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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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<p>In the Consolidated Matter of:</p> <p>Applications of E Fiber Moab LLC and E Fiber San Juan LLC for Certificates of Public Convenience and Necessity to Provide Facility—Based Local Exchange Services and be Designated as Carriers of Last Resort in Certain Rural Exchanges</p>	<p>Docket No. 20-2618-01</p> <p>The Office of Consumer Services’ Rule 56(d) Motion for a Continuance to Conduct Discovery.</p>
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Pursuant to Utah Code § 54-10a-301, UTAH ADMIN. CODE r. 746-1-101 through 801 and Utah Rule of Civil Procedure 56(d), the Utah Office of Consumer Services (“OCS”) submits this Rule 56(d) Motion for a Continuance to Conduct Discovery before the Utah Public Service Commission (“PSC”) rules on portions of Citizens Telecommunications Company of Utah d/b/a Frontier Communications’ (“Frontier”) Motion for Partial Summary Judgment (“SJM”). The Division of Public Utilities (“DPU”) has seen a draft of this Motion and has represented that they support this Motion.

**FACTS**

On April 20, 2020, E Fiber Moab LLC and E Fiber San Juan LLC (collectively “E Fiber”) filed applications, pursuant to Utah Code § 54-8b-2.1, seeking, among other things,

Certificates of Public Convenience and Necessity for competitive entry into local exchange territories presently served by Frontier and designation of the E Fiber companies as a “rate-of-return” regulated carriers of last resort (“COLR”). Exhibit A. Declaration of Robert J. Moore at ¶ 1. On May 20, 2020, the OCS filed initial comments focusing on the interplay between Utah Code §§ 54-8b-2.1 and 54-8b-15 and the negative policy implications of two rate-of-return COLRs in the same territory both with access to the Utah Universal Service Fund (“UUSF”). *Id.* at ¶ 2.

On June 24, 2020, the E Fiber companies filed direct testimony making some incidental reference to voice over internet protocol (“VoIP”). *Id.* at ¶ 3. On July 7, 2020, the OCS served its first set of discovery on all parties and served a second set of discovery on Frontier on July 17, 2020. *Id.* at ¶ 4. Frontier filed the instant Motion for Partial Summary Judgment on July 27, 2020 arguing, in part, that because the applications seek to provide service utilizing VoIP, federal law preempts the PSC from exercising subject matter jurisdiction over the applications and Utah Code § 54-19-103(1) prevents the E Fiber companies from being designated rate-of-return regulated COLR. SJM at 7-11. While the prior record contains some vague reference to VoIP services, it was not until the filing of the SJM that the OCS had knowledge that Frontier would challenge the application on the basis that the E Fiber companies’ use of VoIP places the application outside of the PSC’s jurisdiction. Exhibit A. Declaration of Robert J. Moore at ¶ 6.

In connection with the SJM, on July 30, 2020 the parties filed a stipulated Motion to Vacate the Scheduling Order, Stay Discovery and for a Scheduling Conference and Request for Expedited Treatment. *Id.* at ¶ 7. The purpose of the Stipulated Motion was to stay all proceedings, including discovery, until resolution of the SJM. *Id.* at ¶ 8. On July 31, 2020, the

PSC issued an order granting the Stipulated Motion, vacating the scheduling order and staying discovery. *Id.* at ¶ 9.

## ARGUMENT

In cases such as the instant docket, where a party moves for summary judgment on issues that the nonmoving party does not have access to facts sufficient to dispute the allegations of the motion, Rule 56(d), Utah R. Civ. P., allows the non-movant to request the opportunity to conduct discovery into the issues prior to the ruling on the motion. Specifically, Rule 56(d) provides: “If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it without prejudice; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” In this case, the OCS requests an order that the PSC only rule on the two issues that are not impacted by this motion but delay ruling on the issues relating to VoIP and section 54-19-103(1) until the stay is lifted and the OCS has had time to conduct discovery.

The Utah Supreme Court has held that Rule 56(d) Motions “are to be granted liberally . . . .” *Gudmundson v. Del Ozone*, 2010 UT 33, ¶ 23, 232 P.2d 1059. And has developed a three-part test to use when ruling on a Rule 56(d) motion.

(1) . . . whether the discovery sought will uncover disputed material facts that will prevent the grant of summary judgment or if the party requesting discovery is simply on a “fishing expedition,” (2) whether the party opposing the summary judgment motion has had adequate time to conduct discovery and has been conscientious in pursuing such discovery, and (3) the diligence of the party moving for summary judgment in responding to the discovery requests . . . .

*Overstock.com Inc. v. SmartBargains, Inc.*, 2008 UT 55, ¶ 21, 192 P.3d 858. In addressing the first step of this test, the Supreme Court has noted: “Parties ... cannot justify further discovery

without providing a viable theory as to the nature of the facts they wish to obtain.” *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 57, 70 P.3d 1 (citation and internal quotation marks omitted). The OCS addresses each aspect of this test in turn.

### **A. Materiality of Facts Sought in Discovery**

Frontier argues that because the E Fiber companies utilize VoIP in aspects of the transmission of their voice services, their service must be considered the type of VoIP service that federal law preempts state commissions from regulating and the type of VoIP services exempted from regulation by Utah Code § 54-19-103(1). SJM at 6-10. However, as demonstrated below, not all voice services that utilize VoIP are preempted by federal law or exempt from PSC regulation under section 54-19-103(1). Rather, the issues of preemption and exemption from regulation turn on the nature of the service offered and the technology employed in providing voice services using VoIP. Accordingly, the OCS is entitled to conduct discovery into the services offered and the technology employed by the E Fiber companies. Because Frontier’s SJM will turn on these issues, the materiality of discovery into these issues cannot be questioned. Moreover, while it is likely that E Fiber and possibly the Utah Rural Telecom Association (“URTA”) may already have access to this information, the OCS represents different interests than the E Fiber companies and URTA and is entitled to conduct its own discovery to develop its own theories in addressing this important and complicated issue.

#### (1) Federal Preemption.

Frontier argues that because state and federal cases have ruled that federal law preempts particular VoIP service from state regulation, any voice service that utilizes VoIP to transmit its signal is beyond the jurisdiction of the PSC. SJM at 7-8. This is not the law. In *In the Matter of*

*Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Service Are Exempt from Access Charges*, 19 FCC Red. 7457 (2004) (“*AT&T's Phone-to-Phone*”), the FCC ruled that AT&T’s service is a telecommunications service and therefore subject to joint federal and state jurisdiction even though it uses VoIP in a portion of its network. Nevertheless, Frontier argues that under *In the Matter of the Request for Agency Action of Carbon/Emery Telecom, Inc., v. 8x8, Inc.*, Docket No. 12-2302-01, Order of Dismissal for Lack of Jurisdiction (Nov, 27, 2012, Utah P.S.C.) and *Charter Advance Services (MN) LLC v. Lange*, 903 F.3d 715 (8<sup>th</sup> Cir. 2018) any voice service that uses an internet protocol constitutes the type of VoIP service that is preempted by federal law. SJM 7-8. Neither of the case holdings are this broad.

In *Carbon/Emery Telecom Inc. v. 8x8 Inc.*, the parties argued the case turned on the distinction between nomadic VoIP, which is always preempted, and fixed VoIP, which as discussed below may or may not be preempted. *Carbon/Emery Telecom, Inc., v. 8x8, Inc.*, Docket No. 12-2302-01, Order of Dismissal for Lack of Jurisdiction at 8-9. The PSC resolved the dispute by focusing on the similarities between the type of services provided and the technology employed by *8x8, Inc.*’s and the service and technology at issue in a recent FCC case, *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 Opinion and Order, released November 12, 2004).

8x8’s uncontested affidavit testimony establishes that 8x8’s service is like the service at issue in Vonage. 8x8 provides a nomadic VoIP service and does not provide broadband to its customers. 8x8 requires customers to obtain broadband Internet access from a third party. 8x8’s customers use specialized equipment or software to make use of 8x8’s service. 8x8’s service can be accessed anywhere a broadband Internet connection is available. Customers using 8x8’s service can, therefore, relocate to any geographic area where broadband exists and still use 8x8’s service. This

is what makes 8x8's service nomadic rather than fixed.

*Carbon/Emery Telecom, Inc., v. 8x8, Inc.*, Docket No. 12-2302-01, Order of Dismissal for Lack of Jurisdiction at 14-15. Accordingly, the OCS should be granted the opportunity conduct discovery into whether the E Fiber companies' services and technology are similar to the services and technology that the PSC relied on in ruling that *8x8, Inc.* is preempted from state regulation.

*Charter Advance Services* deals with fixed VoIP and turns on the issue of whether under the Telecommunications Act of 1996 the services offered constitute "information services," which federal law preempts from state regulation, or "telecommunication services," which are subject to dual state and federal regulation. *Charter Advance Services*, 903 F.3d at 718. In determining that the services offered were "information services," the eighth circuit held that the "the touchstone of the information services inquiry is whether Spectrum Voice acts on the consumer's information—here a phone call—in such a way as to 'transform' that information." *Id.* at 719 (quotation marks omitted) Whether information is transformed, again, depends on the services provided and the technology employed, specifically how and where the VoIP service interfaces with the traditional phone network. *Id.* at 719-20. Given this holding, the OCS is certainly entitled to conduct discovery into how and where the E Fiber companies' voice IP transmissions interface with the traditional phone networks.

In *AT&T's Phone-to-Phone*, the FCC in deciding that the services at issue were not "information services" but rather "telecommunication services" subject to regulations again focused on the nature of the services and the technology employed. *AT&T's Phone-to-Phone*, 19 FCC Red. at 7472. Specifically, the FCC limited its ruling that the services offered constituted

“telecommunication services” despite the fact the AT&T used internet protocol lines in a portion of its network to provide the specific services at issue in that case. “We emphasize that our decision is limited to the type of service described by AT&T in this proceeding, i.e., an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.” *Id.* at 7457-58. Again, the OCS should be entitled to conduct discovery into these factors.

In sum, the fact that E Fiber uses VoIP to transmit its voice services is not dispositive of the issue of whether the services are the type that are outside of the PSC’s jurisdiction. Rather, the question of preemption turns on nature of the services offered and the technology employed. Thus, discovery into these issues is obviously material. Accordingly, the first part of the *Overstock.com* test has been met as to the issue of federal preemption.

(2) Section 54-19-103(1)

Similarly, Frontier argues that section 54-19-103(1) exempts all voice services that utilize internet protocols. This contention is based on the language in 54-19-103(1), which provides: “A state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol-enabled service or voice over the internet protocol services.” However, section 54-19-102(2) provides:

“Voice over Internet protocol service’ means any service that:

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

For the reasons outlined above, the OCS should be entitled to conduct discovery into whether E Fiber's service meet this definition. Again, Frontier's SJM turns on this definition therefore discovery into this issue is clearly material and the first part of the *Overstock.com* test has been met for the section 54-19-103(1) issue as well as the preemption issue.

### **B. Diligence in Conducting Discovery**

The remaining two factors of the *Overstock.com* also arguing in favor of granting this Motion. First, Frontier's diligence in responding discovery is not a relevant factor in this case because the outstanding discovery will not be sought from Frontier. Second, the OCS has been diligent in conducting discovery and has not had an adequate opportunity to conduct discovery into the nature of E Fiber's services and technology.

Specifically, the factual inquiry aspect of this case did not begin in earnest until E Fiber filed its direct testimony, on June 24, 2020. Shortly thereafter the OCS served two sets of discovery, one on July 7, 2020 and one on July 27, 2020. While it is true that there were incidental references in the record to VoIP prior to the filing of the June 27, 2020 SJM, the OCS did not anticipate that Frontier would move to dismiss the applications on the grounds that because the E Fiber companies utilized VoIP in transmitting their voice services prior to filing of the motion. Just three days later, the parties filed a Stipulated Motion to vacate the schedule and stay discovery, which was granted the next day. Discovery remains stayed as of the filing of this Motion. Under these facts, the OCS cannot be faulted for not completing discovery into the nature of the E Fiber companies' VoIP voice services prior to the filing of this Motion. Accordingly, all factors of the *Overstock.com* test have been met and the PSC should grant the Motion and delay ruling on the first two arguments in the SJM until the OCS has had the



opportunity to conduct discovery into the nature of the E Fiber companies' voice services and technology.

### **CONCLUSION**

The PSC should grant this Rule 56(d) Motion. The information the OCS seeks—the nature of the E Fiber companies' service and technology used in providing voice service utilizing VoIP—is material to Frontier's arguments that the PSC does not have subject matter jurisdiction over the applications and section 54-19-103(1) prevents E Fiber from being designated as a rate-or-return regulated COLR. Moreover, the OCS has been diligent in pursuing discovery yet has not had a reasonable opportunity to discover facts relating to the E Fiber's companies' services and technology. Moreover, while the E Fiber companies have access to this information in time to respond to the SJM, the OCS represents different interests than the E Fiber companies and is entitled to conduct its own discovery to develop its own theories in addressing this important and complicated issue. Accordingly, the OCS requests an order that the PSC will not rule on the SJM's arguments relating to VoIP and section 54-19-103(1) until the stay is lifted and the OCS has had an opportunity to conduct discovery into E Fiber's services and technology.

Respectfully submitted, August 25, 2020

          /s/ Robert J. Moore            
Robert J. Moore  
*Attorney for the Office of Consumer Services*

# Exhibit A

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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<p>In the Consolidated Matter of:</p> <p>Applications of E Fiber Moab LLC and E Fiber San Juan LLC for Certificates of Public Convenience and Necessity to Provide Facility—Based Local Exchange Services and be Designated as Carriers of Last Resort in Certain Rural Exchanges</p>	<p>Docket No. 20-2618-01</p> <p>Declaration of Robert J. Moore, In Support of the Office of Consumer Services’ Rule 56(d) Motion for a Continuance to Conduct Discovery.</p>
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The undersigned Robert J. Moore hereby declares, under penalty of perjury, that he is the attorney for the Office of Consumers Services in the above captioned matter, has personal knowledge of the facts set out below and if called as a witness would testify to the same.

1. On April 20, 2020, E Fiber Moab LLC and E Fiber San Juan LLC (collectively “E Fiber”) filed applications, pursuant to Utah Code § 54-8b-2.1, seeking, among other things, Certificates of Public Convenience and Necessity for competitive entry into local exchange

territories presently served by Frontier and designation of the E Fiber companies as a “rate-of-return” regulated carriers of last resort (“COLR”).

2. On May 20, 2020, the OCS filed initial comments focusing on the interplay between Utah Code §§ 54-8b-2.1 and 54-8b-15 and the negative policy implications of two rate-of-return COLRs in the same territory both with access to the Utah Universal Service Fund (“UUSF”).

3. On June 24, 2020, the E Fiber companies filed direct testimony making some incidental reference to voice over internet protocol (“VoIP”).

4. On July 7, 2020, the OCS served its first set of discovery on all parties and served a second set of discovery on Frontier on July 17, 2020.

5. Frontier filed the instant Motion for Partial Summary Judgment on July 27, 2020 arguing, in part, that because the applications seek to provide service utilizing VoIP, federal law preempts the PSC from exercising subject matter jurisdiction over the applications and Utah Code § 54-19-103(1) prevents the E Fiber companies from being designated rate-of-return regulated COLR.

6. While the prior record contains some vague reference to VoIP services, it was not until the filing of the SJM that the OCS had knowledge that Frontier would challenge the application on the basis that the E Fiber companies’ use of VoIP places the application outside of the PSC’s jurisdiction.

7. In connection with the SJM, on July 30, 2020 the parties filed a stipulated Motion to Vacate the Scheduling Order, Stay Discovery and for a Scheduling Conference and Request for Expedited Treatment.

8. The purpose of the Stipulated Motion was to stay all proceedings, including discovery, until resolution of the SJM.

9. On July 31, 2020, the PSC issued an order granting the Stipulated Motion, vacating the scheduling order and staying discovery.

I declare under criminal penalty of the State of Utah that the forgoing is true and correct.

Signed on the August 25, 2020, at Salt Lake City, Utah.

                  /s/ Robert J. Moore                    
Robert J. Moore  
*Attorney for the Office of Consumer Services*