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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)	REPLY 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 reply 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 June 16, 2021, the PSC issued a request for comments on the necessity of modifying administrative rules governing UUSF distribution in situations where two COLR’s have overlapping telecommunications service exchanges. E Fiber San Juan LLC and E Fiber Moab LLC (E-Fiber), the Utah Rural Telecom Association (URTA), the Division of Public Utilities (DPU), and the OCS filed initial comments on August 2, 2021. In its initial comments, E Fiber argued that the existing statutes and rules “permit the Commission to appropriately administer the UUSF to COLRs with overlapping exchanges on a case-by-case basis so that no rule change is needed” E Fiber Comments at 1. URTA argued that while existing statutes and rules are

sufficient to address issues surrounding multiple COLR's with overlapping exchanges, URТА believes the PSC "can add clarity to the process by amending its rules to specifically address the administration of the UUSF amongst competing COLRs." URТА Comments at 2-3. The DPU recommended that the PSC open a rulemaking proceeding to promulgate new rules asserting that, while not strictly necessary, promulgating new rules would be in the public interest. DPU Comments at 1, 3. Finally, the OCS reached the conclusion that the existing rules needed to be augmented to incorporate principles of law that the PSC developed in finally adjudicating the E Fiber companies' application under Utah Code § 54-8b-2.1 for competitive entry into the service territory of an incumbent telecom.¹ (E Fiber Order). OCS Comments at 3 & n1.

In their comments, URТА, the DPU and the OCS also proposed principles and guidelines for the promulgation of new rules concerning the administration of the UUSF in circumstances where two or more COLRs serve the same exchange. The OCS and DPU's proposals generally track each other with both set of comments proposing rules involving preapproval, line extension tariffs in situations where a customer receiving adequate service from one COLR nevertheless seeks service of another COLR and provisions for relief from a COLR obligations. DPU Comments at 4-9; OCS Comments at 3-7. URТА's proposals for new rules are also similar to the proposals of the DPU and the OCS. As is true with the DPU and OCS, URТА proposes a mechanism for preapproval. URТА Comments at 4. Like the OCS, URТА proposes the filing of a build out plan with the competitive telecom's initial application. *Id.* at 3; OCS Comments at 4. Both URТА and the DPU propose factors to guide the PSC in making public interest determinations. URТА Comments at 4 & n.1; DPU Comments at 5-6. And URТА also

¹ See *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).

proposes rules tacking the requirements of Utah Code §§ 54-8b-2.1 and 54-8b-15. URITA Comments at 3-5. In sum, the Comments regarding proposed rules are generally consistent with one another, the major disagreement is whether the promulgation of new rules is legally required.

NECESSITY FOR RULEMAKING

The OCS is the only commenter that asserts the need for the augmentation of existing rules. All other commenters contend that the existing statute and rules are sufficient for the PSC to resolve issues involving multiple COLR in a single exchange on a case-by-case basis. However, the disagreement is not that significant. The OCS is not claiming that existing rules conflict with the notion that multiple COLRs can exist within one exchange or that the relevant statutes and existing rules are insufficient for a case-by-case adjudicative development of the law relating to multiple carriers in one exchange. Rather, the OCS's contention for the need to augment existing rules is based on the requirements of Utah Code § 63G-3-201(6), which provides that agencies "shall enact rules incorporating principals of law not already in rules that are established in final adjudicative decisions" OCS comments at 3 & n1.

As stated in the OCS's initial comments, in the E Fiber Order the PSC made two legal rulings related to the novel issues presented by multiple COLRs operating within a single exchange: (1) that the competing COLR has a reasonable time to serve all customers within an exchange that request service, (2) that the build out of duplicate infrastructure is not in the public interest. OCS Comments at 2. The OCS argued: "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." OCS comments at 3 & n1.

The OCS contends that these two rulings fall within the ambit of section 63G-3-201(6). Both rulings constitute issues of law that are not already in rule. Indeed, the PSC has noted that

these ruling involve novel issues not previously address by PSC adjudication or rules. OCS Comments at 1-2. Moreover, these rulings are of general applicability to all COLRs operating within the same exchange. *See* Utah Code § 63G-3-102(19). As mentioned above, the additional rules proposed by the OCS simply strive to ensure that the implementation of the rules subject to section 63G-3-201 are consistent with the policy underlying the PSC’s rulings and the provisions of the statutes governing a COLR’s competitive entry into an incumbent’s territory. Accordingly, the OCS believe that that the augmentation of the rules governing UUSF distribution is necessary under these circumstances pursuant to section 63G-3-201(6).

However, if the PSC concludes that the enactment of the additional rules is not required by section 63G-3-201(6), the OCS concurs with the DPU’s position that the enactment of additional rules is nevertheless in the public interest. As pointed out by the DPU, developing procedures governing administration of the UUSF in cases of multiple COLRs in a single exchange on a case-by-case adjudication would “introduce[] significant and unnecessary risk to carriers and will inevitably lead to litigation and unnecessary costs for both the carriers and the state.” DPU Comments at 3.

Similarly, the OCS observed that a case-by-case approach to determining which telecom is entitled to recover under the UUSF where two carriers are both seeking to upgrade infrastructure could lead to a race to determine which carrier can recover from the fund first resulting in the other carrier being denied UUSF due to the development of duplicative infrastructure. This would lead to “economic waste and financial hardship for the COLR that is denied recovery.” OCS Comments at 5. Additional rules as proposed in the OCS’s initial comments are needed to avoid such situations. Accordingly, the OCS concurs with the DPU that the need for clarity in this area coupled with the cost and uncertainty of a case-by-case approach

compels the conclusion that, even if not required legally, the promulgation of rules governing multiple COLR in the same exchange is in the public interest.

GUIDELINES FOR PROPOSED RULES

As stated above, the commenters generally agree with one another on the appropriate principles and guidelines for prospective rules. Although the OCS did not propose factors for the PSC to consider when making its public interest determinations, the office agrees that the factors listed by URTA and DPU should be given consideration. *See* URTA Comments at 4 & n.1; DPU Comments at 5-6. In addition, the OCS agrees with the DPU that fiber “is not the only method of deploying adequate services and technology might change over time.” DPU Comments at 6. Accordingly, rules should focus on service metrics not on specific technologies. *Id.* Ultimately, however, the OCS continues to recommend a collaborative process to establish the exact provisions of the proposed rules. Given the common elements presented in comments, such a collaborative is likely to reach agreement.

CONCLUSION

As outlined above, the OCS believes that the PSC’s existing rules need to be augmented to incorporate principles of law that the PSC developed in adjudicating the E Fiber Order pursuant to section 63G-3-201(6). If the PSC determines that section 63G-3-201(6) does not legally require the promulgation of rules, nevertheless, the enactment of rules is in the public interest.

Respectfully submitted, September 1st 2021.

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