

Application 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 Carriers of Last Resort in Certain Rural Exchanges	<p style="text-align: center;"><u>DOCKET NO. 20-2618-01</u></p> <p style="text-align: center;"><u>ORDER ON REVIEW, REHEARING, OR RECONSIDERATION</u></p>
---	--

ISSUED: May 10, 2021

SYNOPSIS

For the reasons explained below, in this Order the Public Service Commission (PSC) grants E Fiber Moab, LLC and E Fiber San Juan, LLC’s Petition for Review, Rehearing, or Reconsideration (“Petition”) of the PSC’s Order issued December 16, 2020 (“December 2020 Order”), and vacates its December 2020 Order. The PSC grants a certificate of public convenience and necessity (“CPCN”) to E Fiber Moab, LLC and to E Fiber San Juan, LLC. The PSC concludes that as rate-of-return regulated carriers of last resort, neither would be prohibited from seeking disbursements from the Utah Universal Service Fund (UUSF) in the future, solely because of an overlapping exchange area with Frontier. Both applicants are eligible to seek UUSF support pursuant to Utah Admin. Code R746-8-401, subject to any future rule amendments.

BACKGROUND

E Fiber Moab, LLC and E Fiber San Juan, LLC, collectively, “E-Fiber”, filed two separate applications with the PSC on April 20, 2020 for CPCNs under Utah Code Ann. § 54-8b-2.1, for authority to operate as providers of facilities-based local exchange telecommunications service in the Moab and Thompson exchanges in Grand and San Juan Counties in Docket No. 20-2618-01, and in the La Sal, Monticello, Blanding,¹ Bluff, and Mexican Hat exchanges in San Juan County in Docket No. 20-2619-01, respectively. The applications request (1) designation as a carrier of last resort, as defined in Utah Code Ann. § 54-8b-15(1)(b)(ii); and (2) an order that

¹ E-Fiber seeks authority to provide service in the Blanding Exchange excluding the White Mesa community where E-Fiber does not have permission from the Ute Mountain Ute Tribe Reservation.

E-Fiber will be eligible to receive disbursements from the UUSF. We refer to the applications, together as the “E-Fiber Application.” On June 3, 2020, the PSC issued a Scheduling Order, Notice of Hearing, and Notice of Consolidation which, in part, consolidated Docket No. 20-2619-01 into Docket No. 20-2618-01.

Citizens Telecommunications Company of Utah d/b/a Frontier Communications (“Frontier”), the Division of Public Utilities (DPU), the Office of Consumer Services (OCS), and the Utah Rural Telecom Association (URTA) participated in the docket, and filed motions or responded to them, or both, and submitted pre-filed testimony. The PSC held a hearing on Frontier’s motion for partial summary judgment October 13, 2020, and an evidentiary hearing November 12, 2020.

On December 16, 2020, the PSC issued its December 2020 Order making findings of fact and conclusions of law regarding several issues. First, the PSC determined that E-Fiber’s voice service meets the definition of voice over internet protocol (“VoIP”) service under Utah Code Ann. § 54-19-102(2).² The PSC determined that E-Fiber’s voice service (a) enables real time, two-way communication originating from or terminating at the user’s location in Internet protocol or successor protocol; (b) uses a broadband connection from 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. Pursuant to Utah Code

² VoIP service is any service that:

- (a) enables real time, two-way voice communication originating from or terminating at the user’s location in Internet protocol or successor protocol;
- (b) uses a broadband connection from 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. (“VoIP service definition”).

Ann. § 54-19-103, which states that a “state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol-enabled service or voice over Internet protocol service” (“VoIP and IP-enabled services statute”), the PSC concluded that E-Fiber’s voice service is not a service that it can regulate under the VoIP and IP-enabled services statute. Second, the PSC determined that neither the UUSF statute, Utah Code Ann. § 54-8b-15,³ nor the National Exchange Carrier’s Association (NECA) Guidelines changed the PSC’s findings and conclusions regarding E-Fiber’s voice service. Third, the PSC concluded that E-Fiber’s voice service is an Internet protocol-enabled service (“IP-enabled service”)⁴ that also cannot be regulated under the VoIP and IP-enabled services statute.

On January 15, 2021, E-Fiber filed a Petition for reconsideration of the PSC’s December 16, 2020 Order (“Petition”) and URTA filed a Joinder in the Petition. On January 29, 2021, Frontier filed a Response to the Petition (the “Frontier Response”), and the OCS filed its Response supporting the Petition (the “OCS Response”)⁵ on February 1, 2021. The Petition states that the PSC’s determination that it is prohibited from regulating E-Fiber’s proposed voice service under the VoIP and IP-enabled services statute is erroneous because (1) E-Fiber proposes to offer various public telecommunications services for which a CPCN should be granted; and

³ The UUSF statute established an expendable special revenue fund that provides a mechanism for a qualifying COLR to obtain specific, predictable, and sufficient funds to deploy and manage, for the purpose of providing service to end-users, networks capable of providing access lines, connections, or wholesale broadband Internet access service. *Id.*

⁴ IP-enabled service is defined 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. Utah Code Ann. § 54-19-102(1) (“IP-enabled service definition”).

⁵ Because it raised new issues beyond the Petition, it would have been more appropriate for the OCS to file the OCS Response as a petition for reconsideration to give Frontier an opportunity to respond. This procedural issue was addressed by giving parties an additional opportunity for comments.

(2) the legislative history and status of regulated telecommunications at the time of enactment and since suggest rate of return regulated carriers should not be affected by the VoIP and IP-enabled services statute. E-Fiber argues that the determination that E-Fiber's voice service originates and terminates at the user's location in Internet protocol or a successor is erroneous. E-Fiber also argues that the determination that E-Fiber's voice only service uses a broadband connection at the user's location is legal error. E-Fiber next argues the PSC misconstrued the VoIP service and the IP-enabled service definitions when it determined that E-Fiber's voice only service is IP-enabled service. E-Fiber argues that the PSC failed to properly consider the provisions of Utah Code Ann. § 54-19-103(2)(c).⁶ Finally, E-Fiber argues the PSC erred when it applied a different legal standard to the E-Fiber Application than that applied to other recent applicants. On February 10, 2021, after reviewing the Petition, the Frontier Response, and the OCS Response, the PSC issued a Notice indicating its intent to modify its December 2020 Order.

DISCUSSIONS, FINDINGS, AND CONCLUSIONS OF LAW

Legal Standard.

A request for reconsideration with the PSC must identify action that is based on a determination of fact, made or implied by the PSC that is not supported by substantial evidence when viewed in light of the whole record, or an erroneous interpretation or application of the law.⁷ The PSC reviews the Petition against this standard.

⁶ This part of the VoIP and IP-enabled services statute states that the regulatory prohibition in Subsection 1 does not affect or modify the application of the competitive entry statute in Section 54-8b-2.1. Utah Code Ann. § 54-19-103(2)(c)(v).

⁷ See Utah Code Ann. §§ 63G-4-403(4)(d) and -403(4)(g).

Background.

The E-Fiber Application presents novel issues. E-Fiber seeks to become a carrier of last resort (COLR) in part of another COLR's (Frontier) service territory.⁸ Frontier holds a monopoly to serve as the COLR in its service territory in exchange for assuming an obligation to serve any customer that requests service in its certificated service territory. E-Fiber would become a second COLR in Frontier's service territory and would likewise assume the same obligation to serve. E-Fiber's request is unique. Until the E-Fiber Application, we had only considered CPCN requests in a COLR's service territory from competitors desiring to compete as competitive local exchange carriers (CLECs), without the concomitant obligation to serve.

E-Fiber reveals the reasoning behind its request as follows: “[i]n connection with Applicant’s application for CPCN, Applicant will be seeking ... disbursements from the [] UUSF as a carrier of last resort ... [] ... The Applicant’s proforma five-year plan [] demonstrates that the Applicant’s build-out plan for facilities within the local exchanges, and upon completion of these facilities, will entitle Applicant to disbursements from the UUSF.”⁹ This would be the first time that a COLR would use UUSF disbursements to finance a network from the ground up. Historically, COLRs have requested UUSF disbursements to upgrade their existing telephone networks to ones that are capable of providing broadband internet services, as well as improved telecommunications service and reliability. Granting the requested CPCNs

⁸ The E-Fiber companies that make up “E-Fiber” are wholly-owned affiliates of Emery Telecom HC, Inc. which is a wholly-owned subsidiary of Emery Telephone, an incumbent local exchange carrier. There have been other incumbent local exchange carriers that have formed wholly-owned affiliates to separate their VoIP and broadband services from their traditional telecommunications services. However, unlike E-Fiber, they do so to avoid state regulation, not to seek it.

⁹ E-Fiber Application, at ¶ 11 (emphasis omitted).

would also be the first time that two COLRs serve the same or overlapping certificated service territory in the state of Utah.

In addition to the difficult issues we reference above, this docket also implicates cooperative federalism.¹⁰ Not all VoIP services or IP-enabled services are preempted by federal law. Some of these services can be regulated by the states. However, the FCC has yet to issue a decision implementing a bright line between VoIP services or IP-enabled services that are preempted and those that are not.

1. E-Fiber's voice service does not meet the definition of VoIP service under Utah Code Ann. § 54-19-102(2); therefore, its regulation is not prohibited.

To be considered VoIP service, a service must: (a) enable real-time, two-way voice communication originating from or terminating at the user's location in Internet protocol or a successor protocol; (b) use a broadband connection from the user's location; and (c) permit 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.¹¹ In our December 2020 Order, we found that E-Fiber's service met all three parts of the VoIP service definition. For purposes of our review here, we focus on the first part of the VoIP service definition; specifically, that E-Fiber's voice service originates from or terminates at the user's location in Internet protocol or successor protocol.

¹⁰ The Federal Communications Commission (FCC) may preempt state regulation of "information services." *Vonage III*, 483 F.3d 570, 575 (8th Cir. 2007) (noting that while Congress has deemed that an "information service" "should be free from almost all federal and state regulation," with respect to a "telecommunications service," the intrastate aspects of this service would be "regulated at the state level and the interstate aspects regulated at the federal level").

¹¹ *Supra*, n.2.

When we found that E-Fiber’s service originates from or terminates at the user’s location in Internet protocol or successor protocol, we based our decision on the diagram depicting E-Fiber’s network, beginning with E-Fiber’s optical network terminal (ONT) which is installed at the customer’s home, and “is marked as the ‘demarcation point.’”¹² We found that for an outgoing call, the user picks up the phone and makes the call using the “[e]xisting [h]ouse [w]ire, RJ-11 (Analog)” which connects to the ONT with an “RJ-11” port. Nov. 12, 2020 Hr’g. Tr., at 31:1-6. We explained that the existing house wire is on the user’s side of the demarcation point and is the user’s wiring and responsibility. We noted the ONT converts the analog signal to Internet protocol to initiate its transmission through E-Fiber’s network to the public switched telephone network (PSTN) for delivery to the intended recipient.

In its Petition, E-Fiber explains that contrary to the PSC’s finding, the demarcation point is not at the ONT generally; rather, it is at the RJ-11 port on the ONT. URTA witness Douglas Meredith so testified, stating:

[The] voice service begins with an analog phone at the customer location with a standard RJ-11 jack plugged into the existing wire. The phone signal is routed to the E-Fiber ONT. *The RJ-11 port on the ONT is the network demarcation point* (this is similar to the network demarcation point in a traditional Network Interface Device (“NID”). The demarcation point signifies the point where the Applicants’ network ends and the customer [customer premises equipment (CPE)] begins.¹³

Emphasis added.

¹² See Frontier Exhibit 5 to Citizen’s Telecommunications Company of Utah d/b/a Frontier Communications’ Reply in Support of Motion for Partial Summary Judgment (“Frontier Reply”) and Figure 1 in Direct Testimony of D. Meredith, at line 135.

¹³ Direct Testimony of D. Meredith, at lines 137-144.

While we do not find that voice service begins with an analog phone,¹⁴ we find that the RJ-11 port is the demarcation point. Mr. Meredith’s testimony supplements and clarifies the diagram, and it articulates the precise location of the point of demarcation for E-Fiber’s voice-only service.¹⁵ The analysis regarding whether E-Fiber’s voice only service meets part (a) of the VoIP service definition requires a finding of the precise point of demarcation on the ONT.¹⁶ For an incoming call from the PSTN to the customer, if the ONT converts a transmitted Internet protocol signal to analog before reaching the RJ-11 port, i.e., the point of demarcation, then E-Fiber is providing analog voice service to the customer by the time it reaches the customer’s side of the demarcation point. We find that to be the case here. The Internet protocol signal is not converted to analog at the RJ-11 port. It is converted to analog before it reaches the RJ-11 port, on E-Fiber’s side of the demarcation point. When asked “... whether the proposed E Fiber network: [] [w]ould enable real time, two-way voice communication originating from or terminating at the user’s location in Internet protocol or a successor protocol[,]” E-Fiber responded in the negative, stating “[t]he real time, two-way voice communication for E Fiber’s

¹⁴ Absent applicable state laws, the PSC relies on the FCC for guidance, and the FCC recognizes that VoIP service can be provided over an analog phone; *see* <https://www.fcc.gov/general/voice-over-internet-protocol-voip>. Taking the position that all VoIP service provided over an analog phone is safe from federal preemption is too broad; therefore, we do not adopt Mr. Meredith’s contention. Instead, we base our analysis on the more specific premise that voice service begins at the point where service from a different provider would be delivered should the customer desire to switch voice service providers – at the point of demarcation. We believe this approach is more in line with the definition of demarcation point in Webster’s New World Telecom Dictionary, by Ray Horak, which defines “[D]emarc (demarcation point)” as follows: The point of demarcation between the public carrier network and the customer premises. At the demarc there typically is a physical interface between the local loop, on the network side, and the subscriber’s inside wire and cable system and customer premises equipment (CPE). The demarc, whether physical or logical in nature, constitutes a boundary of responsibility, with the carrier being solely responsible for the network side and the customer being primarily, if not solely, responsible for the subscriber side.

¹⁵ The diagram is vague because it points to the ONT as the demarcation point and while it references the RJ-11 port, it also illustrates the RJ-45 port on the opposite side of the ONT.

¹⁶ The remainder of our discussion in the order focuses on E-Fiber’s voice-only service.

customers originates or terminates at their location in analog form, not in Internet protocol.”¹⁷ E-Fiber explained that “[v]oice traffic is provided through E Fiber’s optical network terminal (ONT) using the registered jack-11 (RJ-11) ports and these ports cannot accept Internet Protocol traffic.”¹⁸ Brock Johansen also testified that “the protocol conversion of the voice traffic to IP occurs in the Applicants’ network at the INID/ONT.”¹⁹ His testimony is supported by Frontier witness John Hansen’s testimony, stating: “[f]or voice applications, the ONT functions to sample the analog voice conversation from the customer’s phone set and convert it to digital.”²⁰ We do not find evidence to the contrary in the record.

Our prior finding that the point of demarcation is at the ONT was not sufficiently specific to determine whether E-Fiber’s service is VoIP service as defined in the VoIP service definition. Given the uncontroverted testimony we reference above, we find that the point of demarcation is the RJ-11 port on the ONT. We also find that, for an incoming call, the signal conversion occurs before it reaches the RJ-11 port, on E-Fiber’s network. This means that E-Fiber is delivering analog voice service to the customer before the signal reaches the “user’s location”, i.e., the RJ-11 port on the customer’s side of the demarcation point. For an outgoing call, after the analog signal reaches the RJ-11 port it continues in analog form until it reaches the part of the ONT that converts it to digital and then to Internet protocol. Therefore, we conclude that E-Fiber’s service does not meet the definition of VoIP service because it neither originates from nor terminates at

¹⁷ See Responses of E Fiber Moab, LLC and E Fiber San Juan, LLC to Frontier Communications’ Second Set of Data Requests, attached as Exhibit 3 to the Frontier Reply.

¹⁸ *Id.*

¹⁹ Rebuttal Testimony of B. Johansen, at lines 484-488.

²⁰ Direct Testimony of J. Hansen, at lines 104-105.

the user's location in Internet protocol. Since E-Fiber's voice service must meet all three parts of the VoIP service definition to be considered VoIP and fails to meet the first part, it is not necessary to determine whether E-Fiber's voice service meets parts (b) or (c).

2. E-Fiber's voice service does not meet the definition of Interconnected VoIP under 47 C.F.R. § 9.3; therefore, it is not preempted by federal law.

Next, we determine if E-Fiber's voice service is preempted by federal law. The FCC defines interconnected VoIP as service that: "(1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." ("Interconnected VoIP") 47 C.F.R. § 9.3. If E-Fiber's voice service is Interconnected VoIP, it is preempted by federal law, unless it is considered a "telecommunications" service.

There is no dispute that E-Fiber's voice service "enables real-time, two-way communications." We determine, next, whether E-Fiber's voice service "requires a broadband connection from the user's location." Our conclusion that E-Fiber's voice service does not meet the "VoIP service" definition is based on our finding that the demarcation point between the customer and E-Fiber's service is the RJ-11 port on the ONT, and for an incoming call, E-Fiber's voice service is delivered to the customer in analog form, not in Internet protocol, *before* it reaches the demarcation point. The PSC has concluded the demarcation point is the "user's

location” as the terms are used in the VoIP service definition in its analysis.²¹ Consistent with that conclusion, the PSC analyzes whether there is a “broadband connection” at the user’s location, i.e., the demarcation point. The record demonstrates that there is not. As E-Fiber explains, “[v]oice traffic is provided through E Fiber’s optical network terminal (ONT) using the registered jack-11 (RJ-11) ports and these ports cannot accept Internet Protocol traffic.”²² Brock Johansen also testifies that “the protocol conversion of the voice traffic to IP occurs in the Applicants’ network at the INID/ONT.”²³ Accordingly, the same facts that support our conclusion that E-Fiber’s voice service is not VoIP service, also support our conclusion that E-Fiber’s voice service is not Interconnected VoIP because there is no broadband connection at the user’s location. E-Fiber’s voice service must satisfy all parts of the Interconnected VoIP service definition to be considered Interconnected VoIP, and it fails to meet the second part. Therefore, we conclude that our regulation of E-Fiber’s proposed voice service is not preempted by federal law.

3. E-Fiber’s voice service is not IP-enabled service.

IP-enabled service means 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. Utah Code Ann. § 54-19-102(1). In our December 2020 Order, we concluded

²¹ We recognize Frontier’s interpretation that the “user’s location” as that term is used in the VoIP service definition or in the Interconnected VoIP service definition, is anywhere within the customer’s home (*see* Frontier Reply at 10). We conclude this interpretation is not sufficiently specific for this inquiry. We conclude that “user’s location” for purposes of determining whether voice service is preempted Interconnected VoIP service requires a more specific point of location. We view our conclusion that it is the point of demarcation as consistent with our view that telecommunications service generally starts at the point of demarcation.

²² *Id.* at Exhibit 3.

²³ Rebuttal Testimony of B. Johansen, at lines 484-488.

that E-Fiber’s service was an IP-enabled service that cannot be regulated based, in part, on our finding that E-Fiber’s voice service met the definition of VoIP service, and on our interpretation that the IP-enabled service definition is broader than the VoIP service definition. Specifically, we determined that the “voice” as the term is used in the IP-enabled service definition is the same as that used in the VoIP service definition. We concluded, as a result, that the VoIP and IP-enabled services statute prohibited the regulation of E-Fiber’s voice service.

Since we vacated our prior conclusions in this order, we evaluate if E-Fiber’s voice service satisfies the IP-enabled service definition independently from the VoIP services analysis. Specifically, we determine if the “voice” services referenced in the IP-enabled service definition include E-Fiber’s voice service.

- a. The legislative intent of the IP-enabled service definition and the VoIP and IP-enabled services statute, and the adoption of IP technology by the telecommunications industry in the provision of telecommunications services support our conclusion that E-Fiber’s voice service is not IP-enabled service that is prohibited from regulation.*

To discern legislative intent, “we look first to the statute’s plain language.”²⁴ “We read the plain language of the [IP-enabled services definition] as a whole[] and interpret its provisions in harmony with other statutes in the same chapter and related chapters.”²⁵ “When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.”²⁶ However, we “should not follow the literal language of a statute if its plain meaning

²⁴ *LPI Servs. v. McGee*, 2009 UT 41, 215 P.3d 135 (quoting *Martinez v. Media-Paymaster Plus*, 2007 UT 42, P 46, 164 P.3d 384).

²⁵ *Id.* (quoting *Miller v. Weaver*, 2003 UT 12, P 17, 66 P.3d 592).

²⁶ *Id.* (quoting *Martinez*, 2007 UT 42, P 47, 164 P.3d 384).

works an absurd result.’²⁷ ‘[I]f the language is ambiguous, [we] may look beyond the statute to legislative history ... to ascertain [a] statute’s intent.’²⁸

We conclude that if we interpreted the IP-enabled service definition and the VoIP and IP-enabled services statutes as broadly as Frontier argues, that interpretation could subsume any public telecommunications service that is delivered using a network that uses Internet protocol, including services that we currently regulate. Accordingly, we must also look to the legislative intent of the statutes, as well as consider the evolution of the use of IP technology by the telecommunications industry.

Since long before the commercialization of the Internet, federal law has drawn a distinction between the more heavily regulated telecommunications services and the more lightly regulated enhanced or information services.²⁹ Distinguishing between the two has been difficult because telecommunications carriers have been adopting IP technologies in their networks for many years to more efficiently and cost effectively deliver their telecommunications services.³⁰ This is the environment in which the Utah legislature passed the VoIP and IP-enabled services statute prohibiting their regulation by the PSC. The legislature was following the federal government’s practice and declaration that the Internet remain deregulated.³¹ Utah’s legislature

²⁷ *Id.* (quoting, *Savage v. Utah Youth Vill.*, 2004 UT 102, P 18, 104 P.3d 1242).

²⁸ *Id.* (quoting, *Martinez*, 2007 UT 42, P 47, 164 P.3d 384).

²⁹ See *Computer I*, or *Computer Inquiries*, which together created the difference between “basic” and “enhanced” services, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Notice of Inquiry, 7 FCC 2d 11 (1966). See also, 47 U.S.C. § 153(24), (53).

³⁰ *Infra.* n. 39, at ¶ 3; see also, <https://www.fcc.gov/news-events/blog/2013/11/19/ip-transition-starting-now>; <file:///C:/Users/yhogle/Downloads/DOC-320876A1.pdf> and <file:///C:/Users/yhogle/Downloads/DOC-323243A1.pdf>; and Direct Testimony of D. Meredith, lines 117-121, and attached URTA Exhibit DDM 01.

³¹ The VoIP service and IP-enabled service definitions, as well as the VoIP and IP-enabled services statute were enacted as part of Senate Bill 229 from the General Session. During committee and floor debates before the Senate Revenue and Tax Committee, Senator Bramble, the sponsor of the bill, testified that the intent of the bill was to “codify the existing practice or the existing treatment of VoIP.” He stated that VoIP is currently viewed as part of

was not the only state legislature that was enacting laws related to the deregulation of the Internet via VoIP and IP-enabled services at the time.³² It is reasonable, therefore, to evaluate as persuasive similar precedent from the FCC to further clarify the intent behind federal preemption. To date, the FCC still grapples with issuing clear guidance on the types of VoIP services and IP-enabled services that are preempted and those that are not.³³ Preemption of VoIP and IP-enabled services has developed in a prescriptive manner.³⁴ Some VoIP services and IP-enabled services are not preempted. Specifically, the FCC only preempts VoIP services and IP-enabled services that it considers to be “information” services. Those that are considered “telecommunications” services are left to the states to regulate.

The Telecommunications Act of 1996 (the “1996 Act”) defines an information service as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, ... but does not

the Internet, and that the Internet is not subject to PSC jurisdiction. *See* <https://le.utah.gov/av/committeeArchive.jsp?timelineID=51788> (at SB 229 marker, 3:55 mark), or <https://le.utah.gov/~2012/bills/static/SB0229.html>, (“Hearings/Debate” tab includes list of links to videos of the bill when it was debated).

³² *See* “Telecommunications Oversight 2017, A State Perspective,” Sherry Lichtenberg, National Regulatory Research Institute, at <https://mail.google.com/mail/u/0/?tab=mm#inbox/KtbxLwhGKPWPqVTqvjPPmpCWQqfgFmKSwg?projector=1&messagePartId=0.6> (referencing MS HB 825 (2012), CA’s SB 116 (2012), NH SB 48 (2012), NJ statute 48:17-35 (2013), TN SB 1180 (2013), WI Act 22 (2011), MD PUC Article 8-602 (2013), among others).

³³ *See Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 720 FN3 (8th Cir. 2018) (“while the FCC would be able to announce a classification decision regarding VoIP, it has so far declined to do so.”). The FCC could have exercised its primary jurisdiction in the *Charter* case and instead filed an amicus brief arguing that the court should not construe the FCC’s orders to reach a definitive resolution of the matter for all VoIP service while simultaneously not providing meaningful guidance on the issue itself. *Id.* at FN4.

³⁴ *See In re Federal-State Joint Board on Universal Service*, 13 F.C.C. Rcd. 11501 (1998); *In Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F. Supp. 2d 993 (D. Minn. 2003), *Vonage Holdings Corp. v. F.C.C.*, 489 F.3d 1232, 376 U.S. App. D.C. 396 (D.C. Cir. 2007); Notice of Proposed Rulemaking in *In re IP-Enabled Services*, 19 F.C.C. Rcd. 4863 (2004); *In re Pet. Decl. Ruling AT&T’s Phone-to-Phone IP Telephony Servs. are Exempt from Access Charges*, 19 F.C.C. Rcd. 7457, 7465 ¶ 12 (2004); *In re Universal Serv. Contrib’n Methodology*, 21 F.C.C. Rcd. 7518, 7536 ¶ 34 (2006), *aff’d in relevant part sub nom.*; *In re Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5763 ¶ 363 (2015), among others.

include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”³⁵ A “telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” *Id.* § 153(53). An information service is subject solely to the FCC’s jurisdiction, while a telecommunications service is subject to state regulation.³⁶

We will not reference all of the relevant body of law that has developed over the years, except to note that the line between the VoIP services and IP-enabled services that are regulated and those that are not, has evolved.³⁷ We limit our review to the two principal cases that were cited by the parties to support their positions. E-Fiber, DPU, the OCS, and URTA argue that E-Fiber’s service is more like the *AT&T* case where the FCC concluded that the carrier’s service was a telecommunications service and was therefore not preempted by federal law. Frontier argues that E-Fiber’s service is more like the *Charter Advanced* case where the 8th Circuit concluded that Charter’s service was an information service and therefore preempted by federal law. We recognize that the cases deal with federal preemption of VoIP services, and that here we analyze if E-Fiber’s voice service satisfies the IP-enabled services definition in state law, not the VoIP services definition.³⁸ Nonetheless, we believe it is instructive to review the following cases because the FCC preempts IP-enabled services, described as “services and applications [that

³⁵ 47 U.S.C. § 153(24).

³⁶ See *Vonage Holdings Corp.*, 290 F. Supp. 2d 993 at 994; *In re IP-Enabled Servs.*, Notice of Proposed Rulemaking, 19 F.C.C. Rcd. 4863, 4880-81 ¶¶ 25-27 (2004).

³⁷ *Supra*, n. 34.

³⁸ We established that the record showed it did not.

rely] on the Internet Protocol family”³⁹, and both the *AT&T* and *Charter Advanced* cases dealt with services that use IP technology.

i. The *AT&T* case.

In 2004, the FCC determined that a service that used Internet protocol in the transport of a phone call did not undergo a net change in the form or content of information sent or received and was therefore a “telecommunications” service.⁴⁰ The FCC reasoned that AT&T’s decision to route phone calls through its “Internet backbone” did not transform the nature of its service from a telecommunications service to an information service. *Id.* at 7465 ¶ 12. Users of AT&T’s service “obtain[ed] only voice transmission with no net protocol conversion, rather than information services such as access to stored files.” *Id.* Nor did AT&T offer the capability to generate, acquire, store, transform, process, retrieve, utilize, or make available information. *Id.*

ii. The *Charter Advanced* case.

In 2016, the Minnesota public utilities commission (PUC) ruled that Charter had violated state laws when it created a separate entity to segregate its VoIP service from its regulated telecommunications service.⁴¹ Charter filed an action in the United States District Court for the District of Minnesota, claiming that the 1996 Act barred the PUC from regulating Charter’s VoIP service. *Id.* The district court granted Charter’s motion for summary judgment, finding that

³⁹ See *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, Adopted February 12, 2004 and Released March 10, 2004, at N1.

⁴⁰ *In re Pet. Decl. Ruling AT&T’s Phone-to-Phone IP Telephony Servs. are Exempt from Access Charges*. The FCC limited its decision to interchange services that: (1) use[] ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originate[] and terminate[] on the public switched telephone network (PSTN); and (3) undergo[] no net protocol conversion and provide[] no enhanced functionality to end users due to the provider’s use of IP technology.” *Id.* at ¶ 1.

⁴¹ *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 720 (8th Cir. 2018).

the PUC was barred from regulating Charter's VoIP service because it is an "information service" rather than a "telecommunications service." *Id.* Specifically, the court found that Charter's VoIP service offered more than mere transmission of telecommunications services - that it offered enhanced functionality. The court noted that Charter's VoIP service was capable of offering features such as online web portal that integrates voice calling features with email accounts, access to features associated with Charter's Internet and cable video offerings, and caller ID information displayed on customers' television screens. On appeal, the 8th Circuit agreed, finding that the Interconnected VoIP service offered by Charter was an "information service" and stating that "any state regulation of an information service conflicts with the federal policy of nonregulation." *Id.* at 719 (internal quotation marks omitted).

E-Fiber, DPU, the OCS, and URTA argue that E-Fiber's service is like AT&T's service and that the FCC does not preempt it from regulation. Frontier argues that the undisputed facts show that "E Fiber will utilize IP to transport data packets for both its retail voice and its wholesale broadband service." Frontier Reply, at 8-9. Frontier states, consequently, that E-Fiber's service satisfies the definition of IP-enabled service and that the PSC cannot regulate it.

We conclude that E-Fiber's voice service uses Internet protocol in the provision of its services. However, like AT&T, the record shows that E-Fiber only uses IP when it transports the voice services through its network. It also shows that its voice-only service does not include any other enhanced services as its RJ-11 port is incapable of receiving Internet protocol signals. This is a similar fact pattern to that in AT&T where the FCC, interpreting a similar statute, concluded that the service was telecommunications service, not IP-enabled service.

Having decided that it is reasonable to consider the legislative intent of the statute as well as the adoption of IP by telecommunications carriers that we currently regulate in our analysis, and in view of our findings that E-Fiber’s voice service is more like AT&T’s service than Charter’s, we cannot agree with Frontier’s position. We also find persuasive that the FCC did not preempt AT&T’s service as IP-enabled service and instead concluded that it was “telecommunications service.” We therefore conclude that E-Fiber’s voice service does not satisfy the state law definition of IP-enabled service⁴² and therefore is not barred from regulation by the PSC.

b. The rules of statutory construction require a narrow interpretation of IP-enabled services to be consistent with and give effect to other related statutes.

As we state above, 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[,] ... avoid[ing] any interpretation which renders parts or words in a statute inoperative or superfluous ...”⁴³ A broad interpretation of the IP-enabled service definition, as Frontier suggests, would subsume many aspects of Utah Code Ann. § 54-8b-15 (the “UUSF statute”), an interpretation we conclude would produce an unreasonable result. The UUSF statute reflects the state’s clear policy of encouraging telecommunications carriers to deploy broadband which necessarily use Internet protocol, stating that the UUSF “shall provide a mechanism for a qualifying [COLR] to obtain specific, predictable, and sufficient funds to deploy and manage, for the purpose of providing service to end-users, networks capable of providing: (i) access lines; (ii)

⁴² Utah Code Ann. § 54-19-102.

⁴³ *State v. Rushton*, 2017 UT 21, ¶ 11, 395 P.2d 92 (quoting, *Monarrez v. Utah Dep’t of Transportation*, 2016 UT 10, ¶ 11, 368 P.3d 846 (internal quotation marks omitted, ellipsis and brackets in original)).

connections; or (iii) wholesale broadband Internet access service.” A narrower interpretation of the IP-enabled service definition would avert contradictions with the UUSF statute, and is consistent with the FCC’s finding in the *AT&T* case that voice service that is provided over a telecommunications carrier’s Internet backbone, is not preempted by federal law and can be regulated as “telecommunications service.”

We conclude that the services that are not “telecommunications services” and rely on Internet protocol, are the types of services that the legislature intended to preempt.⁴⁴ We also observe that the legislative intent of the VoIP service and IP-enabled service definition was to codify the federal preemption that was then in existence.⁴⁵ It was not to remove existing regulation of telecommunications service. We conclude this is an important consideration since E-Fiber’s proposed service will be the same as the service its parent company, an incumbent local exchange carrier, currently offers in other territories.

The types of services that fit this narrower definition of IP-enabled services include communications between computers, including FaceTime, Google Meet, Zoom, and Skype, among others.⁴⁶ According to the FCC, these non-interconnected services, unlike “interconnected VoIP services, which enable people to make and receive calls to and from the [PSTN], include services that enable real-time voice communications either to or from the PSTN

⁴⁴ The legislative intent of the VoIP service and IP-enabled service definitions was to codify what was then in existence. It was not to remove existing regulation of telecommunications service. We also recognize parties’ argument that IP-enabled services also do not include VoIP services as defined in the VoIP services definition. We conclude it is not necessary to perform that legal analysis for purposes of this docket.

⁴⁵ *Supra*, n. 31.

⁴⁶ These types of services are part of “advanced communications services,” which are preempted from regulation by the FCC and include: (1) interconnected VoIP service; (2) non-interconnected VoIP service; (3) electronic messaging service; and (4) interoperable video conferencing service. 47 U.S.C. § 153(1). *See also*, 47 U.S.C. § 153(25), 153(36); 47 CFR § 9.3.

(but not both) or which neither begin nor end on the PSTN.”⁴⁷ See 47 U.S.C. § 153(25), 153(36); 47 CFR § 9.3. This narrow interpretation of IP-enabled services would give effect to the VoIP and IP-enabled services statute, the IP-enabled service definition, as well as the UUSF statute. Based on this interpretation, we conclude that E-Fiber’s voice service, which enables two-way communication between the PSTN and the customer, is not IP-enabled service that is prohibited from regulation by Utah Code Ann. § 54-19-103.

c. The VoIP and IP-enabled services statute excludes “public telecommunications services” such as E-Fiber’s voice service, from regulatory prohibition.

In concluding that E-Fiber’s voice service is neither “VoIP service” nor “Interconnected VoIP service”, we conclude that E-Fiber’s voice service is “public telecommunications service”⁴⁸ under Utah Code Ann. § 54-8b-2.1(18).⁴⁹ The record supports our conclusion. The E-Fiber Application and Brock Johansen’s testimony indicate E-Fiber’s intent to offer regulated services. E-Fiber’s Application indicates: “... [Applicant] hereby applies to the Utah Public Service Commission for a [CPCN] authorizing Applicant to operate as a provider of facilities-based local exchange telecommunications service ... in the State of Utah.”⁵⁰ Similarly, Brock Johansen testified “[t]he Applicants are seeking authority to provide all forms of local exchange

⁴⁷ See FCC Public Notice, DA 20-768, Consumer and Governmental Affairs Bureau Seeks Comment on Tentative Findings for the Twenty-First Century Communications and Video Accessibility Act Biennial Report, CG Docket No. 10-213, ¶ 7, released July 21, 2020.

⁴⁸ We grant the CPCN in this case, not only based on our factual findings and conclusions of law, but also based on the fact that E-Fiber sought PSC regulation in the E-Fiber Application. The PSC did not unilaterally assert its jurisdiction.

⁴⁹ Public telecommunications service is defined as, “the two-way transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means offered to the public generally.” *Id.*

⁵⁰ The E-Fiber Application, Introduction.

public telecommunications services as carriers of last resort on a facilities-based basis. Applicants will provide access to ordinary intraLATA and interLATA message toll calling, operator services, directory assistance, directory listings, and emergency services such as 911 and E911.”⁵¹

The VoIP and IP-enabled services statute includes a carve out (“PTS Exclusion”) that states, “[t]he regulatory prohibition of [VoIP and IP-enabled services] does not ... (c) affect or modify ... (v) the application of Section 54-8b-2.1 ...” (“Competitive entry statute”). Utah Code Ann. § 54-19-103(2)(c)(v). The Competitive entry statute provides the PSC the authority to issue a CPCN to telecommunications corporations authorizing them “to compete in providing local exchange services or other public telecommunications services ...” *Id.* As a public telecommunications service, E-Fiber’s voice service qualifies for a CPCN under the PTS Exclusion of the VoIP and IP-enabled services statute. We conclude this is the case even if its voice service uses Internet protocol. This interpretation of the statute is consistent with and gives effect to the VoIP and IP-enabled services statute, the VoIP services definition, the IP-enabled services definition, as well as the UUSF statute. Based on this interpretation, we conclude that E-Fiber’s service is not IP-enabled service that is prohibited from regulation.

4. As a COLR, E-Fiber has an obligation to serve any customer that requests service within its certificated territory, and to provide service within a reasonable time after service is requested.

Under Utah Code Ann. § 54-8b-15(1)(b), “[c]arrier of last resort’ means: (i) an incumbent telephone corporation; or (ii) a telecommunications corporation that, under Section

⁵¹ Direct Testimony of B. Johansen, lines 439-443.

54-8b-2.1: (A) has a certificate of public convenience and necessity to provide local exchange service, and (B) has an obligation to provide public telecommunications service to any customer or class of customers that requests service within the local exchange.” *Id.* Frontier argues that E-Fiber cannot qualify as a COLR because it will not be able to serve all customers that request service before its network is deployed. We disagree. The statute does not include a deadline within which a COLR must provide the requested service. As DPU states, “[s]uch a determination [i.e., that service must be immediately available] would make competitive entry effectively impossible and thwart the purpose of allowing competitive entry.”⁵² In addition, “the imposition of the [COLR] obligation to serve immediately as [a] pre-condition to granting the [CPCN] would require that any competitive entrant build out the entire service territory [before] having . . . authorization to serve customers.”⁵³ At the same time, we also do not interpret it to mean that E-Fiber can sit on a request forever. In the absence of any deadlines in the statute, we believe that E-Fiber must provide service within a reasonable time after service is requested. E-Fiber has an incentive to construct its network as efficiently and promptly as possible to fulfill its stated business objectives and build goodwill with its prospective customers. Until the time when a customer files a complaint, we assume that E-Fiber will be providing service within a reasonable time after service is requested.

In addition, as the OCS asserts, our long-established practice in administering the UUSF for rate-of-return COLR is to authorize disbursements on an ongoing basis, rather than wait to authorize a one-time disbursement upon the final completion of a comprehensive network to

⁵² DPU Memorandum Opposing Frontier’s Motion for Partial Summary Judgment, at 10.

⁵³ *Id.*, at 11.

serve every resident within the certificated service territory.⁵⁴ As E-Fiber explains, “[a] company makes expenditures associated with providing public telecommunications services in 2019. Those expenditures are included in the 2019 Annual Report filed with the PSC on April 15, 2020. The DPU reviews the 2019 Annual Report and makes recommendations to the PSC for UUSF support for the company in September of 2020. If such recommendation is approved by the PSC, the company begins receiving that level of support in January of 2021. So, the UUSF support received in 2021 is based on the company’s 2019 financial information.”⁵⁵ Next, we conclude it is reasonable and appropriate for any rate-of-return COLR to propose a line extension tariff to serve extremely remote customers, and we find nothing in Utah Code Ann. § 54-8b-15(1) that conflicts with this practice. We observe that Frontier’s own tariff includes line extension charges.⁵⁶ In addition, under Utah Code Ann. § 54-8b-2.1(4), “[t]he competing telecommunications corporation’s obligation to serve shall be no greater than that of the incumbent telephone corporation.” Therefore, we conclude that E-Fiber qualifies as a rate-of-return COLR even if it is unable to offer service immediately upon obtaining a CPCN, and even if it proposes to offer line extension tariffs to serve remote customers, as this does not conflict with Utah Code Ann. § 54-8b-15(1)(b).

⁵⁴ The Office of Consumer Services’ Memorandum In Opposition to Frontier Communication’s Rule 56(a) Motion for Partial Summary Judgment (the “OCS Memo in Opposition”), at 10.

⁵⁵ *Id.* (quoting, Statement of Additional Material Fact (“SAMF”), at 1).

⁵⁶ *Id.*, at 11 (quoting, SAMF, at 2).

5. The existence of two rate-of-return COLRs with overlapping exchange areas means that at some point in the future, both would, potentially, be eligible for UUSF disbursements, assuming they meet the requirements under all applicable laws and rules. However, it is premature to determine how we would administer UUSF disbursements between two potentially eligible COLRs.

At this point it is not necessary to determine how UUSF disbursements would be implemented between two potentially eligible rate-of-return COLRs with overlapping exchange areas. As E-Fiber states, it will not be eligible to receive UUSF disbursements, at the earliest, until nearly two years after expenditures to build the network are made.⁵⁷ We find it reasonable to use that time to evaluate the disbursement issue further. We are not prepared to conclude at this time that only one COLR within a territory is allowed to seek UUSF disbursements. We conclude, though, that it would not be in the public interest for two COLRs to build duplicative networks, as we reasoned in *In the Matter of the Petition of WWC Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier*.⁵⁸ Accordingly, we intend to open a separate docket to seek comments by all telecommunications stakeholders to address whether and how we should modify our existing administrative rules to address UUSF administration with overlapping COLR exchange areas.

ORDER

For the foregoing reasons:

- (1) We grant a CPCN to E Fiber Moab, LLC and to E Fiber San Juan, LLC as rate of return, carriers of last resort in the exchanges requested in the E-Fiber Application.
- (2) We conclude that as rate-of-return carriers of last resort, neither E Fiber Moab, LLC nor E Fiber San Juan, LLC would be prohibited from seeking disbursements from the UUSF

⁵⁷ Direct Testimony of B. Johansen, at lines 172-173.

⁵⁸ Docket No. 98-2216-01, Report and Order, issued July 21, 2000, *affirmed*, *WWC Holding Co., Inc. v. Public Service Comm'n*, 2002 UT 23, 44 P.3d 714.

DOCKET NO. 20-2618-01

- 25 -

in the future, solely because of an overlapping exchange area with Frontier. Both applicants are eligible to seek UUSF support pursuant to Utah Admin. Code R746-8-401, subject to any future rule amendments.

- (3) We conclude that it would not be in the public interest for two COLRs to build duplicative networks.
- (4) We intend to open a separate docket to seek comments by all telecommunications stakeholders to address whether and how we should modify our existing administrative rules to address UUSF administration with overlapping COLR exchange areas.

DATED at Salt Lake City, Utah, May 10, 2021.

/s/ Yvonne R. Hogle
Presiding Officer

Approved and Confirmed May 10, 2021, as the Order of the Public Service

Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Gary L. Widerburg
PSC Secretary
DW#318640

DOCKET NO. 20-2618-01

- 26 -

Notice of Opportunity for Judicial Review

Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on May 10, 2021, a true and correct copy of the foregoing was served upon the following as indicated below:

By Email:

Kira M. Slawson (kslawson@blackburn-stoll.com)
Brock Johansen (bjohansen@emerytelcom.com)
E Fiber Moab, LLC

Kira M. Slawson (kslawson@blackburn-stoll.com)
Brock Johansen (bjohansen@emerytelcom.com)
E Fiber San Juan, LLC

Phillip J. Russell (prussell@jdrsllaw.com)
Gregory C. Brubaker (gregory.c.brubaker@ftr.com)
*Attorneys for Citizens Telecommunications Company of Utah
d/b/a Frontier Communications*

Kira M. Slawson (kslawson@blackburn-stoll.com)
Brett N. Anderson (bretta@blackburn-stoll.com)
Blackburn & Stoll, L.C.
Attorneys for the Utah Rural Telecom Association

Patricia Schmid (pschmid@agutah.gov)
Justin Jetter (jjetter@agutah.gov)
Robert Moore (rmoore@agutah.gov)
Assistant Utah Attorneys General

Madison Galt (mgalt@utah.gov)
Division of Public Utilities

Alyson Anderson (akanderson@utah.gov)
Bela Vastag (bvastag@utah.gov)
Alex Ware (aware@utah.gov)
(ocs@utah.gov)
Office of Consumer Services

Administrative Assistant