiber or any other utility to serve *immediately*. For convenience, the Division's Memo is quoted in relevant part:

> When considered as part of the broader competitive entry statute the need for reasonable time is apparent. "'Often, statutory text may not be plain when read in isolation, but may become so in light of its linguistic, structural, and statutory context.' 'For this reason, our interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a *harmonious whole.*'" *Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶ 16, 308 P.3d 461, 467 (emphasis in original) (Citing to *State v. J.M.S. (In re J.M.S.)*, 2011 UT 75, ¶ 13, 280 P.3d 410). In the instant case, while Utah law states that the competitive entrant designated as a carrier of last resort must offer service to all customers who request it, it does not require that such service be immediately available. Interpretation of the statute in the way that Frontier suggests would make competitive entry impractical if not impossible. The interpretation requires some flexibility in the timing in order for it to work as a harmonious whole process for competitive entry. Even for existing carriers of last resort, some time is often required to provide service to certain customers.
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> Further supporting the need for some period to construct facilities is § 54-8b-2.1 that requires the Commission to grant an application for competitive entry if "the applicant has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for; and (b) the issuance of the certificate to the applicant is in the public interest." Both conditions may be met without reference to a current ability to provide service to all customers in the exchange. Subsection (4) requires that if the Commission issues the CPCN to the competitive entrant, it must also "impose an obligation upon the competitive telecommunications corporation to provide public telecommunications services to any customer or class of customers who requests service within the local exchange." If the obligation required immediate availability of service to all customers, the

Commission could both approve a CPCN and simultaneously find the utility in violation of its service obligations. This cannot be the result contemplated by the statute.

Similarly, the imposition of the carrier of last resort obligation to serve immediately as pre-condition to granting the certificate would require that any competitive entrant build out the entire service territory prior to having any authorization to serve customers. Such a build out would be very difficult if not nearly impossible due to the high risk of installing plant without any assurance of the ability to ever use that plant to serve customers. The result would effectively thwart any meaningful ability to compete in rural exchanges with regulated services unless a new technology became available with very low capital costs.

Additionally, not all current carriers of last resort have the current facilities to serve all customers who request service. If that were the case, it would be necessary to install facilities to locations that have not ever requested service and are unlikely to request service on the chance that the customer might request service at some point in the future. Many utilities have a line extension policy in place to cover the extensive costs to extend service to remote locations with one or few customers. Even large statewide utilities that have carrier or last resort obligations do not build facilities to serve all customers immediately. Rather, they have various options such as line extension tariffs for certain difficult or expensive to serve customers.[2] Similarly, for example when a gas or electric utility seeks to expand service territory to a newly served area, the utility is not expected to have the ability to serve the new territory before it seeks approval to do so even though it will become a carrier with an obligation to serve comparable to a carrier of last resort in the new territory.[3]

The obligation to serve all customers or classes of customers must be subject to the reasonable time to install the facilities to do so after being granted competitive entry. The determination that the entrant has sufficient technical, financial, and managerial resources and abilities to do so are necessary elements in the determination of whether to approve of the application. The analysis of those factors should include consideration of the ability to successfully build a system that will be capable of serving any customer or class of customer requesting service within a reasonable time. The law however, does not require that the system actually be built prior to being granted a CPCN.

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[2] *See Ex.* Rocky Mountain Power Electric Service Regulation No. 12 “Line extension”.
[3]*See Ex. Request of Dominion Energy Utah to Extend Natural Gas Service to Eureka, Utah,* Utah PSC Docket No: 19-057-31.

If so, is it in the public interest?

Competitive entry including imposition of a COLR obligation on the competitive entrant for the entire exchange of the incumbent carrier can be in the public interest. This is a fact specific inquiry legislatively granted to the Commission. Utah Code §54-8b-2.1(2)(b). Moreover, the existence of the statute and the grant of authority demonstrates legislative intent that the public interest may be best served by overlapping COLR obligations in the same exchanges. The Division believes such an outcome is in the public interest in this case.

Phasing in the COLR obligation and certificated territories where E-Fiber is granted competitive entry one exchange at a time as service becomes available might be in the public interest. The Division is not opposed in principle to this approach so long as it does not increase the costs of the construction. The Division does not have expertise to know what the potential cost impacts of this type of phased in approach would be. The cost of construction of the facilities may be less if the network in all the exchanges is installed in a single project as compared to one exchange at a time. It's also plausible that the costs would be reasonably similar either way.

Frontier has a COLR obligation to the exchanges at issue. Granting a second COLR will not change Frontier's existing burden and may provide new optionality for Frontier. Frontier's ability to exit the exchange will become easier. With respect to E-Fiber, it has requested designation as a COLR. So, it is a reasonable conclusion that E-Fiber will not be harmed by the obligation. Customers in the exchange are likely to benefit from the facilities that E-Fiber has proposed to construct. The remaining question of public interest with respect to duplicate COLR obligations is the cost to the UUSF. Is it in the public interest to impose the COLR obligation on two carriers that could then result in UUSF support for potentially two overlapping networks?

Generally, the Division opposes the use of UUSF funds to provide duplication of facilities or service when a single system can provide similar service quality for less cost. However, that question is not before the Commission for two reasons. First, there is no indication that Frontier is likely to invest in these exchanges to the extent necessary to qualify for UUSF support. Had it made the type of investments that E-Fiber is proposing to modernize its plant, it is unlikely that a competitor would be over-building the aging copper with a fiber network. Second, there is flexibility in the Commission's legislative authority to minimize the UUSF support for duplicate facilities by applying the reasonableness standard on costs that are recovered through the UUSF and using tariff provisions (line extension policies) that will discourage overbuilding of unnecessary facilities.

Because the Commission can protect the UUSF from paying for duplication of facilities, and in this case the grant of a CPCN and imposition of overlapping COLR obligation on a second carrier will significantly benefit customers, it is in the public interest. A phased in approach may be in the public interest so long as it does not result in higher costs to the UUSF.

Can the PSC divide potential future UUSF funding between E-Fiber and Frontier, assuming Frontier qualifies for UUSF funds?

The PSC can manage the UUSF funding to provide fair and adequate UUSF support to two carriers without significant duplication. The Commission likely cannot directly divide a specific quantity of UUSF funding between E-Fiber and Frontier or provide less than full recovery for reasonable UUSF qualifying costs of either provider. That does not inherently mean that the PSC will be able to both fairly and efficiently allocate the UUSF funds to two competing carriers in the same territory or require the UUSF to support duplication of costs. The Commission's best available method of safeguarding against the over-use of UUSF funds for duplicate costs is through defining reasonableness and providing guidance to the two UUSF

eligible carriers through the preliminary review of significant new capital projects like network upgrades and expansion.

If so, how would the PSC divide the funding between the two carriers?

The PSC has two tools that it should use in this instance to divide UUSF funding between two competing carriers in the same territory. The Commission may rely on a reasonableness standard for new facility construction and determine prospectively that overbuilding existing comparable infrastructure is either unreasonable or likely to be determined unreasonable without proper justification. For example, building a new fiber optic network offers significant additional capability for customers and might be justifiably supported by the UUSF, while building a second fiber optic network in an area might not be. This may be used in combination with line extension policy tariffs to prevent overbuilding and unnecessary duplication. In many ways these are the same tools the Commission uses today to prevent carriers from over-building or duplicating their own facilities and limit the cost to the general customer classes of extending service to certain high-cost customers.

The §54-8b-15(4)(b) reasonableness standard should be the primary tool for preventing duplication of costs. It has not been previously applied to limit recovery for duplication of costs among competing carriers in Utah because this is a matter of first impression, but the general principle that it is not reasonable to unnecessarily duplicate facilities is similar whether it is a single carrier duplicating its own facilities or a competing carrier duplicating existing facilities.

Utah Code § 54-8b-15(4)(a)(ii) states in relevant part that the recovery from the UUSF for rate of return carriers is for "reasonable costs." The code does not define this term further and the Commission has broad discretion in determining what costs are reasonable subject to the "specific, predictable, and sufficient" standards from subsection (2)(b). The Commission has the

discretion to make determinations that certain overbuilding is unreasonable, particularly when such determinations are plain and predictable in advance. It is not economically efficient for the UUSF to fund the construction of two duplicate fiber networks in rural exchanges. The Commission could therefore review competing infrastructure upgrades and provide either a type of pre-approval mechanism where it reviews both providers' 5 year plans and makes a determination that the construction of facilities by one, both, or neither company will be in the public interest and to pursue the proposed plans is reasonable.

The Division recognizes that neither the UUSF nor the competitive entry statutes directly identify any mechanism for pre-approval. However, the pre-approval type process plainly fits within the legislative requirement for specific, predictable, and sufficient funds for deploying a network and the Commission is granted discretion to limit UUSF support to reasonable costs. Such a process would be consistent with the statutory directives. It is also within the Commission's general jurisdictional grant of authority to "do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction." Utah Code § 54-4-1.

A preliminary review of competing plans would address the large-scale overbuilding potential. However, there would remain the two overlapping COLR obligation problem where a customer served within the network of one provider seeks to obtain service from the other. The other provider would then presumably be required to serve the customer upon request as that is the very nature of an obligation to serve. The potential exists for the other COLR to be required to serve without UUSF support to defray the costs of facilities to serve a single customer in an area already fully served.

The Division proposes that there are potential solutions to this scenario. The first solution is to provide an efficient pathway through administrative rule or otherwise for an ILEC to be relieved of its COLR obligation upon a petition showing that the customer is already served by another ILEC.[4]This is the Division's preferred alternative. It would be uneconomical and unreasonable for the UUSF to fund significant capital costs to serve one or a few customers that are already served with comparable facilities by another provider. And it would be unreasonable to require a COLR to make significant capital investments without a reasonable opportunity to earn a fair rate of return on the capital investment. Therefore, the most reasonable alternative is to relieve a COLR of its obligation to serve upon request and demonstration that the area is already adequately served.

The Second alternative is to rely on economic incentives and the use of carefully crafted line extension or service upgrade tariffs. COLR obligation means that a carrier is "generally not allowed to (1) refuse local phone service to any customer in any area in which they operate, or (2) discontinue service in an area where there is no other carrier.") *In re FCC* 11-161, 753 F.3d 1015, 1142 (10th Cir. 2014)(quoting *Stuart Buck, Telric v. Universal Service: A Takings Violatio*n, 56 Fed. Comms. L.J. 1, 46 (2003)). The COLR obligation has not been interpreted in the past to require a utility to fulfill the service obligations without cost. All or nearly all regulated utilities in Utah have line extension policies that require high cost to serve or remote customers to pay for some or all the cost of extending utility service. In the case of many utilities this policy also applies to upgrades in service when the upgrade requires significant expenses.

[4] The current rules for discontinuation of telecommunication service found in Utah Admin Code r.746-350 supports the premise that carriers may be relieved of COLR obligations for areas served by another provider and might be used as it currently exists or with some amendments to better fit this situation.

In this alternative, the line extension tariffs for both competing ILECs would need to be set in such a way that a customer who has access to equivalent service that is already in place but seeks a connection from the non-serving carrier would be required as part of the line extension tariff to fund most or all of the capital costs to overbuild the existing carrier facilities. In this case the customer would retain the choice of either COLR, and both COLRs would have an obligation to serve all customers. But the UUSF and ultimately other ratepayers who fund the UUSF would not be responsible for the duplicate costs of an overbuilding of similar equipment.

The third potential alternative would be through the use of unbundled network element sales between the two carriers. The Commission might require that a provider serving an area be required to interconnect and offer a wholesale end loop to serve where the wholesale end loop is lower cost than the construction of new facilities to serve. The FCC recently removed many federally mandated requirements on the sale of unbundled network elements. *See* 47 C.F.R. § 51.319 as recently amended by *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 86 FR 8872-02. But that rule change would not apply to the case where a carrier is selling the end loop service to one or more third parties.

And while federal law does not require ILECs to offer nondiscriminatory access to competitors, that does not bar Utah from requiring that an ILEC who does sell services to an affiliate also offer the same terms to non-affiliates. Utah Code §54-3-7 requires "any service rendered or to be rendered" must be sold subject to tariffs on file with the Commission and that no utility may extend any contract or agreement or use any facility "except as are regularly and uniformly extended to all corporations and persons" unless the Commission grants and exception to this rule. Similarly, §54-3-8 prohibits preferences in rates, charges, service, or facilities to different customers.

To the extent that E-Fiber or Frontier sells wholesale end loops to an affiliate it must also do the same for non-affiliates at the same rates and with the same terms and conditions. The Commission therefore might direct a COLR without facilities in an area to pursue the use of wholesale end loop connections for offering service.

The Division is uncertain whether it is practical for a competitor who has a right to purchase wholesale end loops service to offer a qualifying regulated voice service over that connection. More investigation may be appropriate if this route is chosen as a preferred alternative.

If not, and assuming E-Fiber does not become a COLR to all of the current customers of Frontier in the subject service territory, how would the PSC decide which COLR should receive the UUSF funding, assuming again Frontier qualifies for UUSF funding?

The Division does not believe that the E-Fiber may be granted a CPCN to serve without a COLR obligation for each entire exchange. The COLR obligation is subject to a reasonable time to build facilities to offer service. A period before a customer is ultimately served does not mean that the COLR obligation is not in place.

Assuming however that E-Fiber has a COLR obligation to only a subset of the customers of Frontier in a particular exchange, if both carriers have reasonable expenses that qualify for UUSF support, it may be necessary for UUSF funds to support two carriers in the same exchange. This does not inherently mean that the UUSF must necessarily fund duplicate service to the same customers in the exchange as explained *supra*. However, the UUSF may end up funding E-Fiber's facilities to serve one subset of customers and Frontier's costs to serve another subset of customers within the same exchange.

CONCLUSION

The Division recognizes the difficulty in balancing the funding from the UUSF and COLR obligations during the interim period of E-Fiber's construction as well as after. The Division supports the limitation of UUSF funding for reasonable expenses and proposes that the Commission provide clear up-front guidance for the competing carriers on what expenses it will consider reasonable. That guidance might include preliminary review of capital improvement proposals over the next 5 years or possibly longer. Providing the carriers with advanced guidance on reasonableness of construction and what is likely to qualify for UUSF funding will greatly reduce the risk for the carriers and the risk for customers who might otherwise pay for overbuilding. The Commission might also provide guidance on a potential scenario where updated fiber facilities are in place and determine that there is a point it becomes unreasonable to continue to maintain the legacy equipment for a small number of customers.

Submitted this 15th day of March 2021.

/s/ Justin C. Jetter

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CERTIFICATE OF SERVICE

I certify that on March 15, 2021, I caused a true and correct copy of the foregoing to be filed with the Public Service Commission and served by the Utah Division of Public Utilities to the following in Utah Docket 20-2618-01 as indicated below:

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