

KIRA M. SLAWSON (7081)
BLACKBURN & STOLL, LC
Attorneys for E Fiber Moab, LLC
And E Fiber San Juan, LLC
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Telephone: (801) 521-7900

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Applications of E Fiber Moab, LLC)	
and E Fiber San Juan, LLC for Certificates)	
of Public Convenience and Necessity)	Docket No. 20-2618-01
to Provide Facilities-Based Local)	
Exchange Service and Be Designated as Carriers)	
Of Last Resort in Certain Rural Exchanges)	

**APPLICANTS' MEMORANDUM IN OPPOSITION TO FRONTIER'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

On July 28, 2020, Citizens Telecommunications Company of Utah d/b/a Frontier Communications (“Frontier”) filed a Motion for Partial Summary Judgment (the “Motion”). E Fiber Moab, LLC (“E Fiber Moab”) and E Fiber San Juan, LLC (“E Fiber San Juan”) (E Fiber Moab and E Fiber San Juan collectively the “Applicants” or “E Fiber”) hereby file this Memorandum in Opposition to Frontier’s Motion.

INTRODUCTION

Frontier calls its Motion a Motion for Partial Summary Judgment and indicates it is seeking dismissal of one of the claims for relief brought in this Docket by E Fiber.¹ However, review of Frontier’s Motion reveals that Frontier is actually asking the Utah Public Service Commission (“Commission”) to dismiss the Applications of E Fiber arguing that the Commission lacks subject matter jurisdiction because the services proposed to be offered by E

¹ Frontier’s Motion, p. 1.

Fiber are voice over internet protocol services that the state is prohibited from regulating under state and federal law.²

Then, if the Commission believes it does have subject matter jurisdiction over these Applications, Frontier asks the Commission to dismiss the E Fiber Applications on three grounds³:

1. E Fiber will offer services that cannot be regulated by this Commission, and therefore, it cannot be designated as “rate of return regulated;”⁴
2. E Fiber will not meet the obligations of a carrier of last resort; and
3. The Commission lacks legal authority to rule that Frontier is not eligible to receive distributions from the Utah Public Telecommunications Service Support Fund (“UUSF”) based on any criteria other than those set forth in Utah Code §54-8b-15(4) or Utah Admin. Code R746-8-401.

Frontier’s analysis of the subject matter issue and the “rate of return regulated” issue (both identified in Issue No. 1 above) misconstrue the services to be provided by E Fiber. As demonstrated below, the undisputed facts show that E Fiber is proposing to provide the exact same telecommunications services contained in the tariffs and provided by rate of return regulated Emery Telephone and Carbon/Emery Telcom. The Applicants are not proposing to provide interconnected voice over internet protocol service as that term is defined by state and federal law because their voice service does not require a broadband connection at the user’s location; the Applicants are merely using internet protocol as a transport technology in portions of the network. Therefore, the Commission has subject matter jurisdiction to consider these Applications and the services to be offered are eligible for rate of return regulation.

² Frontier’s Motion, p.2.

³ Id. at p.2.

⁴ The issues relating to subject matter jurisdiction and whether the services to be provided by E Fiber can be regulated by the State of Utah present the same issues and argument. Therefore, the Applicants have consolidated their response on these two issues in Section I of this Memorandum.

With the “carrier of last resort” issue (Issue No. 2 above), Frontier argues that the Applicants cannot be designated carriers of last resort because they have not yet constructed and deployed facilities to all customers in the five local exchanges where they are seeking competitive entry (the “Local Exchanges”). Additionally, Frontier argues that a carrier who relies on line extension tariffs to serve the most remote customers in an exchange does not meet its carrier of last resort obligations. This position is not supported by Utah Code §54-8b-2.1 (the “competitive entry statute”) or the Commission’s Administrative Rules. Moreover, the inclusion of line extension provisions in a Local Exchange Tariff is good public policy and does not mean a provider is not meeting its carrier of last resort obligations.

The final issue presented by Frontier is that the Commission lacks legal authority to adopt criteria for UUSF eligibility that differs from those in Utah Code §54-8b-15. Although Frontier has identified this as one of the grounds for dismissal of the Applications (as identified above), this argument, even if found in Frontier’s favor, does not warrant dismissal of the Applications because it is not dispositive of the legal issues raised in the Applications. Rather, to the extent Frontier’s UUSF eligibility is relevant to the consideration of the Applications, it would only be relevant for the public interest inquiry required by Utah Code §54-8b-2.1. Frontier has not moved for summary judgment on the public interest inquiry, so dismissal of the Applications on the basis of Frontier’s third argument is not appropriate.

As demonstrated in this Memorandum, Frontier’s Motion should be denied, and this matter should proceed to hearing.

**RESPONSE TO FRONTIER’S STATEMENT OF
UNDISPUTED MATERIAL FACTS**

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].

RESPONSE: Admit.

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].

RESPONSE: Admit.

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].

RESPONSE: Admit.

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].

RESPONSE: Admit.

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

RESPONSE: Disputed. This statement mischaracterizes the Direct Testimony of Brock Johansen on Lines 142-144. The Direct Testimony of Brock Johansen on lines 142-144⁵ provides:

“So, if the Applications are granted, Applicants will, by statute, be eligible for UUSF support if they provide voice service or wholesale broadband internet access service and their reasonable costs to provide such services exceed their revenue.”

This language is consistent with Utah Code §54-8b-15, which declares that networks capable of providing access lines, connections, and wholesale broadband internet service are eligible for UUSF. The Applicants are not “requesting that they be declared eligible for UUSF support.” Rather, they are requesting that they be granted competitive entry.⁶ If they are

⁵ Because the sentence begins on line 141, we have included the entire sentence.

⁶ See Applications, generally.

granted competitive entry into the Local Exchanges, the Commission is statutorily required to impose an obligation upon the Applicants to provide public telecommunications services to any customer or class of customers who requests it.⁷ By definition, this would make the Applicants “carriers of last resort” as that term is defined in Utah Code §54-8b-15(1)(b) and as rate of return regulated carriers of last resort, their networks capable of providing voice or wholesale broadband services are eligible for UUSF evaluation by the Commission.⁸

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.”)].

RESPONSE: Disputed. Paragraphs 4.c, 5, and 15 of the Applications identify the services E Fiber is proposing to provide:

- “Applicant is seeking authority to provide all forms of local exchange public telecommunications services as a carrier of last resort on a facilities-based basis.”⁹
- “Applicant 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 through its own operations.”¹⁰
- “Both public telecommunications services, as defined in Utah Code §54-8b-2(18) and advanced communications services, as defined in 47 U.S.C. §153(1) will be offered using these facilities.”¹¹

Additionally, the Testimony of Brock Johansen provides:

- Q. What types of service will the Applicants offer?
- A. The Applicants are seeking authority to provide all forms of local exchange 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,

⁷ U.C.A. §54-8b-2.1(4).

⁸ U.C.A. §54-8b-15.

⁹ Applications, ¶4. c.

¹⁰ Id. at ¶5.

¹¹ Id at ¶15.

and emergency services such as 911 and E911.¹²

The Proforma workbook provided as Confidential Exhibit 1 to Darren Woolsey's testimony also specifically identified special access revenue demonstrating that the E Fiber Applicants intend to provide special access circuits, which are public telecommunications services.¹³

Finally, in Applicants' Response to Frontier Data Request, DR 1.20, the Applicants identified the services they intend to offer:

1.20 Please describe and list each of the residential and business local exchange services the two E Fiber companies plan to offer throughout each of the exchanges included in its CPCN application request?

Response: Applicants plan to offer similar services to those listed in the Carbon/Emery Telcom Local Tariff and the Emery Telephone Local Tariff found at <https://emerytelcom.com/support/tariffs.html>.¹⁴

The E Fiber applicants refer to carrier grade voice over internet protocol service and high speed broadband as two of the services they will provide.¹⁵ The E Fiber voice service is a public telecommunications service,¹⁶ and the Applicants also intend to provide all other local exchange public telecommunications services as demonstrated above. Thus, Frontier's statement of undisputed material fact contained in paragraph six of the Motion, does not accurately reflect all the services that the E Fiber Applicants intend to provide. See also, E Fiber's Statement of Additional Material Facts below.

7. E Fiber does not "currently have fiber facilities constructed to enable them

¹² Direct Testimony of Brock Johansen, lines 438-443.

¹³ Direct Testimony of Darren Woolsey, lines 129-137, Exhibit 1, Tabs 9 and 11.

¹⁴ See E Fiber Responses to Frontier DR 1.20.

¹⁵ Application, ¶15.

¹⁶ As discussed *infra*, carrier grade voice over internet protocol service is distinguishable from interconnected voice over internet protocol as defined by the FCC and voice over internet protocol as defined by Utah Code. Carrier grade service does not require the use of a customer broadband connection to the Internet, while the other two internet protocol services absolutely require a customer broadband connection to the Internet.

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)].

RESPONSE: The Applicants admit that they do not currently have fiber facilities constructed to all customers, but as required by Utah Admin. R746-349-3, Applicants have identified they will construct facilities in the Local Exchanges on a five-year time frame and have included a build out plan for their fiber facilities in their Applications.¹⁷

Additionally, as stated in the Direct Testimony of Brock Johansen:

“The Applicants propose using a phased in approach. As fiber facilities are constructed in the Local Exchanges or acquired as discussed in more detail in the testimony below, the Applicants will offer service to the residents and businesses in the Local Exchanges. The Applicants anticipate having the fiber network completed in all of the Local Exchanges within five years, with service available to sections of the Local Exchanges shortly after receiving the CPCNs. Before a Local Exchange is completely built out with fiber facilities, customers will be able to request service subject to the Applicant’s line extension tariffs.”¹⁸

Additionally, it is material to the analysis to note that:

“Applicants will not be eligible to receive UUSF until well after facilities are constructed and customers are offered service. As the Applicants complete construction in each specific sector of the Local Exchanges, customers are offered Utah universal services. The carrier of last resort obligation means that the Applicants won’t be able to just build down the middle of town. Rather, they will be obligated to construct facilities and provide service to any customer or class of customer who reasonably requests it. Applicants will incur build costs nearly two years before they can hope to receive UUSF support for such facilities. Therefore, regulatory lag ensures that Applicants will not receive UUSF support until such facilities are constructed and after such customers are offered service.”¹⁹

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].

RESPONSE: Admit.

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-

¹⁷ *Id.* at ¶3, 11, and 15; See also Direct Testimony of Darren Woolsey, Exhibit 1.

¹⁸ Direct Testimony of Brock Johansen, lines 110-117.

¹⁹ *Id.* at lines 183-192.

338].

RESPONSE: Admit.

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].

RESPONSE: Disputed. The E Fiber Applications do not seek to declare Frontier ineligible for UUSF funding. Rather, the Testimony of Brock Johansen in lines 193-368 responded to the public interest factors issue raised by the Comments of the Office of Consumer Services (“OCS”) and the Utah Rural Telecom Association (“URTA”). Specifically, the OCS and the Utah Rural Telecom Association have expressed concern with the possibility that two carriers of last resort may qualify for UUSF for building duplicative networks in the same local exchange.²⁰ Brock Johansen reviewed the public interest factors identified by the OCS and URTA and stated that consideration of those ten factors argues in favor of granting Applicants’ CPCN and designation of Applicants as the carriers of last resort, eligible for UUSF in the Local Exchanges.²¹ Additionally, the Applicants have made it very clear that they cannot make a business case for deploying this extended fiber build unless they are eligible for UUSF.²²

E FIBER’S STATEMENT OF ADDITIONAL MATERIAL FACTS

1. Brock Johansen is the Chief Executive Officer of Emery Telephone, Carbon/Emery Telcom, Inc., Hanksville Telcom, Inc., and Emery Telcom HC, Inc. (collectively “Emery”) Emery Telcom HC, Inc. is the sole member of each of the E Fiber entities.²³

²⁰ See Comments of OCS and Comments of URTA, generally, filed with the Commission on May 20, 2020.

²¹ Direct Testimony of Brock Johansen at lines 206-210.

²² *Id.* at lines 196-199.

²³ Direct Testimony of Brock Johansen, lines 3-8.

2. E Fiber will offer the same voice service that is offered to all the customers in the exchanges of Emery, Carbon, and Wayne counties by Emery Telephone, Carbon/Emery Telcom, Inc., and Hanksville Telcom, Inc.²⁴

3. E Fiber has defined this service as “carrier grade VoIP” for purposes of these Applications, but that just means that the service uses internet protocol, packet based technology at some points in the network to transmit or transport the voice signals.²⁵

4. Historically, telephone voice service was provided over copper wires using traditional circuit switched architecture. Traditional phones use an analog signal that originally required a continuous circuit between the calling and called party. With the advent of time-division multiplexing (“TDM”), individual channels could be derived on a common transmission facility and the use of circuit switching could establish temporary connections between TDM channels on different facilities. This allowed for more efficiency in the public switched telephone network.²⁶

5. Emery and its affiliates adopted TDM technology in its transport network.²⁷

6. TDM and circuit switching transport are now evolving to include packet-based transport technology that uses internet protocol transport technology together with TDM technology.²⁸

7. Emery and the E Fiber entities have found engineering and cost efficiencies can be recognized when offering voice services using IP technology in the transport portion of the

²⁴ Declaration of Brock Johansen, ¶ 4.

²⁵ Id. at ¶5.

²⁶ Id. at ¶6.

²⁷ Id. at ¶7.

²⁸ Id. at ¶8.

network, but the provided by Emery Telcom, and to be provided by E Fiber does not rely on, require, or utilize a broadband connection at the customer's location.²⁹

8. Emery Telcom provides traditional telephone service across a state-of-the-art network. Customers connect to the network at a fixed location in their home using a network powered and battery backed up traditional telephone connected into a RJ11 jack. For those customers on copper facilities, this analog signal travels across twisted pair copper to access equipment in Emery Telcom offices or remote cabinets. The access equipment is connected to a telephone Class 5 switch via fiber, across a dedicated private IP transport network. For customers on fiber facilities, the analog signal travels across the copper wire in the home to an Optical Network Terminal ("ONT") that can be installed on the side of the home or placed inside the outer wall of the home to take advantage of the customer's power and climate control. The ONT communicates with the switch through access equipment across a dedicated private IP transport network. Emery Telcom's voice services are not dependent upon an Internet connection in the customer's home.³⁰ If a call originates and terminates inside the Emery Telcom network, then the call never leaves the Emery Telcom network. For calls originating or terminating outside the Emery Telcom network, the Emery Telcom switch is connected to a designated tandem switch via one of two redundant transport systems: (a) a TDM transport system; or (b) an IP over a private peering connection transport system.³¹

9. As a regular Class 5 switch, the Emery Telcom switch also has TDM direct trunks and IP dedicated direct trunks to other carriers. The switch also provides other Class 5 legacy phone services such as integrated service digital networks ("ISDN"), primary rate interface

²⁹ Id. at ¶9.

³⁰ Id. at ¶10.

³¹ Id. at ¶11.

(“PRI”), or traditional direct inward dialing (“DID”) service over TDM. Emery Telecom delivers these other traditional telecommunication services over ports on the access equipment. This access equipment provides service between T1 endpoints, by taking the physical connection to the T1 signals and packetizing the T1s for transport over Ethernet. In addition to supporting IP protocols, Emery’s switch is compatible with traditional digital loop carrier (“DLC”) TDM signaling protocols.³²

10. The services to be provided by E Fiber will utilize the Emery Telecom switch and be provided exactly the same as the services provide by Emery Telephone, Carbon/Emery Telecom, Inc., and Hanksville Telecom, Inc.³³

11. Internet traffic on the Emery Telecom network is different. It is provided by a non-regulated affiliate and it originates on a customer’s device connected directly to a home router through a residential gateway port or via WIFI. If the customer owns the home router it is connected to the ONT through a bridged ethernet port and receives a public IP address. In some models of the ONT there is a built in WIFI home router, and customers can connect to this router via WIFI or directly through the ethernet port and receive a private IP address. The ONT is connected to a core router that has peering directly to the public Internet.³⁴

12. A customer who has a broadband connection at her location could connect a VoIP phone to the home router and receive voice service from any provider connected to the public Internet, but in that instance would have a public IP or a private IP translated to a public IP for that voice device. This would be VoIP service that requires a broadband connection, but this is not the voice service the E Fiber entities will provide.³⁵

³² Id. at ¶12.

³³ Id. at ¶13.

³⁴ Id. at ¶14.

³⁵ Id. at ¶15.

13. Frontier’s Local Tariff which can be found at http://carrier.frontiercorp.com/crtf/tariffs/u/46/UT/local/Local_Tariff_UT.pdf includes a line extension policy in Schedule No. A-2, Sheets 2 and 3.³⁶

14. The Frontier line extension policy is similar to the Emery Telephone line extension policy which is found at <https://emerytelcom.com/support/tariffs/Emery-Local-Tariff.pdf>, Sheets No. 17 and 49.³⁷

15. Emery’s line extension policy provides that Emery will extend lines at no charge if the cost of construction is less than 3 times the annual primary service revenue. If the total construction costs exceed 3 times the annual primary service revenue, the cost to the customer will be total costs less 3 times the total annual primary service revenue. This is the same line extension policy that E Fiber will adopt in its tariff.³⁸

STANDARD OF REVIEW

Summary judgment is only appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”³⁹ In determining whether a genuine issue of fact exists, all evidence and the reasonable inferences that can be drawn from the evidence must be viewed “in the light most favorable to the nonmoving party.”⁴⁰ “It only takes one sworn statement under oath to dispute

³⁶ Id. at ¶16 and 17.

³⁷ Id. at ¶18.

³⁸ Id. at ¶19.

³⁹ Utah R. Civ. P. 56(c).

⁴⁰ Suarez v. Grand County, 2012 UT 72, ¶ 18, 296 P.3d 688.

the averments on the other side of the controversy and create an issue of fact for purposes of summary judgment.”⁴¹

ARGUMENT

I. THE COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THE MATTERS PRESENTED IN THE E FIBER APPLICATIONS AND THE E FIBER SERVICES ARE SUBJECT TO STATE REGULATION.

A. The Commission is Granted the Authority to Determine Competitive Entry.

Applicants have requested competitive entry into the Local Exchanges under Utah Code §54-8b.2.1. Certainly, the legislature has granted the Commission jurisdiction to grant or deny competitive entry pursuant to the competitive entry statute, U.C.A. §54-8b-2.1. Utah Code §54-8b-2.1 provides:

(1) Notwithstanding any provision of Section 54-4-25 to the contrary, the commission may issue a certificate to a telecommunications corporation authorizing it to compete in providing local exchange services or other public telecommunications services ton all or part of the service territory of an incumbent telephone corporation. . .

(2) The commission shall issue a certificate to the applying telecommunications corporation if the commission determines that:

(a) the applicant has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for; and

(b) the issuance of the certificate to the applicant is in the public interest.

(3) (a) The commission shall process the application in accordance with Title 63G, Chapter 4, Administrative Procedures Act.

(b) Each telecommunications corporation holding a certificate to provide public telecommunications service within the geographic area where an applicant is seeking to provide telecommunications service shall be provided notice of the application and granted automatic status as an intervenor.

(c) An intervening incumbent telephone corporation serving fewer than 30,000 access lines in the state may petition the commission to exclude from an application filed pursuant to Subsection (1) any local exchange with fewer than 5,000 access lines that is owned or controlled by the intervening incumbent telephone

⁴¹ Zundel v. Magana, 2015 UT App 69, 347 P.3d 444.

corporation. Upon finding that the action is consistent with the public interest, the commission shall order that the application exclude such local exchange.

(d) The commission shall approve or deny the application under this section within 240 days after it is filed. If the commission has not acted on an application within 240 days, the application is considered granted.

(4) If the Commission issues a certificate to a competitive telecommunications corporation to provide local exchange services in a local exchange that has fewer than 5,000 access lines and that is controlled by an incumbent with fewer than 30,000 access lines in the state, the commission shall impose an obligation on the competitive telecommunications corporation to provide public telecommunications services to any customer or class of customers who requests services within the local exchange. The competing telecommunications corporation's obligation to serve shall be no greater than that of the incumbent telephone corporation.

Utah Code §54-8b-2.1 contemplates allowing competitive entry into local exchanges and tasks the Commission with granting or denying such entry upon a finding that the applicant has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for; and such competitive entry is in the public interest, as determined by the Commission.⁴²

B. The Service Proposed by E Fiber is Subject to Rate of Return Regulation.

Frontier claims that the services that E Fiber proposes to offer in the Local Exchanges are interconnected VoIP service in the Local Exchanges, and therefore, E Fiber is not offering “public telecommunications services” that are subject to rate of return regulation under state. As result, Frontier claims, the Commission lacks jurisdiction to consider the Applications. There are several problems with this analysis.

⁴² Pursuant to Subsection 3(c), Frontier, as the incumbent serving fewer than 30,000 access lines in the state could petition the commission to exclude from the application any local exchange with fewer than 5,000 access lines that is owned or controlled by Frontier, but Frontier has indicated in its Comments filed in this docket it is not requesting that the Commission exclude the Local Exchanges from the Applications. See Frontier Comments filed with the Commission, dated May 20, 2020, p. 4.

1. E Fiber Plans to Provide All Public Telecommunications Services.

The Applications, Testimony, and Data Request Responses cited above demonstrate that the E Fiber entities propose to provide “all forms of local exchange public telecommunications services as carriers of last resort on a facilities-based basis”⁴³ including “access to ordinary intraLATA and interLATA message toll calling, operator services, directory assistance, directory listings, and emergency services such as 911 and E911.”⁴⁴ And if that evidence weren’t clear enough, the Applicants further indicated they “plan to offer similar services to those listed in the Carbon/Emery Telcom Local Tariff and the Emery Telephone Local Tariff found at <https://emerytelcom.com/support/tariffs.html>.”⁴⁵ The services include special access service, ISDN, PRI, DID services.⁴⁶ These are public telecommunications services under Utah Code⁴⁷ which are subject to rate of return regulation under Utah Code §54-4-4.

Therefore, Frontier’s assertion that the Applicants propose to offer “two services” is not accurate or supported by the evidence.

2. The Services to be Provided by E Fiber are Public Telecommunications Service.

Additionally, the service that the Applicants propose to provide is the very same voice service that is currently offered by Emery Telephone, Carbon/Emery Telcom, Inc., and Hanksville Telcom, Inc..⁴⁸ As further explained in the Declaration of Brock Johansen, the voice service will be deployed like the local exchange service offered by Emery Telecom.⁴⁹ Emery

⁴³ Direct Testimony of Brock Johansen, lines 438-443.

⁴⁴ Id.

⁴⁵ Applicants’ Response to Frontier DR 1.20, dated July 15, 2020.

⁴⁶ Declaration of Brock Johansen, ¶12.

⁴⁷ Utah Code §54-8b-2, which provide that public telecommunications service “means 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.

⁴⁸ Declaration of Brock Johansen, ¶4.

⁴⁹ Id. at ¶13.

Telcom provides traditional telephone service using a state-of-the-art network that used TDM and packet-based transport. Voice customers connect to the network at a fixed location in their home using a network powered and battery backed up traditional telephone connected to a RJ11 port located on an Optical Network Terminal (ONT) installed on the side of the home, or placed inside the outer wall of the home to take advantage of the customer's power and climate control. The E Fiber service is a voice services that does not require a broadband internet connection at the customer's home. Telephone service transmission from the customer's location to the Class 5 carrier switch uses optical equipment using private IP addressing across a dedicated private transport network segment. The Applicants have, perhaps confusingly, defined their service as "carrier grade VoIP" for purposes of these applications.⁵⁰ However, it doesn't matter what the service is called. The appropriate inquiry is to look at the actual service provided.

Historically, telephone voice service was provided over copper wires using traditional circuit switched architecture. Traditional phones use an analog signal that originally required a continuous circuit between the calling and called party. With the advent of TDM, individual channels could be derived on a common transmission facility and the use of circuit switching could establish temporary connections between TDM channels on different facilities. This allowed for more efficiency in the public switched telephone network.⁵¹

Emery and its affiliates adopted TDM technology in its transport network.⁵² More recently, the TDM and circuit switching transport have further evolved to include a packet-based transport technology together with TDM technology.⁵³ The packet-based IP technology when utilized for transport in the network, allows facilities-based providers, such as Emery Telephone

⁵⁰ Id. at ¶5.

⁵¹ Id. at ¶6.

⁵² Id. at ¶7.

⁵³ Id. at ¶7 and 8.

and E Fiber, to recognize engineering and cost efficiencies, which result in lower costs to provide the voice service.⁵⁴ Use of packet-based IP technology in the transport of voice signals does not, however, transform the E Fiber voice service into interconnected voice over internet protocol that is beyond the jurisdiction of the Commission.

In 2004 the Federal Communications Commission (“FCC”) addressed the issue of using packet based transport service for transport within a provider’s network and held that the mere use of IP technology in the transport of voice signals does not transform the voice service from telecommunications service to information service.⁵⁵

Similarly, the use of IP transport technology in addition to the TDM transport, does not convert E Fiber’s service from a public telecommunications service which should be eligible for to rate of return regulation under Utah Code §54-4-4.

C. State of Utah Prohibitions on Regulation of VoIP and Federal Preemption Do Not Apply to Carrier Grade VoIP Service as Proposed by E Fiber Entities.

Frontier claims that the voice services proposed by the E Fiber entities cannot be regulated by the State of Utah because of federal preemption and state statute. Specifically, Frontier claims that federal law preempts state regulation of interconnected VoIP service; and Utah Code §54-19-103 prohibits state regulation of VoIP service.⁵⁶ However, with these issues, definitions matter, and the voice services proposed by the E Fiber entities do not meet the definition of “voice over internet protocol service” adopted by the State of Utah in Utah Code §54-19-102. Utah Code §54-19-102 defines voice over internet protocol service as:

(2) “Voice over internet protocol service” means any service that:

⁵⁴ Id. at ¶10.

⁵⁵ *In the Matter of the Petition for Declaratory Ruling that AT&T Phone to Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-261, FCC 04-97, ¶1 (the “AT&T Order”).

⁵⁶ See Frontier Motion, pp. 6-9.

- (a) enables real time, two-way voice communication originating from or terminating at the user's location in Internet protocol or a 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. (emphasis added).*

While the State of Utah in Utah Code Section 54-19-103 prohibits a state agency from regulating “voice over Internet protocol” service, the service being proposed by the E Fiber companies does not meet the definition of VoIP service contained in Utah Code 54-19-102 because the E Fiber service will not require, rely on, or utilize a broadband connection from the user’s location as specifically required by Utah Code 54-19-102(2)(b).⁵⁷ Therefore, the E Fiber voice service is not VoIP under state law and is not precluded from rate of return regulation.⁵⁸

Similarly, on the federal side, 47 CFR § 9.3 defines “interconnected VoIP service” as:

- (1) An interconnected Voice over Internet Protocol (VoIP) service is a service that:*
 - (i) Enables real-time, two-way voice communications;*
 - (ii) **Requires a broadband connection from the user's location;***
 - (iii) Requires internet protocol-compatible customer premises equipment (CPE);*
 - and*
 - (iv) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. (emphasis added)*

Again, the federal definition of interconnected VoIP requires a broadband connection from the user’s location. As stated above, E Fiber’s voice service does not require, rely on, or utilize a broadband connection at the user’s location.⁵⁹

⁵⁷ Declaration of Brock Johansen, ¶9.

⁵⁸ Additionally, Utah Code §54-19-103(2)(c)(v) specifically states that the regulatory prohibition in Subsection (1) does not affect or modify the application of Section 54-8b-2.1.

⁵⁹ Id. at ¶9.

Frontier relies on the Commission’s Order of Dismissal *In the matter of the Request for Agency Action of Carbon/Emery Telcom, Inc. v. 8x8, Inc.* (“8x8”)⁶⁰ and the *Charter Advanced Services (MN), LLC v. Lange* (the “Charter”)⁶¹ case in support of its federal preemption issue. Frontier argues that under the 8x8 and Charter cases any voice service that uses an internet protocol technology in any manner ceases to be a telecommunications service and transforms to the type of voice over internet protocol service that would be preempted by federal law.⁶² Neither the 8x8 nor the Charter cases went so far.

The 8x8 case held that the service being provided by 8x8 was nomadic VoIP, “like the service at issue in Vonage.”⁶³ There is no evidence that the E Fiber service is nomadic VoIP. Rather, as Brock Johansen has provided, no broadband connection is required at the customer’s home for the E Fiber voice service,⁶⁴ and customer connect to the E Fiber network at a fixed location in their home.⁶⁵

Additionally, the Charter case is inapposite to the facts presented by E Fiber. In the Charter case, Charter’s voice product “Spectrum Voice” was an “interconnected VoIP service” operated by Charter allowed subscribers to exchange calls with traditional telephones, transmitting voice signals as IP data packets via a broadband internet connection. According to Charter, in its brief filed with the Eighth Circuit on appeal:

- Charter must activate a broadband connection to a location in order to offer Spectrum Voice.

⁶⁰ *In the matter of the Request for Agency Action of Carbon/Emery Telcom, Inc. v. 8x8, Inc.*, Docket No. 12-2302-01, Order of Dismissal for Lack of Jurisdiction (Nov. 27, 2012, Utah Commission) (“8x8 Order of Dismissal”).

⁶¹ 903 F3d 715,720 (8th Circuit 2018).

⁶² Frontier’s Motion, p. 7-8.

⁶³ 8x8 Order of Dismissal, p. 8-9 (referring to *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (FCC 04-267 Memorandum and Opinion and Order, released November 12, 2004).

⁶⁴ Declaration of Brock Johansen, ¶9.

⁶⁵ *Id.* at ¶10.

- Charter offers Spectrum Voice as a service option for customers who subscribe to Charter’s internet and cable television services.
- Charter does not attempt to sell Spectrum Voice separately.⁶⁶

The Spectrum Voice required a broadband connection from the user’ location and was, therefore, “interconnected VoIP” as defined by 47 CFR §9.3 As stated above, the service proposed by E Fiber is not an “interconnected VoIP service” as this term is defined by the FCC (or the State of Utah) because the E Fiber service does not rely on or require a broadband connection at the user’s home. Unlike the Spectrum Voice service, the E Fiber entities will provide telephone service to end users who do not have a broadband connection to the Internet.

The E Fiber service is not the same VoIP service that has been prohibited by state law or preempted by federal law.⁶⁷ It is a public telecommunications service that is subject to rate of return regulation under Utah Code §54-4-4. Frontier’s Motion for Summary Judgment on this issued should be denied.

II. E FIBER CAN BE DESIGNATED A CARRIER OF LAST RESORT

A. The Competitive Entry Statute and Administrative Rules Allow for Construction of Facilities After the CPCN is Granted.

Frontier argues that the Applicants cannot be designated a carrier of last resort unless or until they have constructed and deployed facilities to all customers in a local exchange. This argument is not supported by the current competitive entry statute, Utah Code §54-8b-2.1. As set

⁶⁶ Brief of Charter Advanced Services, *Charter Advanced Services (MN), LLC v. Lange*, 2017 WL 4847408 (C.A. 8 Appellate Brief, p. 7).

⁶⁷ Additionally, it is interesting to note that in both the cases cited by Frontier, each of the voice providers was seeking to avoid state regulation of their services. On the contrary, in this case, E Fiber is requesting to be a rate of return regulated carrier of last resort. They are voluntarily subjecting themselves to the regulatory authority of this Commission and are specifically asking that their services be regulated. This is not a situation where the State is trying to assert regulatory authority over an interconnected VoIP provider.

forth above, the competitive entry statute contemplates the Commission issuing a certificate to competing providers if the provider has the appropriate resources and the Applications are found to be in the public interest. If a provider is seeking entry into a local exchange of fewer than 5,000 access lines, owned or operated by an incumbent with fewer than 30,000 access lines in the state, the carrier seeking competitive entry into a small rural exchange will be required to provide service to all customers or class of customers who request it.

Before obtaining a certificate of public convenience and necessity (“CPCN”) from the Commission pursuant to Utah Code §54-8b-2.1, a provider has no authority to provide public telecommunications service in the state. It simply does not make sense that a carrier would go to the expense of constructing and installing facilities to every customer in a local exchange **before** even having the regulatory authority to provide service to those same customers. If the competitive entry is not approved, the provider will have invested in construction and installation of facilities it cannot use to provide public telecommunication services. This would be an absurd result and is not consistent with the Commission’s rules. Utah Admin. Code R746-349-3 provides that an applicant for a certificate to provide competitive local exchange service shall include “a statement as to whether the telecommunications corporation intends to construct its own facilities.”⁶⁸ The Commission does not require that the Applicant provide a statement that such facilities have already been constructed. On the contrary, the Commission asks the Applicant to provide an implementation schedule identifying the date service will begin.⁶⁹ These rules demonstrate that the Commission contemplates that facilities will need to be constructed by the Applicants and service is not expected to begin immediately upon granting the CPCNs.

⁶⁸ R746-349-3.3.

⁶⁹ R46-349-3.6 and 13.

This is precisely what E Fiber is suggesting. The E Fiber entities are each seeking a CPCN to provide services in the Local Exchanges. If the CPCNs are issued, E Fiber will proceed with construction and installation of facilities in the Local Exchanges in a planned manner, as described in the Applications, with the ultimate obligation to serve all customers or classes of customers who request service.⁷⁰

As facilities are constructed in the local exchanges, to the extent those facilities are determined to be reasonable and prudent, their costs will be added to the rate base of E Fiber and will be included in E Fiber's annual report for UUSF calculation. Therefore, the "benefit" of being designated a carrier of last resort, which is eligibility for UUSF support, will not accrue to E Fiber unless and until facilities are constructed. To the extent the Commission deems it in the public interest to add milestone requirements to the E Fiber build out plan and CPCNs it can certainly do so, but the fact that the E Fiber entities have to construct the facilities should not preclude the granting of the CPCN in the first place.

B. Line Extension Provisions Are Good Public Policy and Do Not Mean a Carrier of Last Resort is Unable to Meet its Obligations.

Frontier also makes the claim that because E Fiber will have a line extension provision in its tariff, it "admits it may never be able to meet COLR obligations."⁷¹ Line extension tariffs are well established in Utah and run contrary to Frontier's position—even Frontier has a line extension tariff for its local exchange service in areas where it is a carrier of last resort.⁷² Furthermore, line extension tariffs are good public policy. It is not prudent for a carrier to build to each and every customer in an exchange no matter how remote. Line extension tariff's balance

⁷⁰ U.C.A. §54-8b-2.1(4).

⁷¹ Frontier Motion, p. 12.

⁷² Declaration of Brock Johansen at §16.

the public interest of providing service to customers who request it with the assurance that the costs to build to such customers will be reasonable. This further demonstrates the Commission's ability to regulate carrier of last resort responsibilities. The Commission has the ability to determine when it is prudent to require a certificated carrier to build to a particular customer. E Fiber will have a line extension provision in its tariffs, similar to that of Emery Telephone.⁷³ This should not preclude the Commission from granting the Applications. Frontier's Motion for Summary Judgment on this issue should be denied as a matter of law.

III. CHANGES TO THE CRITERIA FOR UUSF ELIGIBILITY ARE NOT REQUIRED FOR APPROVAL OF E FIBER'S CPCN APPLICATIONS.

The final issue that Frontier has moved for summary judgment on is the claim that the Commission lacks legal authority to adopt criteria for Utah Public Telecommunications Service Support Fund ("UUSF") eligibility that differ from those in Utah Code §54-8b-15. The OCS and URTA have raised concerns in their Comments filed with the Commission about two carriers of last resort being eligible for UUSF to construct overlapping duplicative networks. The Applicants agree with the OCS and URTA that it is not in the public interest for duplicative networks to be funded by the UUSF, but also acknowledge that the Commission is precluded from adopting criteria for UUSF eligibility differ from the criteria established in Utah Code §54-8b-15 and Utah Admin. Code R746-8-401.⁷⁴ Thus, judgment by this Commission that it is

⁷³ Id. at ¶18.

⁷⁴ Applicant's acknowledgment that the Commission cannot adopt criteria for UUSF eligibility that differ from the criteria established in Utah Code §54-8b-15 should not be taken as acquiescence that the concerns about two carriers of last resort being eligible for UUSF support to fund construction of duplicative networks cannot be addressed in the context of the current statutes and rules. Review of Utah Code §54-8b-15 and R746-8-401 demonstrates that the Commission is not required to adopt criteria for UUSF eligibility that differ from those created by the Utah Legislature and set forth in Utah Code §54-8b-15. Both the statute and the rule require that the Commission determine whether a provider's costs to provide public telecommunications services and wholesale broadband Internet access services are reasonable before they will be considered for UUSF purposes. In fact, even Frontier, in its Motion for Summary Judgment, notes that a carrier of last resort's costs must be determined reasonable to receive UUSF distributions.⁷⁴ If the Commission determines any provider's costs are not reasonable, they are excluded from a company's eligible costs for UUSF calculation purposes. Historically, the determination of "reasonable

precluded from adopting criteria for UUSF eligibility which are not included in Utah Code §54-8b-15 is appropriate. Nevertheless, such a determination does not warrant dismissal of the Applications because this issue is not dispositive of either of the two requirements for competitive entry.

E Fiber applied for competitive entry into the Local Exchanges pursuant to Utah Code §54-8b-2.1. Utah Code §54-8b-2.1 does not require the Commission to adopt criteria for UUSF eligibility that differs from Utah Code §54-8b-15. Rather, as previously discussed herein, Utah Code §54-8b-2.1 requires the Commission to review the Applications to determine whether the Applicants have the technical, managerial, and financial resources to provide the public telecommunications services. If the Applicants have the requisite resources, the Commission must establish the public interest factors and determine whether such factors are met in this case.

The legislature has granted the Commission the authority and discretion to determine what constitutes the public interest in Utah Code §54-8b-2.1(2)(b). In making this determination, the Commission is authorized to identify particular factors in determining the public interest, weigh those factors, and determine whether those factors are met in the context of each Application. This is a factual determination to be made by the Commission based on the full and complete record in the case and supports a hearing to examine these factors.

costs” was performed each time a company sought an increase to their UUSF disbursement. Since the revision of Utah Code § 54-8b-15, each year the Commission, through the Division reviews each carrier of last resort’s annual reports, determines the carrier’s “reasonable costs” (as required by statute and rule), and uses the “reasonable costs” in the annual UUSF calculation.

The Commission has always had, and continues to have under Utah Code §54-8b-15 and R746-8-401, the obligation and responsibility to determine the reasonableness of all costs expended by rate of return regulated carriers. If the Commission believes that as a matter of public policy it is not reasonable for UUSF dollars to be spent to fund the deployment of duplicative facilities by competing carriers in a single local exchange, the Commission already has the statutory and regulatory authority to deem any duplicative expenditures unreasonable, and thus not eligible for UUSF support. No statutory or administrative rule change is needed, and the Commission is not required to adopt criteria for eligibility inconsistent with Utah Code §54-8b-15.

As demonstrated above Frontier's eligibility for UUSF does not need to be determined in this case. To the extent Frontier's eligibility for UUSF is relevant to the Applications, it would only be relevant for the public interest inquiry, and it would be one factor, in a list of many public interest factors the Commission could consider in the context of granting or denying Applicant's competitive entry. Frontier has not moved for summary judgment on the public interest inquiry, so that matter is not properly before the Commission and the parties should proceed to hearing on that issue.

Further, Utah Code §54-8b-2.1(4) provides a process for competitive entry into a local exchange that has fewer than 5,000 access lines and that is controlled by an incumbent with fewer than 30,000 access lines in the state. As rate of return regulated carriers of last resort, these incumbents can receive UUSF provided the Commission deems their regulated costs reasonable and in excess of their regulated revenues. Frontier's reliance on the theory that a competitor cannot be granted competitive entry into these exchanges because the incumbent might qualify for UUSF in the future would make it impossible for a competitor to ever be granted competitive entry as allowed in Utah Code §54-8b-2.1(4). Obviously, such an interpretation is incorrect. While the Commission might look at the effect of duplicative competitors and the effect on the UUSF when weighing the public interest, it cannot invalidate every competitive company merely because the incumbent might receive UUSF at some future date, or it would be violating the Utah Code §54-8b-2.1(4) which contemplates competitive interest when the corresponding public benefit outweighs the potential burdens on the UUSF.⁷⁵ Again, however, Frontier has not

⁷⁵ See *WWC Holding Co. v. Public Service Commission of Utah*, 2002 UT 23, ¶13, 44 P.2d 714 (2002) ("The [commission] Order does find that designating an additional ETC in rural areas—or as WWC expresses it, allowing competition in rural areas—may increase burdens on the State [UUSF] Fund. The Order does not, however, say that because of this the PSC will never allow competition in rural areas by refusing to designate additional rural ETCs. Rather the Order says that in the *absence* of corresponding public benefits, increasing the burdens on the State [UUSF] Fund is not in the public interest. . .the PSC's Order is not against competition per se, but, rather, merely

moved for summary judgment on the public interest inquiry so the issue of whether granting the Applicants competitive entry will be decided by the Commission at hearing.

CONCLUSION

Frontier's Motion for Partial Summary Judgment should be denied. The Applicants have identified genuine issues of material fact in the record, including the Applications, the Testimony, the Data Request Responses, and the Declaration of Brock Johansen. Contrary to the arguments of Frontier in its Motion, the Applicants have established they will be providing public telecommunications services, which are eligible for rate of return regulation in Utah, to all customers and classes of customers in the local exchanges who request service. While Frontier's Motion for Summary Judgment on the issue of the Commission's legal authority to adopt criteria for UUSF eligibility is well taken, that argument does not warrant dismissal of E Fiber's Applications. Under Utah law, the Applicants are eligible for competitive entry into the Local Exchanges to provide public telecommunications services if they have the technical, managerial, and financial resources required to provide public telecommunications services, and if the Commission finds competitive entry is in the public interest. There is no evidence disputing E Fiber's technical, managerial, or financial resources, and Frontier has not moved for summary judgment on whether the Applications are in the public interest, thus dismissal of the Applications should be denied.

recognizes that in *some instances* competition in *rural areas* by multiple ETCs receiving state universal service support may not be in the public interest."

Respectfully submitted this 25th day of August, 2020.

BLACKBURN & STOLL, LC



Kira M. Slawson
Attorneys for E Fiber Moab, LLC and E Fiber San
Juan, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2020, I served a true and correct copy of APPLICANTS' MEMORANDUM IN OPPOSITION TO FRONTIER'S MOTION FOR PARTIAL SUMMARY JUDGMENT via e-mail transmission to following persons at the e-mail addresses listed below:

Division of Public Utilities

William Powell

Brenda Salter

Wpowell@utah.com

bsalter@utah.gov

dpudatarequest@utah.gov

Office of Consumer Services

Michelle Beck

Alyson Anderson

mbeck@utah.gov

akanderson@utah.gov

Assistant Utah Attorneys Generals

Justin Jetter

Robert Moore

jjetter@utah.gov

rmoore@utah.gov

Phillip J. Russell

Gregory C. Brubaker

prussell@jdrslaw.com

Gregory.c.brubaker@ftr.com

Brett Anderson

BrettA@blackburn-stoll.com

/s/Kira M. Slawson