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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

<p><b>ADMINISTRATION OF UTAH UNIVERSAL SERVICE FUND DISTRIBUTIONS TO CARRIERS OF LAST RESORT WITH OVERLAPPING TELECOMMUNICATION SERVICE EXCHANGES</b></p>	<p>Docket No. 21-R008-03</p> <p><b>COMMENTS</b></p>
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Pursuant to Utah Code 54-4a-1 and Utah Admin. Code R746-1 the Utah Division of Public Utilities (“Division”) files this response to the Public Service Commission of Utah’s (Commission) June 16, 2021 Notice and Request for Comments. The Division recommends that the Commission open a rulemaking proceeding and that new administrative rules be promulgated to ensure that the Utah Universal Service Support Fund (UUSF) is available to support the provision of universal high-quality telecommunications service while also protecting the fund from unreasonable duplication of costs.

## INTRODUCTION

On June 16, 2021, the Commission issued a Notice and Request for Comments seeking comments regarding whether it is necessary to modify the existing administrative rules to address the scenario where two rate of return carriers have overlapping territory and are both eligible for Utah Universal Telecommunications Service Support Fund (UUSF) support. The Commission's request is in response to its approval of the Applications of E Fiber Moab, LLC and E Fiber San Juan, LLC for Certificates of Public Convenience and Necessity and designation as Carriers of Last Resort (COLR) in exchanges where an incumbent carrier is also a rate of return carrier of last resort.<sup>1</sup> Approval of a second COLR in those two dockets introduced a novel problem: the potential for UUSF support for two overlapping carriers.

This duplication of efforts problem was a central concern to parties in the two dockets. The Commission addressed this issue in its E-Fiber Order on Review, "it would not be in the public interest for two COLRs to build duplicative networks."<sup>2</sup> The Commission further recognized that this is not an immediate concern as the E-Fiber companies will not have costs eligible for UUSF support for approximately two years and the incumbent carrier is not currently receiving UUSF support. The Commission subsequently opened this docket to receive comments.

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<sup>1</sup> *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 on Review).

<sup>2</sup> *Id* at 24.

## COMMENTS

Each rate of return COLR is entitled to earn its allowed rate of return for reasonable and prudent actions through a combination of revenue from customers and the remaining revenue requirement made up from UUSF support. And each rate of return regulated COLR must also serve any customer who requests service within the area that the COLR is obligated to serve. Without more, the combination of these two factors is at least reasonably likely to result in the duplication of equipment and services that will cost more and offer little or no incremental benefit to customers.

The goal of the UUSF to provide affordable telecommunications service to high-cost rural areas of Utah in a cost-effective way is inconsistent with the UUSF supporting multiple overlapping networks. The Commission recognized this in its E-Fiber Order on Review. The public interest is best served by providing support for adequate service to customers at reasonable costs. Therefore, the rules or implementation of the UUSF should focus on the most cost-effective way to provide adequate service to customers without duplication of costs. This will typically be met by limiting support to only one carrier's facilities to each customer or area.

### I. Rulemaking is in the Public Interest, but Not Strictly Necessary.

Rulemaking is not strictly necessary to approve or deny recovery of the costs of duplicate facilities if the Commission finds that such facilities are not reasonable. This could be handled on a case-by-case basis where a carrier builds its network and then submits its costs for recovery during the annual UUSF review process. At that point the Division and other parties might challenge recovery of imprudent or unreasonable costs. This process introduces significant and unnecessary risk to carriers and will inevitably lead to litigation and unnecessary costs for both the carriers and the state.

The reasonableness standard is included in Utah Admin Code R746-8-401 by reference. Section 401(1)(f) requires that the carrier seeking recovery “demonstrate[] through an adjudicative proceeding that its costs as established in Utah Code Section 54-8b-15 exceed its revenues...” The reference to § 54-8b-15 incorporates the reasonableness standard for costs included in a carrier’s request for UUSF recovery. Therefore, the current rule is sufficient to rely on for adjudicating a conflict in the absence of a more direct rule. Ideally this should be relied on only in the interim if a conflict arises between now and the effective period of new rules.

The public interest supports rulemaking to provide greater clarity for the carriers before construction of facilities or commitments to other costs that may be eligible for UUSF support. The Commission’s best available method of safeguarding against the over-use of UUSF funds for duplicate costs is to promulgate a rule to define reasonableness and providing guidance to the two otherwise UUSF eligible carriers through the preliminary review process for new capital projects like network upgrades and expansion. Rulemaking is also supported by § 54-8b-2(b) that states in relevant part, “[t]he fund shall provide a mechanism for a qualifying carrier of last resort to obtain specific, predictable, and sufficient funds...” Providing guidance before carriers expend funds on what the Commission will review for reasonableness of those expenses under § 54-8b-15(4)(a)(ii) goes to the heart of the requirement for such funds to be predictable.

## II. The Rule Should Include Pre-Approval and Other Guidance for Recovery.

The Division supports a rule that includes a pre-approval process. Although not explicitly authorized or directed by the UUSF statute, the Commission has authority to implement a pre-approval process. The pre-approval type process plainly fits within the legislative directive that the UUSF provide specific, predictable, and sufficient funds. Pre-approval is consistent with the statutory directive. 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.

In making the determination of whether a proposed project is reasonable, the Office of Consumer Services (OCS) in filings in Docket No. 20-2618-01 that gave rise to the first instance of overlapping rate of return regulated COLRS, discussed the elements that might be included in a rule. The Division generally agrees and supports the proposals made by OCS witnesses Anderson and Beck. In prefiled Direct Testimony in Docket No. 20-2618-01 OCS witness Alyson Anderson identified three factors that should be considered in evaluation of reasonableness:

- 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?

The UUSF should avoid redundancy to the extent possible while recognizing that at least some level of redundant overlap may be necessary where the two carriers' lines might follow common paths. Similarly, redundancy might not always be unreasonable. For example, if a development were to offer to install both fiber networks to each home or unit for low cost at the time of construction it might be reasonable for both carriers to take advantage of that opportunity. Or if a new highway project provides an ideal time to install new backbone fiber lines, both carriers might be reasonable in taking advantage of that opportunity of a time limited window where costs are low. However, it would be an unusual circumstance where it would be reasonable to build a duplicate fiber network on top of an existing fiber network or a fiber loop overtop of an existing fiber loop to serve the same customer.

The existing quality of service is critical to this type of analysis. Fiber is not the only method of deploying adequate service and technology might change as time goes forward. So, the quality of service including reliability, data speeds, and other network or service qualities should be considered during an evaluation. Overbuilding or duplicating high quality telecom service is unreasonable. Overbuilding or duplicating existing service offerings that are barely sufficient to meet current industry standard data speeds or reliability standards may be reasonable.

It is also critical that infrastructure supported by the UUSF be maintained and offered to customers for the life of the plant. The commitment level of the carrier requesting the pre-approval should be a consideration for the Commission in its decision. In addition, two competing proposals might be judged in part on the carriers' respective ability to demonstrate dedication to maintaining a quality service offering.

In the OCS's March 15, 2021 Comments OCS witness Michele Beck identified 8 items that might be addressed in a rulemaking:

- What information must be provided with an application for competitive entry into an incumbent's telecom exchange, designation as a COLR and request for eligibility for the UUSF?
- What factors the PSC will consider in determining if it should allow competitive entry into an incumbent's exchange.
- What factors the PSC will consider in determining if a proposed/actual buildout is a reasonable expenditure.
- The fact that the buildout of duplicative infrastructure is per se unreasonable.
- What factors the PSC will consider in determining if a proposed /actual buildout is duplicative.
- The timing and procedures for the PSC to make the determination that a proposed/actual buildout is a reasonable expenditure.
- Reporting requirements for any proposed/actual buildout.
- Process and timing for final review to ensure the buildout plan was implemented prudently.

Like the previous list of questions that should be considered, the Division further supports the OCS's list of items that should be addressed in a proposed rule. The first two of the 8 items are more relevant to the competitive entry process than a pre-approval process or rule for the competing carriers after entry is granted. The final six items are directly relevant to the rule and are all supported by the Division.

In addition to the pre-approval process and the rules surrounding it, there are a few additional issues that should also be included. Those include guidance for scenarios where duplication is not a concern and whether pre-approval is necessary or not, and a process for a streamlined review for small projects such as individual customer lines or other minor projects that might not warrant the full review would be appropriate to include in a proposed rule.

### III. The Obligation to Serve Must be Addressed to Avoid Duplicate Networks.

In addition to the factors identified by the OCS for consideration in a rule, there remains a sticky issue with respect to how the carriers handle their obligation to serve a customer who already has adequate service from another provider. For example, if carrier A has facilities installed and offers service to an area and a customer wishes to have service provided by carrier B. 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. When a second carrier is granted competitive entry, "the commission shall impose an obligation...[on the new carrier] to provide public telecommunications services to any customer or class of customers who requests service within the local exchange." Similarly, carriers with COLR obligations are "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.”<sup>3</sup> Therefore, carrier B might be obligated to build out the facilities to serve a customer requesting service where carrier A already has a comparable service in place.

Line extension tariffs are likely the best mechanism for addressing these situations. 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 that would not be equitable to socialize across the entire class of customers. This same principle should be applied when a customer has access to adequate service from an existing UUSF supported carrier and seeks service from another carrier who would require significant expense to overbuild and serve that customer.

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 line extension tariff could be addressed through the rule creating an obligation for each competing carrier to develop such a tariff that meets the requirements of the rule or making an approved line extension tariff a qualifying requirement prior to recovery for duplicate service

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<sup>3</sup> *In re FCC 11-161*, 753 F.3d 1015, 1142 (10th Cir. 2014)(quoting *Stuart Buck, Telric v. Universal Service: A Takings Violation*, 56 Fed. Comms. L.J. 1, 46 (2003)).



construction. Alternatively, this might be done outside of the rulemaking through the Commission's general regulatory authority by ordering the carriers to create such tariffs.

#### IV. Voluntary Relief from the Obligation to Serve.

The rules should also provide a mechanism for addressing the scenario where one of the carriers seeks to be relieved of service obligations when another carrier is providing adequate service to the area. The Division in its Response to Commission Questions in Docket No. 20-2618-01 suggested that the relief from the COLR obligation upon request for good cause might be an option. After further consideration, it is unclear how this would interplay with competitive entry statute requirements in §54-8b-2.1(4). The two are in conflict. Section 54-8b-2.1(4) requires the competitive entrant to serve any customer currently served by the incumbent. However, the Commission's current rule for discontinuation of telecommunications service in Utah Admin Code R746-350 provides the process for carriers to be relieved of service obligations that might be expanded for some utility in the instance of a demand for service in an already served area. The option presumably applies to the first carrier but may not be available to the competitive entrant. It might work for certain situations but is unlikely to be provide a broader solution for both carriers.

#### CONCLUSION

For the reasons stated above, the Division recommends that the Commission open a rulemaking proceeding and promulgate rules for UUSF support in areas where two or more UUSF eligible carriers overlap.

Submitted this 2nd day of August 2021.

/s/ Justin C. Jetter

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## CERTIFICATE OF SERVICE

I certify that on August 2, 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.

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