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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Administration of Utah Universal Service Fund)	Docket No. 21-R008-03
Distributions to Carriers of Last Resort with)	
Overlapping Telecommunication Service)	COMMENTS
Exchanges)	

Pursuant to Utah Code § 54-10a-301, UTAH ADMIN. CODE r. 746-1 and the Public Service Commission of Utah’s (PSC) June 16, 2021, Notice and Request for Comments, the Utah Office of Consumer Services (OCS) submits these comments on the necessity of modifying the PSC rules to address the administration of Utah Universal Service Fund (UUSF) distributions to carriers of last resort (COLR) with overlapping telecommunications service exchanges.

BACKGROUND

On May 12, 2021, the PSC issued its final order in docket 20-2618-01. *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*, Docket No. 20-2618-01, Amended Order on Review, Rehearing, or Reconsideration (Utah P.S.C., May 12, 2021) (E Fiber Order). The E Fiber case involved the applications of E Fiber Moab and E Fiber San Juan (E Fiber) to obtain CPCNs for competitive entry into the service territory of an incumbent telecom pursuant to the competitive entry statute, Utah Code § 54-8b-2.1. In granting the CPCNs, the PSC noted that the case

presents novel issues involving a COLR seeking to obtain UUSF distributions to build out infrastructure from the ground up and the allotment of UUSF distributions when two COLRs in the same territory both qualify for UUSF support. E Fiber Order at 5-6.

The PSC made two rulings impacting these issues. First, although Utah Code § 54-8b-15(1)(b)(ii)(B) defines a COLR, in part, as a telecom that “has the obligation to provide public telecommunications service to any customers or class of customer that request service within the exchange,” the statute does not set a timeline establishing when the COLR must provide the requested service. Accordingly, the PSC concluded a COLR must provide services within a “reasonable time” after the service is requested. *Id.* at 22. Second, the PSC ruled, in cases where two COLRs qualify for UUSF in the same territory, it would not be in the public interest for two COLRs to use UUSF distributions to build duplicative networks. *Id.* at 24.

The E Fiber Order also provides that the PSC will “open a separate docket to seek comments by all telecommunications stakeholders to address whether and how we should modify our existing rules to address UUSF administration with overlapping COLR exchange areas.” *Id.* The instant docket was opened for this purpose.

LEGAL AUTHORITY TO ENACT RULES

The PSC may enact any rule, that does not conflict with statutory or constitutional law, where the PSC has been granted the authority to promulgate rules, assuming there is substantial evidence to support the rule and the PSC followed the required procedures. Utah Code § 63G-3-602(4)(a). In this case, the PSC has been expressly granted extremely broad authority to promulgate rules related to the administration of the UUSF. Specifically, Utah Code § 54-8b-15(2)(c) provides that the PSC shall develop, through the enactment of rules that are consistent with section 54-8b-15, “policies and procedures to govern the administration of the fund.” Thus,

because rules and policies concerning UUSF distributions in cases of overlapping exchanges relate to the “administration of the fund,” the PSC has the authority to enact any rule it deems in the public interest concerning overlapping exchanges that is consistent with sections 54-8b-2.1 and 54-8b-15.

**ADDITIONAL RULES ARE NEEDED TO INCORPORATE AND DEVELOP THE
PSC’S E-FIBER RULINGS**

Given the novel issues identified in the PSC’s E Fiber Order, it is necessary to augment the existing rules to incorporate the two requirements in the Order and to develop procedures to ensure that the policies underlying these requirements are properly implemented.¹ Accordingly, the OCS proposes developing rules that provide for explicit PSC approval to ensure consistency with the statutes and the requirements of a reasonable time to provide service and the prevention of the construction of duplicate infrastructure.

(1) Section 54-8b-2.1(2) CPCN Rules. Initially, rules should be promulgated to coincide with the requirements of obtaining a CPCN for competitive entry under 54-8b-2.1(2) because this is the first procedural step authorizing PSC oversight of a competing COLR’s proposal to provide services in the territory of an incumbent COLR. Section 54-8b-2.1 provides that the PSC shall grant a CPCN for competitive entry under section 54-8b-2.1(2) if the applicant demonstrates the necessary technical, financial and managerial resources to provide the services

¹ These two requirements are consistent with both section 54-8b-2.1 and 54-8b-15. The E Fiber Order demonstrates that the requirement that a COLR has a reasonable time to provide service does not conflict with section 54-8b-15. *Id.* at 22. Nor is there any conflict in the provisions of section 54-8b-2.1 that interrelate with section 54-8b-15. And the remaining provision of 54-8b-2.1 do not implicate the requirement to provide service once requested. Moreover, a prohibition on providing UUSF for the purpose of building duplicate infrastructure comports with section 54-8b-15(4)(a)(ii)’s requirement that a COLR may receive UUSF disbursements only for “reasonable costs, as determined by the commission.” Clearly, it is not reasonable to incur costs for installing duplicate networks. Accordingly, the PSC has the authority to promulgate rules codifying the two requirements contained in the E Fiber Order. *See generally*, Utah Code § Utah Code 63G-3-201(6).

applied for and the PSC determines the application is in the public interest. To comply with this provision in cases where a telecom is seeking competitive entry into an incumbent's territory and seeks designation as a COLR to obtain UUSF funds to build out a competing network, rules should be developed requiring the applicant to file with its application a detailed plan outlining its proposal for construction of its network. The plan should include projected costs, timelines identifying the beginning date and completion date of each stage of proposed construction and the need for the upgrade or expansion.

Such a requirement would serve several purposes. First, it would aid the PSC in its determination of whether the applicant possesses the requisite technical and financial resources to complete the buildout. Without a concrete plan regarding the proposed buildout, it would be difficult to determine if the applicant possesses adequate resources to provide the service that is the subject of the application. Moreover, a proposed plan will enable to PSC to make an initial determination of whether the proposal will provide service within a "reasonable time."

Accordingly, a proposed schedule of construction that places the completion date too far into the future can be rejected at the CPCN stage for failure to comply with the requirement to provide services in a reasonable time.

Finally, the requirement of a detailed initial plan will assist the PSC in ensuring that duplicative networks are not created. Specifically, section 54-8b-2.1(2)(c) provides that the incumbent telecom may petition to exclude competitive entry into its service territory. A detailed construction plan will enable an incumbent telecom to challenge competitive entry on the grounds that the proposed construction will conflict with the incumbent's own plans for upgrades. This will enable the PSC to consider conflicting plans for upgrades at the CPCN stage so that the PSC can determine if the proposed plan is likely to result in the building of

duplicative networks. Accordingly, together with rules incorporating the requirements set out in the PSC's order, the PSC should enact rules requiring the filing of a construction plan with the filing of an application for competitive entry in cases presenting the issue of two COLRs potentially operating within the same exchange.

(2) Section 54-8b-15 Distribution Rules. As mentioned above, the central concern with UUSF disbursements with two or more COLRs operating within the same exchange is the prevention of the funding of redundant infrastructure, a possible result that the PSC has ruled is not in the public interest. E Fiber Order at 5-6. This goal is complicated by the fact that generally there is a two-year gap between the time expenditures are made by a COLR and the time UUSF disbursements are made to cover those expenditures. *Id.* at 23. This could lead to a situation where two COLR both seek to construct upgrades in the same area creating a race to determine who could recover from the UUSF first, leading to one COLR being prevented from recovery on the grounds that the expenditures are for duplicate infrastructure. Section 54-8b-15(4)(a)(ii). This could lead to economic waste and financial hardship for the COLR that is denied recovery.

To prevent this situation from occurring, the OCS proposes that the PSC promulgate rules providing for PSC approval prior to the beginning of each stage of construction of telecommunication infrastructure within a territory where two or more COLRs provide services. The precise contours of these rules should be left to a collaborative process with all stakeholders to ensure, as much as possible, that the rules correspond with the COLR companies' business practices. However, the prerequisite of obtaining approval prior to the construction of any upgrades or expansions should apply to the incumbent COLR, as well as, any competing COLRs.

Enacting rules requiring telecoms to obtain initial approval of a proposal before construction begins resolves the problems associated with multiple COLRs operating within one exchange seeking to expand service without the construction of duplicate networks and avoids the difficulties associated with potential disallowances after investments have been made.

(3) Miscellaneous Rules. There are two other issues that stem from two COLRs operating within the same exchange that should be addressed in rules. One issue that could arise is where a customer who resides in an area within an exchange where one COLR provides adequate telecom services nevertheless requests service from the other COLR. This circumstance presents a conflict. Section 54-8b-15(1)(b)(ii)(B) requires that COLR have the obligation to serve any customer within the exchange that request services. However, in such circumstance the build out of infrastructure to serve the customer would be duplicative of the other COLR's adequate infrastructure. This could lead to one of two possible untenable results. Pursuant to section 54-8b-15(1)(b)(ii)(B), the COLR could be required to build out to serve the customer but not recover from the fund, this would be unfair to the COLR and could lead to constitutional problems. On the other hand, to allow a COLR to recover from the fund under these circumstances would be contrary to the PSC's E Fiber Order, the approach recommended by the OCS in these comments, and would burden the fund.

Accordingly, the OCS proposes rules establishing that in such circumstances the COLR providing service may utilize its line extension tariff to reach the requesting customer. The PSC has ruled that "nothing in Utah Code Ann. § 54-8b-15(1) that conflicts with" the use of line extension tariffs. E Fiber Order at 23. Moreover, a customer who is receiving adequate service from a COLR but nonetheless demands services from a second COLR is making a somewhat unreasonable request. Under these circumstances it is equitable to have the customer shoulder

the additional cost associated with the request. This approach allows a competing COLR to comply with section 54-8b-15(1) without burdening the fund or violating the prohibition of using UUSF disbursements to pay for duplicate infrastructure.

The second issue that may arise is, after a competing COLR is granted a CPCN to enter the incumbent's territory, the incumbent telecom may wish to be relieved of its COLR obligations. Accordingly, a rule should be enacted to clarify that the incumbent telecom may be relieved of its COLR obligations pursuant to the Utah Code § 54-8b-3. This process might be preferable to a line extension tariff to a COLR in a region where another COLR already provides adequate service.

CONCLUSION

For these reasons, the PSC should promulgate rules for cases of COLRs with overlapping exchanges in the manner described above.

Respectfully submitted, August 2, 2021.

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