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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 to
Provide Facilities-Based Local Exchange
Service and Be Designated as Carriers of
Last Resort in Certain Rural Exchanges**

E FIBER MOAB, LLC AND E FIBER SAN
JUAN, LLC'S COMMENTS ON THE
COMMISSION'S NOTICE ISSUED
FEBRUARY 10, 2021

DOCKET NO. 20-2618-01

I. PROCEDURAL HISTORY

On February 10, 2021, in accordance with Utah Code Ann. §54-7-14.5, the Utah Public Service Commission ("Commission") issued a Notice that it intended to modify its December 16, 2020 Order (the "Order"). Upon reconsideration of the evidence, legal arguments, and parties' filings responding to the Order, the Commission concluded:

1. That the prohibition against regulating voice over internet protocol ("VoIP") and internet protocol-enabled ("IP-Enabled") service contained in Utah Code Section 54-19-101 et seq. does not extend to the regulation of IP-Enabled service providers when they voluntarily seek to be regulated, such as E Fiber Moab, LLC and E Fiber San Juan, LLC (collectively "E Fiber");

2. That the services E Fiber seeks to provide do not originate and terminate in internet protocol as those terms are used in the VoIP Statute.; and

3. That the State’s clear policy of encouraging broadband deployment as set forth in the 2017 legislative amendments to the Utah Universal Public Telecommunications Service Support Fund in Utah Code Ann. §54-8b-15 (the “UUSF Statute”) supports E Fiber’s applications.

Because the Commission had initially denied the E Fiber applications on the basis of the VoIP and IP-Enabled Statute, the Commission directed the Office of Consumer Services (“OCS”) and the Division of Public Utilities (“DPU”) to address two additional legal issues:

- 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; and
- Can the Commission divide potential future UUSF funding between E Fiber and Frontier, assuming Frontier qualifies for UUSF funds? If so, how would the Commission divide the funding between the two carriers? If not, assuming E Fiber does not become a COLR to all of the current customers of Frontier in the subject service territory, how would the Commission decide which COLR should receive the UUSF funding, assuming again, Frontier qualifies for UUSF funding.

The Commission’s Order permitted E Fiber and Frontier to file comments on the above issues, but directed all parties to supplement previously made arguments, not repeat them.

II. E FIBER’S COMMENTS

A. Modification of the Commission’s Order.

E Fiber appreciates the opportunity to file supplemental comments. E Fiber believes the Commission’s proposed modification of its Order as set forth above is well taken and is consistent with Utah Code, past Commission practice, and the public policy encouraging

broadband deployment as promulgated by the Utah legislature. E Fiber’s supportive facts and legal arguments were set forth in detail in its Petition for Review, Reconsideration, and Rehearing, and as requested by the Commission, will not be repeated here. E Fiber will focus these comments on the issues raised by the Commission in its Notice.

B. The COLR and UUSF Issues.

1. Can E Fiber become a COLR to fewer than all of the current Frontier customers in the subject service territory? If so, is it in the public interest?

E Fiber in its application, and the testimony of Brock Johansen has committed to constructing fiber facilities to the premise in all of the local exchanges in the proposed service area (“Proposed Service Area”), serving all of Frontier’s customers in the Proposed Service Area, with the exception of White Mesa.¹ As explained in the Applications and the Testimony, E Fiber exempted White Mesa from the subject service territory because E Fiber does not have permission from the Tribe to serve these areas. However, in the event the Tribe provides E Fiber with such permission, E Fiber will commit to serve the White Mesa area with its fiber facilities.² Therefore, the question of whether E Fiber can become a COLR to fewer than all of the current Frontier customers in the subject service area is moot, as is the question of whether not serving all of the subject service territory is in the public interest.

2. Can the Commission divide potential future UUSF funding between E Fiber and Frontier, assuming Frontier qualifies for UUSF funds?

¹ See Direct Testimony of Brock Johansen, Lines 95-97; Rebuttal Testimony of Brock Johansen, Lines 167-168; 211-213; 215-216;

² See Direct Testimony of Brock Johansen, Lines 565-572.

The Commission next asks if the Commission can divide potential future UUSF funding between E Fiber and Frontier. The answer is yes. Utah Code Ann. §54-8b-2.1 (the “Competitive Entry Statute”) contemplates allowing more than one carrier of last resort in the small rural exchanges provided the Commission finds it is in the public interest. Pursuant to the Competitive Entry Statute, if the Commission determines it is in the public interest and issues a certification of public convenience and necessity (“CPCN”) to a competitive entrant in a small rural exchange, the Commission is required to impose carrier of last resort obligations on the competitive provider. Finally, under Utah Code 54-8b-15, a COLR is eligible for UUSF support if their costs, plus a reasonable rate of return, exceed their revenues (from all sources). The Competitive Entry Statute and the UUSF Statute when read together contemplate competitive COLRS in an area, which could result in a division of UUSF amongst such COLRs.

3. How should the Commission divide UUSF support when there are Competitive COLRS in an area?

In light of the statutory contemplation of competing COLRs sharing an area, the next question is, how should the Commission divide UUSF support between competitive COLRs? As the Commission is aware, the Commission is tasked with determining the UUSF support of each COLR on an annual basis after review and determination of the carrier’s reasonable costs to provide public telecommunications services. The determination of how to divide UUSF when there are competitive COLRs in an area can be handled efficiently by the Commission by only funding the “reasonable expenses” of each COLR in the competitive area. Specifically, this can be accomplished as follows:

When application is made for competitive entry into a small rural exchange, the application should include the provider’s detailed build-out plan for becoming a COLR in the

area. The Competitive Entry Statute is clear that upon designation of a competitive COLR in an area, the provider seeking competitive entry (“Competitive Entrant”) is required to be designated a COLR and is required to provide public telecommunications services to any customer or class of customers who requests service within the local exchange.³ Therefore, one of the requirements for competitive entry should be the Competitive Entrant’s ability to ultimately serve the entire exchange or exchanges where competitive entry is sought. During the course of the pending application docket, the Competitive Entrant should be prepared to provide detailed information on its particular build out plan for the local exchanges where competitive entry is sought. This can be accomplished through the application, testimony, and responses to data requests.

The existing COLR (“Incumbent”) should have the opportunity to intervene in the application docket to challenge the application for competitive entry in the local exchange. A successful challenge should demonstrate why the application for competitive entry is not in the public interest. For example, within the pending application docket the Incumbent could provide evidence that the proposed service area doesn’t need to be upgraded, or that the Competitive Entrant’s application should be denied because the Incumbent is currently engaging in capital investment and build out in the proposed service area. The evidence from the Competitive Entrant, the Incumbent, the Division, and the Office would form the record from which the Commission would determine whether granting the application is in the public interest.

If the Commission ultimately approves the competitive entry, the Commission is, in effect, approving the reasonable build-out plan proposed by the applicant and as developed by

³ Utah Code Ann. §54-8b-2.1(4).

the record and the establishment of COLR responsibilities as the network is built. Any overbuilding by the Incumbent of the approved plan would be unreasonable, absent a specific showing of public interest, but the Incumbent could petition to have its COLR obligations removed once the approved build-out was complete.

C. The Public Interest Supports Granting E Fiber’s Applications.

E Fiber has presented testimony in this case that it seeks competitive in the Proposed Service Area. The testimony of Brock Johansen indicates that E Fiber will build a fiber network in the Proposed Service Area over a six-year period to provide upgraded voice and broadband internet access to every customer or class of customers who requests it in the Proposed Service Area.⁴ The testimony shows that E Fiber will construct this robust fiber network efficiently leveraging federal Community Connect funds, federal ReConnect funds, Rural Development Opportunity Funds, and, as needed using Utah UUSF funds.⁵ In response to this testimony, Frontier did not provide any testimony or evidence that it had plans to build/install fiber to the premises in the local exchanges. Rather, Frontier specifically stated in its testimony that “because of the rural nature of Frontier’s markets in Utah, it would not be economically feasible for Frontier to build the network infrastructure, including the fiber backbone.”⁶ Frontier offered testimony that it received CAF funding to deploy 10/1 Mbps service in certain eligible census blocks within the Blanding, La Sal, Monticello, Moab, and Thompson households, but offered no testimony over the course of the docket that it had any plans to improve service in the local

⁴ See Direct Testimony of Brock Johansen, Lines 95-97; Rebuttal Testimony of Brock Johansen, Lines 167-168; 211-213; 215-216.

⁵ See Rebuttal Testimony of Brock Johansen, Lines 264-268 and 294-315. See also, Supplemental Filing of E Fiber re RDOF, dated December 8, 2021.

⁶ See Direct Testimony of Jack Hansen, Lines 150-152.

exchanges to include fiber to the premises. Rather Mr. Erhart testified that Frontier’s network “provides high quality and affordable services to all residents and business in its exchanges,”⁷ despite the complaints to the contrary. Further, it does not appear that Frontier is in a financial position to make any such investment. When responding to whether Frontier has a reasonable plan for providing high quality telecommunications services, Mr. Erhart indicated future investment plans could not be developed until after Frontier emerges from bankruptcy⁸ – leaving the residents and businesses of Grand and San Juan counties in broadband limbo—a state of wait and see. In today’s economic and social environment, this position is unacceptable.

There is no dispute that there is very little fiber deployed in the Proposed Service Area, and the Incumbent has no plans to upgrade its facilities to fiber to the premises. There have been comments filed in this docket regarding the poor service currently being provided by Frontier in the Proposed Service Area. E Fiber has presented a cost-effective solution to dramatically improve service in the Proposed Service Area. Because E Fiber has access to federal grant funds, E Fiber, URTA, the Division, and the Office have all concluded that the potential cost to the State UUSF is significantly less than it would be if Frontier, or another a carrier were to deploy fiber in the Proposed Service Area.⁹

If the Commission agrees with E Fiber, the Division, the Office, and the public comment received in this docket that it is in the public interest to permit E Fiber’s entry into the areas,¹⁰ the Commission would be approving the build-out plan contained in E Fiber’s Applications and

⁷ See Direct Testimony of Carl Erhart, Lines 710-712.

⁸ See Direct Testimony of Carl Erhart, Lines 775-776.

⁹ See Rebuttal Testimony of Douglas Meredith, Lines 384-393; Direct Testimony of Brock Johansen, Lines 351-353; Rebuttal Testimony of Brock Johansen, Lines 264-265; Hearing Transcript, p. 12, Lines 3-7.

¹⁰ See Direct Testimony of Alyson Anderson, Lines 101-114; Rebuttal Testimony of Alyson Anderson, Lines 16-23 and 78-101; Direct Testimony of Ron Slusher, Lines 57-70; Rebuttal Testimony of Ron Slusher, Lines 44-46; Direct Testimony of Brock Johansen, Lines 353-356; and Rebuttal Testimony of Douglas Meredith, Lines 294-301.

in the testimony.¹¹ As fiber is built by E Fiber in the Proposed Service Area, E Fiber would have COLR obligations in the areas where their facilities have been deployed pursuant to the build-out plan. To ensure E Fiber fulfills its build-out commitments, the Commission can require E Fiber to meet build out milestones and make reports to the Division and Commission on an annual (or more frequent) basis. The Commission, in its order approving E Fiber's Applications, can direct E Fiber to work with the Division to establish milestones and reporting requirements for approval by the Commission.

As discussed at length in the testimony, because of the regulatory lag associated with UUSF calculations and disbursements, there is no risk of E Fiber qualifying for UUSF support before the network has been deployed in an area.¹² E Fiber would only begin receiving UUSF support after it has constructed the facilities and is providing service, and even then, only if its reasonable costs exceed its revenues as required by Utah Code §54-8b-15(4). By approving E Fiber's competitive entry, the Commission would be establishing that E Fiber is approved to build out the Proposed Service Area.¹³ A duplicate build by the Incumbent, after approval of E Fiber's application is unlikely to be reasonable, and would therefore, not qualify for UUSF support.

The Incumbent would be eligible to earn the approved rate of return on its existing investment until such time as the assets were fully depreciated, but as the build-out is completed,

¹¹ To the extent the Commission, materially modifies the build-out plan established by E Fiber in its Applications, or adopt rules governing E Fiber's Applications, E Fiber would request the opportunity to review the modifications and accept or reject the CPCN.

¹² See Direct Testimony of Brock Johansen, Lines 302-312; Rebuttal Testimony of Brock Johansen, Lines 142-160.

¹³ Of course, the actual expenses incurred by E Fiber in the build out would be reviewed and approved by the Division and the Office prior to any UUSF support.

the Incumbent could petition to be relieved of COLR responsibility in the areas overbuilt by E Fiber.

As it applies to the E Fiber Application Docket, all of these issues can be addressed by the Commission in its Order. However, for future applications, the Commission may want to consider adopting a general rule that includes the following:

- Permit application for competitive entry into the small rural exchanges pursuant to and consistent with 54-8b-2.1.
- Require such application to include a build-out plan for serving as the carrier of last resort in the exchange(s) applied for.
- Allow the Incumbent Carrier to contest the need for competitive entry showing how infrastructure deployment is occurring in the subject area.
- Provide that the Commission shall hear evidence relevant to whether the application is in the public interest.
- If the Commission determines that allowing competitive entry (and a second carrier of last resort) in the area is in the public interest, the Commission shall approve competitive entry and require the competitor to work with the DPU and OCS to adopt a specific and detailed build out plan with milestones and reporting requirements to be approved the Commission.
- The Competitive Entrant shall be entitled to build out the area and shall be entitled to recover its reasonable costs, net of revenues from all sources, for building out such areas from the UUSF.
- The Incumbent would not be entitled to recover capital expenditures for fiber facilities that duplicate the approved build-out plans of the Competitive Entrant, without a specific determination by the Commission that such costs were “reasonable costs” for UUSF determination.
- The Incumbent would continue to be entitled to earn a rate of return on its existing, non-depreciated plant, but once the existing plant is fully depreciated and removed from rate base, expenditures to replace such facilities are unlikely to be reasonable costs and would, therefore, not be included in the UUSF calculation.

- As the Competitive Entrant builds out the proposed service areas, the Incumbent could petition the Commission to be released from COLR obligations in the overbuilt exchanges.

E Fiber notes that the Division has suggested three potential solutions to the possibility that the Incumbent will be required to serve its exchanges where the Competitive Entrant is granted entry without UUSF support. E Fiber would like to offer brief comment on the third alternative suggested by the Division on page 11 of the Division's Response to the Commission's February 10, 2021 Notice, which is relevant for the Commission's consideration of this alternative. The Division suggests that one possible solution would be to require a provider serving an area to interconnect and offer unbundled network elements, in the form of a wholesale end loop, to serve where the wholesale end loop is lower cost than the construction of new facilities. This approach would be problematic. As the Commission is aware, E Fiber is proposing to install a fiber to the premises network. Under federal law, there is no unbundled network obligation for a fiber network.¹⁴

Additionally, with respect to the Office's Comments on PSC Notice, the Office astutely identifies three factors that the Commission should consider in evaluating whether investments are reasonable:

- Is the proposed infrastructure redundant of the current telecom infrastructure in the service territory?
- What is the current service quality in the service territory?
- What is the commitment level of the competitor and incumbent in the service territory?

¹⁴ See 47 CFR 51.319

E Fiber agrees that these are important considerations, and E Fiber notes that each of those questions has already been addressed in this docket. The fiber to the premise build-out in the Proposed Service Area is not redundant of the existing Frontier infrastructure, but rather, will provide a significant improvement in service and quality; the evidence demonstrates that the existing service quality in the Proposed Service Territory is inadequate; and E Fiber has shown a commitment to build fiber to the premise in the Proposed Service Territory.

IV. CONCLUSION

The Competitive Entry Statute clearly contemplates competitive COLRs in the same exchange; and the testimony offered by the Parties in this docket demonstrate that approving the E Fiber Applications will bring a substantial improvement in voice and broadband Internet access service to the seven local exchanges in Grand and San Juan counties. Improved service and access to high-speed broadband is clearly in the public interest as this state and nation rely evermore heavily on advanced telecommunications services to engage school, work, and the global marketplace. The testimony also demonstrates that the potential impact to the UUSF by approving E Fiber to build this network is likely to be significantly less than if another provider sought to deploy the same fiber network in the exchanges, due to E Fiber's access to federal funding for much of the fiber network build. The improvement in service, coupled with the relatively low impact to the UUSF means that granting the E Fiber Applications is in the public interest.

The concern raised by the Commission about dividing UUSF between competitive COLRS in the same area is addressed by only permitting reasonable costs to be eligible for

UUSF support. In granting the E Fiber Applications, the Commission would be approving E Fiber's build out of the local exchanges with fiber. Any duplicate build by Frontier is unlikely to occur, given Frontier's testimony and its financial status, but if it did occur, it is unlikely to be reasonable given the Commission's approval of E Fiber's build-out plan for the local exchanges. Based on the foregoing, the testimony, and the arguments set forth herein, and in the Petition for Reconsideration, Review, and Rehearing, E Fiber respectfully requests that its Applications be granted. To the extent the Commission grants E Fiber's Applications, but seeks to modify E Fiber's proposed build-out, or adopt particular rules related to E Fiber's Applications, E Fiber respectfully requests the right to review all the conditions of the CPCN before committing to such terms.

Dated this 15th day of March, 2021.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of E Fiber's Comments, Docket No. 20-2618-01 was sent to the following individuals by email and/or mailing a copy thereof via first-class mail, postage prepaid (as indicated), this 15th day of March, 2021:

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