Phillip J. Russell (10445)
JAMES DODGE RUSSELL & STEPHENS P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666
Email: prussell@jdrslaw.com

Gregory C. Brubaker
Associate General Counsel
Frontier Communications
Telephone: (260) 241-3606
Email: gregory.c.brubaker@ftr.com

Counsel for Citizens Telecommunications Company of Utah d/b/a Frontier Communications

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Consolidated Matter of: The Applications 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 a Carrier of Last Resort in Certain Rural Exchanges	Docket No. 20-2618-01

MOTION FOR PARTIAL SUMMARY JUDGMENT

Citizens Telecommunications Company of Utah d/b/a Frontier Communications ("Frontier") hereby submits this Motion for Partial Summary Judgment seeking dismissal of one of the claims for relief brought in this docket by E Fiber Moab, LLC ("E Fiber Moab") and E Fiber San Juan ("E Fiber San Juan") (collectively "Applicants" or "E Fiber").

RELIEF REQUESTED

In Applications and direct testimony filed in this docket, E Fiber makes the following claims for relief in certain exchanges[1] (the "Local Exchanges") in southeastern Utah:

- a certificate of public convenience and necessity ("CPCN") for competitive entry;
- designation as a "rate-of-return regulated" carrier of last resort ("COLR");
- an order determining that E Fiber will be eligible to receive distributions from the Universal Public Telecommunications Service Support Fund ("UUSF"); and
- an order ruling that Frontier will ***not*** be eligible to receive distributions from the UUSF based on criteria other than those set forth in Utah law or Commission Rule.

This Motion first requests that the Commission determine whether it has jurisdiction to grant E Fiber's application for a CPCN and to be designated as a rate-of-return regulated COLR. Then, if the Commission determines that it has jurisdiction, this Motion seeks dismissal of the Applications on three grounds. *First*, E Fiber will offer services that cannot be regulated by this Commission and, therefore, it cannot be designated as a "rate-of-return regulated" carrier of last resort. *Second*, E Fiber admits that it will not meet the obligations of a carrier of last resort. *Third*, this Commission lacks legal authority to rule that Frontier is not eligible to receive UUSF distributions based on any criteria other than those set forth in Utah Code § 54-8b-15(4) or Utah Admin. Code R746-8-401.

[1] Specifically, E Fiber Moab seeks competitive entry in the Moab and Thompson exchanges, and E Fiber San Juan seeks competitive entry in the La Sal, Monticello, Blanding, Bluff, and Mexican Hat exchanges (excepting portions of the Blanding exchange that includes the White Mesa community).

GROUNDS FOR RELIEF

1. E Fiber Cannot be Designated a "Rate-of-Return Regulated" Carrier of Last Resort

Utah Code § 54-19-103(1) prohibits this Commission from regulating wholesale broadband internet service and retail Voice over Internet Protocol ("VoIP") service—the two services that E Fiber intends to provide. Because E Fiber intends to offer only services that cannot be regulated by this Commission, E Fiber cannot be designated as a "rate-of-return regulated" carrier of last resort.

2. E Fiber Cannot be Designated a "Carrier of Last Resort"

A carrier of last resort must "provide public telecommunications service to any customer or class of customers that requests service within the local exchange." Utah Code § 54-8b-15(1)(b)(ii)(B). In its Application and its testimony, E Fiber admits that it is not currently in a position to meet this obligation and may never be in a position to meet that obligation. As such, E Fiber is not entitled to be designated as a carrier of last resort.

3. This Commission Lacks the Legal Authority to Adopt Criteria for UUSF Eligibility that Differs from those in Utah Code § 54-8b-15

Utah Code section 54-8b-15 establishes the UUSF and states that "[t]he fund ***shall*** provide a mechanism for a qualifying carrier of last resort to obtain specific, predictable, and sufficient funds to deploy and manage . . . ." Utah Code § 54-8b-15(2)(b) (emphasis added). The statute further defines the eligibility criteria for a rate-of-return regulated carrier of last resort—such as Frontier—to receive UUSF distributions, stating that "[a] rate-of-return regulated carrier of last resort ***is eligible*** for payment from the Universal Public Telecommunications Service Support Fund if" it meets certain criteria. Utah Code § 54-8b-15(4)(a) (emphasis added). The statutory criteria relate solely to whether the rate-of-return regulated carrier of last resort's reasonable costs

exceed its eligible revenues. The statute does not grant the Commission the authority to adopt criteria that differ from those in the statute. As such, the Commission must reject E Fiber's request that it adopt new criteria for UUSF eligibility and, based on those criteria, rule that Frontier is ineligible to receive UUSF distributions.

STATEMENT OF FACTS NOT GENUINELY IN DISPUTE

1. In each of the Local Exchanges, Frontier is the incumbent local exchange carrier and is a rate-of-return regulated carrier of last resort. [*See* Declaration of Carl Erhart ("Erhart Decl.") at ¶¶ 4-6].[2]

2. E Fiber Moab and E Fiber San Juan are each a Utah limited liability company organized on February 13, 2020. [E Fiber Application at ¶ 1a].[3]

3. E Fiber seeks a certificate of public convenience and necessity ("CPCN") to construct, install, and operate fiber facilities to provide telecommunications services in the Local Exchanges. [E Fiber Applications, generally].

4. E Fiber also requests that it be designated as a rate-of-return regulated carrier of last resort in the Local Exchanges and, in connection, seeks approval to receive disbursements from the UUSF. [*Id*. at ¶ 19].

5. E Fiber requests that it be declared "eligible for UUSF support if they provide voice service or wholesale broadband Internet access service and their reasonable costs to

[2] A true and correct copy of the Declaration of Carl Erhart is submitted herewith.
[3] E Fiber's Applications are on file with the Commission in this consolidated docket.

provide such services exceed their revenue." [Direct Testimony of Brock Johansen ("Johansen Direct Test.") at lines 142-44].[4]

6. E Fiber proposes to offer two services—wholesale broadband internet service and retail Voice over Internet Protocol ("VoIP") voice service. [E Fiber Application at ¶ 15 ("Applicant will . . . bring updated facilities, access to high speed broadband and state-of-the-art carrier-grade voice over internet protocol telephone services to these exchanges."); Johansen Direct Test. at lines 348-351 ("Our facilities will provide carrier grade Voice over Internet Protocol ('VoIP') services and high-speed wholesale broadband internet access.")].

7. E Fiber does not "currently have fiber facilities constructed to enable them to provide service to **all customers**, or classes of customers who request service in the Local Exchanges." [Johansen Direct Test. at lines 99-102 (emphasis in original)].

8. E Fiber proposes to conduct a "phased in" approach to building its fiber network and providing service to customers in the Local Exchanges. [*Id*. at lines 108-117].

9. E Fiber further states that even after its proposed fiber facilities are completely built out, certain remote locations "may still be subject to line extension tariffs." [*Id*. at 332-338].

10. E Fiber's application requests that the Commission declare Frontier ineligible to receive UUSF funding under any circumstances based on a proposed ten-factor public policy test. [*See id*. at lines 194-368].

[4] Mr. Johansen's Direct Testimony is on file with the Commission in this docket.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). Summary judgment may be sought with respect to "any issues raised by the complaint and answer" or for a "determination of issues raised by any counterclaim or cross-claim." *Timm v. Dewsnup*, 851 P.2d 1178, 1181 (Utah 1993). If the moving party presents evidence sufficient to determine an issue raised by the pleadings and that no material issues of fact remain, the burden then shifts to the nonmoving party to identify contested material facts, or legal flaws in the determination sought by the moving party. *See Salo v. Tyler*, 2018 UT 7, ¶ 2, 417 P.3d 581.

II. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT

There are no genuine disputes with respect to the facts material to this motion. Moreover, even if E Fiber *could* raise genuine issues of fact, "the mere existence of genuine issues of fact . . . does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case." *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah Ct. App. 1994) (quoting *Horgan v. Indus. Design Corp.*, 657 P.2d 751, 752 (Utah 1982)).

III. SUBJECT MATTER JURISDICTION

Before addressing the substantive legal issue addressed in this Motion, this Commission must first determine whether it has subject matter jurisdiction over the matters presented in this docket. "Under Rule 12 of the Utah Rules of Civil Procedure . . . . the PSC is obligated to dismiss an action 'whenever it appears by suggestion of the parties or otherwise that the [PSC] lacks [subject matter] jurisdiction.'" *In the Matter of the Request for Agency Action of Carbon/Emery*

Telecom, Inc., v. 8x8, Inc., Utah PSC Docket No. 12-2302-01, ("*Carbon/Emery v. 8x8*") Nov. 27, 2012 Order of Dismissal for Lack of Jurisdiction, at 13 (citing Utah R. Civ. P. 12(h)(2)). As discussed below, recent decisions by this Commission and federal courts have addressed the question of whether state utility commissions are preempted from regulating the provision of Voice over Internet Protocol ("VoIP") and/or broadband service.

A. Federal Preemption

First, this Commission should determine whether federal law preempts the Commission from granting E Fiber's application for a CPCN and to be designated as a "rate of return regulated" carrier of last resort. This Commission has previously determined that it does not have jurisdiction to require a VoIP service provider to obtain a CPCN to operate within the state of Utah. In *Carbon/Emery v. 8x8*, an incumbent local exchange carrier had filed a petition seeking to require a provider of VoIP service to obtain a CPCN to operate within the incumbent's exchange. Applying the holding of the Minnesota Public Utilities Commission in *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Public Utilities Commission*; WC Docket No. 03-211 ("*Vonage*"), this Commission determined that it lacked jurisdiction to require a provider of VoIP service to obtain a CPCN because the Commission's regulatory authority is preempted by federal law. *See Carbon/Emery v. 8x8* Order at 14 ("[T]he Vonage Order 'mak[es] clear that the [FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities.'" (quoting *Vonage* Order at 2)).

This question of federal preemption of state utility commission regulation over carriers seeking to provide VoIP and other internet communications services was also recently addressed

by the 8th Circuit in *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 720 (8th Cir. 2018). In *Charter Advanced Services*, the Minnesota PUC issued a ruling that Charter had violated state laws when it created a separate entity to segregate its VoIP service from its regulated telecommunications service. Charter then filed an action in the United States District Court for the District of Minnesota, asserting that the Telecommunications Act of 1996 barred the Minnesota PUC from regulating Charter's VoIP service. The district court granted Charter's motion for summary judgment on the point, finding that the Minnesota PUC was barred from regulating Charter's VoIP service because it is an "information service" rather than a "telecommunications service." 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." *Charter Advanced Services*, 903 F.3d at 719 (internal quotation marks omitted).

Like the VoIP service providers in *Carbon/Emery v. 8x8* and *Charter Advanced Services*, E Fiber proposes to provide interconnected VoIP service in the Local Exchanges. This Commission should determine whether federal law preempts its authority to adjudicate E Fiber's request for a CPCN and to be designated as a rate-of-return regulated carrier of last resort within the Local Exchanges.

B. State Statute

In addition to the question of whether federal preemption principles bar this Commission from exercising jurisdiction over this matter, the Commission should also determine whether state law bars the Commission from granting E Fiber's proposal to provide VoIP and broadband service in the Local Exchanges. Utah Code § 54-19-103(1) 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." On its face, this statute prohibits the Commission from regulating E Fiber's proposed broadband and VoIP service offerings, as discussed further below. As a threshold question, however, the Commission should determine whether, pursuant to Utah Code § 54-19-103(1), the Commission lacks jurisdiction to grant E Fiber's request to operate as a rate-of-return regulated carrier of last resort in the local exchanges.

IV. FRONTIER IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Several of E Fiber's requests for relief in this docket seek outcomes that are contrary to Utah law, either because E Fiber's own testimony demonstrates that it is not entitled to the relief it seeks or because this Commission does not have the legal authority to grant that relief. As discussed below, A) E Fiber is not eligible for designation as a "rate-of-return regulated" carrier of last resort; B) E Fiber cannot be designated as a "carrier of last resort;" and C) this Commission lacks the legal authority to adopt criteria for UUSF eligibility that differs from those created by the Utah Legislature and set forth in Utah Code § 54-8b-15.

A. E Fiber is Not Eligible for Designation as a "Rate-of-Return Regulated" Carrier of Last Resort

E Fiber does not propose to offer services that can be regulated by this Commission and, therefore, cannot be designated a "rate-of-return regulated" carrier of last resort. Utah Code § 54-8b-15 creates the UUSF and defines the criteria pursuant to which a "rate-of-return regulated" carrier of last resort is deemed eligible to receive UUSF distributions. The term "rate-of-return regulated" is defined in Subsection (1) to mean "subject to regulation under Section 54-4-4." Utah Code § 54-4-4 identifies the Commission's power to set just and reasonable rates based on cost of

service and cost of capital. *See Stewart v. Utah Public Service Commn.*, 885 P.2d 759, 771 (Utah 1994) (discussing Commission's power to set rates pursuant to Utah Code § 54-4-4).

E Fiber asserts in its testimony and responses to data requests that it plans to offer two services—wholesale broadband internet service (which it will sell to its unregulated affiliates, who will offer retail broadband service within the Local Exchanges) and retail VoIP voice service. *See* E Fiber Application ¶ 15 ("Applicant will . . . . bring updated facilities, access to high speed broadband and state-of-the-art carrier-grade voice over internet protocol telephone services to these exchanges."); Johansen Direct Test. at lines 348-351 ("Our facilities will provide carrier grade Voice over Internet Protocol ("VoIP") services and high-speed wholesale broadband internet access"). Utah law bars the Commission from regulating both wholesale broadband and voice over internet protocol services. *See* Utah Code § 54-19-103(1) ("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."); *In the Matter of the Formal Complaint of Dimas Rodarte against Qwest Corp.*, Utah PSC Docket No. 09-049-42 (Report and Order dated Aug. 31, 2009) (dismissing complaint alleging imposition of improper fees associated with internet and wireless phone services for lack of jurisdiction and noting that "wireline broadband services [are] 'information services' and not 'telecommunications services' and [are] under the FCC's jurisdiction." (citing *Report and Order and Notice of Proposed Rulemaking*, Federal Communications Commission, FCC Docket 02-33, 02-337, 95-20, 98-10)).

E Fiber proposes to offer services that are not "subject to regulation under Section 54-4-4" and, therefore, E Fiber cannot be designated as a "rate-of-return regulated" carrier of last resort. As such, E Fiber's application should be denied.

B. E Fiber Does Not Meet the Definition of "Carrier of Last Resort"

E Fiber admits that it cannot provide public telecommunications service to any customer or class of customers that requests it in the Local Exchanges and, therefore, cannot be designated as a "carrier of last resort." Utah Code § 54-8b-15 defines "carrier of last resort" as either (i) an "incumbent telephone corporation," or (ii) a telecommunications corporation that has a CPCN and "an obligation to provide public telecommunications service to any customer or class of customers that requests service within the local exchange." E Fiber is not "an incumbent telephone corporation" in the Local Exchanges and, therefore, to qualify as a "carrier of last resort" it must have a CPCN and "an obligation to provide public telecommunications service to any customer or class of customers that requests service within the local exchange." Utah Code § 54-8b-15(1)(b)(ii)(B). In testimony, E Fiber admits that it cannot meet the carrier of last resort obligations. For example, E Fiber witness Brock Johansen testifies that E Fiber does not "currently have fiber facilities constructed to enable them to provide service to **all customers**, or classes of customers who request service in the Local Exchanges." [Direct Testimony of Brock Johansen ("Johansen Direct Test.") at lines 99-102]. Mr. Johansen states that, *if* E Fiber is designated as a COLR and guaranteed to receive UUSF distributions, only *then* will it initiate a "phased in approach" to building its fiber network and providing service to customers in the Local Exchanges. [*Id*. at lines 108-117]. Mr. Johansen candidly states that E Fiber seeks designation as a COLR *before* it can meet the COLR obligations because it requires the COLR designation to be eligible to receive UUSF distributions, and that without the designation and associated UUSF distributions it will not be able to construct its proposed fiber network. [*Id*. at lines 119-134].

Indeed, Mr. Johansen admits that it may *never* be able to meet COLR obligations when he admits that *even after* it completes the planned five-year build-out of its fiber network that certain remote locations "may still be subject to line extension tariffs." [*Id*. at 332-338]. In other words, E Fiber states that even after it utilizes the UUSF funds to build out its fiber network to serve the lowest-cost customers, it will seek to impose expensive line-extension costs on customers in remote areas of the Local Exchanges. For those remote customers, E Fiber will apparently rely on Frontier to continue to provide service under its obligations as a COLR—all while E Fiber seeks to deny Frontier access to UUSF distributions to continue to provide that service.

E Fiber's testimony demonstrates that it will not, and may never, be able to comply with "an obligation to provide public telecommunications service to any customer or class of customers that requests service within the local exchange" as is required of a carrier of last resort under Utah Code § 54-8b-15(1)(B)(ii)(b). This Commission should, therefore, dismiss the Application.

C. This Commission Lacks the Legal Authority to Adopt Criteria for UUSF Eligibility that Differs from those in Utah Code § 54-8b-15

A rate-of-return regulated carrier of last resort, such as Frontier, is eligible for UUSF distributions if it meets the requirements for eligibility set forth in Utah Code § 54-8b-15, and this Commission cannot rule that Frontier is ineligible to receive UUSF distributions based on different factors not identified in the statute. E Fiber's request that the PSC deny UUSF eligibility to Frontier is beyond the scope of the Commission's authority under both Utah Code § 54-8b-15 and Utah Administrative Code Rule R746-8-401. Utah Code § 54-8b-15 establishes the UUSF and defines the terms pursuant to which a "rate-of-return regulated" carrier of last resort is deemed eligible to receive UUSF distributions. Subsection (2) of the statute states that "[t]he fund ***shall*** provide a mechanism for a qualifying carrier of last resort to obtain specific, predictable, and

sufficient funds to deploy and manage . . . ." Utah Code § 54-8b-15(2)(b) (emphasis added). Subsection (4)(a) states that "[a] rate-of-return regulated carrier of last resort ***is eligible*** for payment from the Universal Public Telecommunications Service Support Fund if" it meets certain enumerated criteria. Utah Code § 54-8b-15(4)(a) (emphasis added). The enumerated criteria relate solely to whether the rate-of-return regulated carrier of last resort's reasonable costs exceed its eligible revenues. Furthermore, a rate-of-return regulated carrier of last resort that is eligible to receive UUSF distributions is "***entitled*** to a rate of return equal to the weighted average cost of capital rate of return prescribed by the Federal Communications Commission for rate-of-return regulated carriers." Utah Code § 54-8b-15(5)(a) (emphasis added).

While § 54-8b-15 explicitly outlines the criteria necessary for a rate-of-return regulated CLR to be eligible for UUSF funding, it contains no provision granting the PSC the authority to deny UUSF funding to a CLR that otherwise meets these criteria. This Commission adopted a Rule to implement this statute that similarly identifies bright-line criteria for a rate-of-return regulated carrier of last resort to be eligible to receive UUSF distributions, and similarly focuses the Commission's inquiry on whether the carrier's reasonable costs exceed its eligible revenues. *See* Admin. Code R746-8-401.

Neither the statute nor the rule permit the Commission to create separate factors to determine whether a rate-of-return regulated carrier of last resort is eligible for UUSF distributions. "'It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute.'" *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (quoting *Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 754 P.2d 928, 930 (Utah 1988)). "When a 'specific power is conferred by statute upon

a commission with limited powers, the powers are limited to such as are specifically mentioned.'" *Id*. (quoting *Union Pac. R.R. v. Pub. Serv. Comm'n*, 134 P.2d 469, 474 (Utah 1943)). "Accordingly, to ensure that the administrative powers of the [Commission] are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof." *Id*. (internal quotation marks omitted).

Despite the clear language in both Utah Code § 54-8b-15 and Utah Admin. Code R746-8-401 that define the factors which this Commission must consider in determining a rate-of-return regulated carrier of last resort's eligibility for UUSF distributions, E Fiber requests that the Commission impose a new 10-factor test and, based on that test, ultimately conclude that Frontier is not eligible for UUSF distributions. [*See* Johansen Direct Test. at lines 204-243]. E Fiber first notes (correctly) that any rate-of-return regulated carrier of last resort that has reasonable costs in excess of eligible revenues is eligible to receive UUSF distributions. [*See id*. at lines 136-148]. E Fiber then notes, however, that the Commission's granting of the Applications in this docket would result in the undesirable outcome of having two carriers of last resort that may qualify to receive UUSF distributions to fund operations in the same exchanges, and asserts that "the public interest inquiry should include PSC determination of which carrier of last resort in the Local Exchanges will be eligible to draw from the UUSF." [*Id*. at lines 150-156]. E Fiber argues that the Commission has authority to make this determination based on Utah Code § 54-8b-15(2)(c), which directs this Commission to "develop, by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, and consistent with this section, policies and procedures to govern the administration of the fund." E Fiber then proposes the same 10-factor test proposed in

comments previously submitted in this docket by Utah Rural Telecom Association ("URTA")[5]—whose attorney in this docket also represents E Fiber. E Fiber's request for the Commission to consider any factors other than those in Utah Code § 54-8b-15 and Utah Admin. Code R746-8-401 should be rejected for several reasons, as discussed below.

First, as discussed above, Utah Code § 54-8b-15 defines the circumstances in which a rate-of-return regulated carrier of last resort "is eligible" to receive UUSF distributions. The statute does not direct or allow the Commission to engage in an inquiry to determine if a carrier that is eligible under the statute passes some other, additional, eligibility determination—particularly not a multi-factor test fabricated from whole cloth by a party seeking competitive entry and a guarantee of UUSF eligibility, as E Fiber does in this docket. To the contrary, Utah Code § 54b-8b-15 states that the UUSF "***shall*** provide a mechanism for a qualifying carrier of last resort to obtain specific, predictable, and sufficient funds to deploy and manage," states that "a rate-of-return regulated carrier of last resort ***is eligible*** for payment" from the UUSF if its reasonable costs exceed its eligible revenues, and further states that a rate-of-return regulated carrier of last resort that is eligible to receive funds is "***entitled*** to a rate of return" prescribed by the FCC. Utah Code § 54-8b-15(2)(b), (4)(a), (5)(a) (emphasis added).

[5] In addition to the fact that the Commission does not have legal authority to apply the proposed 10-factor test to determine if Frontier is eligible to receive UUSF distributions, it is notable that the 10-factor test, first proposed by URTA, seeks to address a completely different issue. URTA filed comments on May 20, 2020 in this docket suggesting the Commission adopt the 10-factor test "when engaging in a public interest inquiry related to competitive entry into Small Rural Exchanges, if the incumbent seeks to exclude a Small Rural Exchange pursuant to Utah Code § 54-8b-2.1(3)." URTA Comments at 5. Frontier has not petitioned pursuant to Utah Code § 54-8b-2.1(3) to exclude any Small Rural Exchanges from the Applicants' petitions, so the 10-factor test proposed by URTA has no relevance to this docket. Moreover, E Fiber offers no explanation as to why the same 10-factor test should be used to decide issues about competitive entry into Small Rural Exchanges and eligibility for UUSF distributions.

E Fiber asks this Commission to ignore the plain language of Utah Code § 54-8b-15 that asserts that UUSF funds ***shall be*** distributed to a rate-of-return regulated carrier of last resort that meets the statutory criteria. In place of this plain language, E Fiber seeks to re-write the statute to allow the Commission to exercise its discretion to fashion additional UUSF eligibility criteria to determine whether a rate-of-return regulated carrier of last resort is eligible to receive USSF distributions. The statute does not grant such discretion to the Commission and the Commission should deny E Fiber's request. *See Utah Office of Consumer Services v. Public Service Comm'n*, 2019 UT 26, ¶ 37, 445 P.3d 464 (noting that Commission authority "authority is not so broad as to read statutory EBA safeguards out of existence); *Hi-Country Estates Homeowners Ass'n*, 901 P.2d at 1021 ("When a specific power is conferred by statute upon a commission with limited powers, the powers are limited to such as are specifically mentioned." (internal quotation marks omitted)).

Second, E Fiber's reliance on the Commission's rulemaking authority identified in Utah Code § 54-8b-15(2)(c) is misguided and does not grant the Commission the authority to create new rules in an adjudicative proceeding—particularly ones that contradict the statute the rule seeks to implement. That provision tasks the Commission to "develop, by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, and consistent with this section, policies and procedures to govern the administration of the fund." Utah Code § 54-8b-15(2)(c). But this Commission *already has* created a rule, in accordance with the Utah Administrative Rulemaking Act, to govern the administration of the fund. This Commission adopted Utah Admin. Code R746-8-401 to address a rate-of-return regulated carrier of last resort's eligibility to receive UUSF distributions, and that rule does not contain the 10-factor test proposed by E Fiber. The

rule also does not allow the Commission to impose—in any adjudicative proceeding—additional requirements on a carrier seeking UUSF eligibility. As the rule this Commission adopted regarding distributions to rate-of-return regulated carriers of last resort, such as Frontier, R746-8-401 "is enforceable and has the effect of law." Utah Code § 63G-2-202(2). This Commission cannot now change the rule as it applies to Frontier.

Third, E Fiber's reliance on Utah Code § 54-8b-15(2)(c)'s invocation to this Commission's authority to adopt rules under the Utah Administrative Rulemaking Act has no relevance to this adjudicative proceeding. This Commission's power to preside over this docket arises not from the Utah Administrative Rulemaking Act, but from the Utah Administrative Procedures Act in Title 63G, Chapter 4 of the Utah Code. While Utah Code § 54-8b-15(2)(c) empowers the Commission to implement the statute by adopting a rule *in a formal rulemaking setting with adequate public notice to interested stakeholders*, it does not empower the Commission to make ad-hoc rules in an adjudicative setting such as this one.

For all of these reasons, the Commission should deny E Fiber's request for the Commission either to apply E Fiber's 10-factor test or to otherwise rule that Frontier is not eligible to receive UUSF distributions. The statute does not grant to this Commission the discretion to declare that a rate-of-return regulated carrier of last resort that meets the statutory requirements is otherwise ineligible to receive UUSF distributions. As such, E Fiber's request that this Commission declare that Frontier—a rate-of-return regulated carrier of last resort—is ineligible to receive UUSF distributions must be dismissed.

CONCLUSION

For the foregoing reasons, the Commission should find that Frontier is entitled to judgment as a matter of law and that E Fiber's Application should be dismissed.

Dated: July 27, 2020

JAMES DODGE RUSSELL & STEPHENS

By: 

Phillip J. Russell
Counsel for Citizens Telecommunications Company of Utah d/b/a Frontier Communications

Certificate of Service
Docket No. 20-2618-01

I hereby certify that a true and correct copy of the foregoing was served by email this 27th day of July, 2020, on the following:

DIVISION OF PUBLIC UTILITIES

Chris Parker	chrisparker@utah.gov
Artie Powell	wpowell@utah.gov
Brenda Salter	bsalter@utah.gov
Ron Slusher	rslusher@utah.gov
Patricia Schmid	pschmid@agutah.gov
Justin Jetter	jjetter@agutah.gov
	dpudatarequest@utah.gov

OFFICE OF CONSUMER SERVICES

Michele Beck	mbeck@utah.gov
Alyson Anderson	akanderson@utah.gov
Robert Moore	rmoore@agutah.gov
Steven Snarr	stevensnarr@agutah.gov

E FIBER MOAB & E FIBER SAN JUAN

Kira M. Slawson	KiraM@blackburn-stoll.com
Brock Johansen	bjohansen@emerytelcom.com

URTA

Kira M. Slawson	KiraM@blackburn-stoll.com
Brett Anderson	BrettA@blackburn-stoll.com

/s/ *Phillip J. Russell*