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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	Docket No. 20-2618-01 **DIVISION MEMORANDUM OPPOSING FRONTIER MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Utah Admin. Code r.746-1 and Rules 7 and 56 of the Utah R. Civ. P., the Utah Division of Public Utilities ("Division") files this Memorandum Opposing Citizens Telecommunications Company of Utah d/b/a Frontier Communications ("Frontier") Motion for Partial Summary Judgment ("Frontier's Motion"). The Public Service Commission of Utah ("Commission") should grant the Utah Office of Consumer Services' ("OCS") simultaneous Rule 56(d) Motion for Continuance to Conduct Additional Discovery. The Commission should deny summary judgment on the matter of E Fiber Moab, LLC and E Fiber San Juan, LLC's (collectively "E Fiber") ability to serve all customers as a precondition to carrier of last resort

status and on the matter of the Commission's authority to review the Utah Universal Service Support Fund ("UUSF") costs for reasonableness.

INTRODUCTION

On July 27, 2017 Frontier filed a Motion for Partial Summary Judgment seeking summary judgement on 4 legal questions. First, Frontier asserts that the Commission lacks jurisdiction to regulate the service offerings proposed by E Fiber because state regulation is preempted by federal law. (Frontier Motion at p.8). Second, Frontier asserts that E Fiber cannot be designated as a rate of return regulated provider of last resort because the Commission is prohibited from regulating broadband internet and voice over internet protocol (VoIP). (Frontier Motion at p.9). Third, Frontier claims that E Fiber cannot be designated as a carrier of last resort because it cannot currently serve all customers who request service within the exchange as required by § 54-8b-15(1)(b)(ii)(B). (Frontier Motion at p.11). Finally, Frontier seeks summary judgment on the issue of whether the Commission has legal authority to adopt the public interest factors suggested by intervenor Utah Rural Telecom Association ("URTA"). (Frontier Motion at p.12)

The Commission should withhold judgment on the two issues of preemption and prohibition on the regulation of VoIP service under Utah law until further discover may be conducted and deny summary judgment on remaining issues in this docket. To the extent that the Commission does not withhold judgment, the Commission should deny summary judgement on the issues of federal preemption and state VoIP service regulation.

The retail voice service offerings proposed by E Fiber are like those being currently offered and regulated by this Commission in other rural exchanges and are subject to state

regulation. The voice service proposed by E Fiber is like that offered by affiliates and does not require a separate broadband connection. Therefore, without further information establishing that the service requires a broadband connection, the voice service offered does not meet the definition of VoIP such that regulation is prohibited by §54-19-103. E Fiber cannot immediately serve all customers in the exchanges. However, this is not a requirement for designation as a carrier of last resort. New utility service inherently requires sufficient time to build facilities and connect customers and CPCN grants do not require immediate service. Finally, the Commission has authority under § 54-8b-15 to consider the reasonableness of costs when approving UUSF distributions.

RESPONSE TO FRONTIER STATEMENT OF FACTS NOT GENUINELY IN DISPUTE

The Division does not dispute fact statements 1,2,3, 5, and 7-10 of Frontier's Statement of Facts not Genuinely in Dispute. The Division does dispute facts 4 and 6 based on the E Fiber's Applications and testimony on the record.

> 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].

The Division disputes this statement of fact to the extent that it asserts that E Fiber has requested to receive UUSF disbursements. E Fiber has requested eligibility to receive UUSF funds and anticipates that it will become eligible. To the extent that this statement of fact is intended to claim that E Fiber is currently requesting approval to receive any disbursement of UUSF funds without a showing of the necessary elements including reasonable expenses and financial eligibility, the Division does not agree. The Division does recognize that E Fiber has

requested a determination that it will be eligible to receive funds if reasonable costs of providing service exceed revenues.

> 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.")].

The Division disputes this statement of fact in part. The Division does not have sufficient evidence to conclude that E Fiber will only offer the two services and E Fiber's Application and prefiled testimony indicate an intent to offer regulated services. E Fiber's Application states for example that it will offer local exchange service on existing affiliate facilities such as coaxial cable.

> Applicant anticipates using its own facilities and/or utilizing facilities and network from its affiliates Emery Telecommunications & Video, Inc. ("ET&V') and Emery Telcom Video, LLC (collectively the "Affiliates) to provide local exchange services while E Fiber Moab builds out its fiber network in the local exchanges. As fiber facilities are constructed by E Fiber Moab to replace coaxial cable facilities of its Affiliates, existing Affiliate customers will be transferred to E Fiber Moab.

(E Fiber Application at ¶3). Similarly, prefiled testimony of Brock Johansen states in relevant part:

> 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, and emergency services such as 911 and E911

(Prefiled Direct Testimony of Brock Johansen at lines 439-443).

The evidence on the record and evidence that has been obtained so far in discovery by the Division does not limit E Fiber's application to only the two services of wholesale broadband and retail VoIP services. The Division is still uncertain as to some technical aspects of the primary voice service to be offered by E Fiber and supports the OCS' motion for additional discovery.

ARGUMENT

Summary Judgment shall be granted if "the moving party shows that 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). Utah courts "apply an "objective standard" to determine whether a genuine factual dispute exists, which asks whether reasonable jurors, properly instructed, would be able to come to only one conclusion, or if they might come to different conclusions, thereby making summary judgment inappropriate." *Heslop v. Bear River Mut. Ins. Co.*, 2017 UT 5, ¶ 20, 390 P.3d 314 (internal quotation and citation omitted).

Frontier has not demonstrated that no genuine issues of material facts exist and that it is entitled to summary judgment as a matter of law. With respect to the issues of preemption and application of Utah Code § 54-19-103 the Division and OCS are in an unusual position where the two are parties to a docket with respective interests in the outcome, yet are not in the position of either of the two utilities with the facts necessary to respond to certain issues raised in Frontier's motion. These facts necessary to apply the federal preemption case are not fully established on the record or through discovery. The Commission should withhold a determination on summary judgment on both the federal and state questions of whether the services being offered are preempted by federal law or prohibited by state law under § 54-19-103 until further discovery

can be completed for the reasons stated in the OCS' Rule 56(d) Motion for a Continuance to Conduct Discovery.

To the extent that the Commission considers those issues, based on the facts available to the Division at this time the Commission should not grant summary judgment because it likely has authority to regulate the voice service offered by E Fiber under federal law and is not prohibited from doing so by Utah law.

Federal Law Does Not Preempt all VoIP Services

Frontier argues that federal law preempts the Commission from granting E Fiber's application. (Frontier Motion at p.7). Frontier relies on this Commissions' order in *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")*(holding that the Commission lacked jurisdiction over nomadic VoIP service) and the recent 8th Circuit opinion in *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 720 (8th Cir.2018)("*Charter"*)(holding that Charter's VoIP service is an information service and state regulation is therefore preempted). While the Division recognizes that many flavors of VoIP technology are preempted from state regulation, not all voice services that use internet protocol packets for any part of the system are preempted.

The Division does not have sufficient information through discovery to establish the exact nature of E Fiber's proposed voice service. To the extent that the service is not interconnected VoIP or a similar information service, this Commission is likely not preempted by federal law. In *Charter* the service provider was offering an interconnected VoIP service that was additional to the broadband internet service that was being provided by the same entity and

the interconnected VoIP service was determined to be an information service not subject to state regulation. *Id*.

The FCC defines interconnected VoIP as 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.
>
> 47 C.F.R. § 9.3

Charter was not generally offering a stand-alone voice service and its VoIP offering was being provided over the top of the broadband internet service (commonly purchased as a package offering).[1] Its service plainly met subpart (ii) that it required a broadband connection from the user's location. While there is more to the distinction between telecommunication and information services, this issue alone may distinguish E Fiber's service.

E Fiber has stated that it will offer all services that its affiliate Carbon/Emery offers. (E Fiber Responses to Frontier DR 1.20). Carbon/Emery currently offers a residential retail voice

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[1] *Charter Advanced Servs. (MN), LLC v. Lange*, 259 F. Supp. 3d 980, 983 (D. Minn. 2017), aff'd, 903 F.3d 715 (8th Cir. 2018) ("Charter Advanced must activate a broadband connection to a residence or business in order to implement Spectrum Voice, it is not marketed as a standalone offering, but as a service option for customers who subscribe to Charter's broadband internet and cable television services. Although a customer could request Spectrum Voice without internet or cable, and Charter Advanced would supply it, such requests are 'exceedingly rare.'")

service that is a stand-alone product without a customer broadband connection. (*See In the Matter of: Carbon/Emery Telcom, Inc.'s Petition for Approval to Revise its Tariffs to Increase Rates to the Affordable Base Rate*s, Utah PSC Docket No. 16-2302-T01, June 16, 2016 Petition to Revise Tariffs attached Sheet No. 20 (approved by June 23, 2016 Approval Letter)). Assuming this service will also be offered by E Fiber, the services to be provided by E Fiber in its application include a service such as stand-alone residential voice. Such a voice product without a customer broadband internet service would not meet the FCC's definition of interconnected VoIP.

Because there is not a bright line rule from the FCC on the issue and the various inquiries have been fact specific, the exact nature of E Fiber's service must be known. For example, in contrast to *Charter* the FCC held that AT&T's "IP in the middle" service, using VoIP technology to transmit circuit-switched calls via IP and back again, was a transfer without net protocol conversion and therefore not an information service in *Petition for Declaratory Ruling That AT & T's Phone-to-Phone IP Telephony Servs. are Exempt from Access Charges* (IP in the Middle), 19 F.C.C. Rcd. 7457, 7465 (¶¶ 10–14) (FCC 2004).

Moreover, because of the nature of the fact specific inquiry, the *Charter* ruling should be narrowly construed and not extended here. At least one other recent state commission has declined to extend *Charter* to other types of VoIP services. *See Ex. In the Matter of Viasat Carrier Servs., Inc.s Application for Designation As an Eligible Telecommunications Carrier*, No. 7641B, 2019 WL 1047705, at ¶ 20 (Feb. 28, 2019) ("[*Charter*] was a declaratory ruling which was narrowly and specifically applicable to the services provided by Charter Communications, and cannot be construed as precedential for FCC jurisdictional purposes that

all VoIP service providers are information services subject to exclusive FCC Title I jurisdiction…").

For these reasons, the Commission should withhold summary judgment on the matter until further discovery may be conducted or E Fiber provides greater factual detail regarding its voice only service.

Utah Code § 54-19-103 Does Not Preclude Regulation of All of E Fiber's Proposed Service Offerings

If the voice service provided by E Fiber is not over a broadband connection Utah Code §54-19-103(1) does not prohibit the regulation of E Fiber's voice service. Frontier asserts that E-Fiber cannot be designated as a rate of return regulated carrier because it is proposing to offer either broadband internet service or a type of VoIP service, both of which the Commission is prohibited from regulating by Utah Code § 54-19-103(1). Therefore, even if E Fiber is granted entry, it cannot be rate of return regulated and as a result cannot be a rate of return regulated carrier. However, while the primary services being proposed by E Fiber are broadband internet and a type of phone service that may be called "VoIP" the service as the Division understands it does not meet §54-19-102(2) definition of VoIP.

Section § 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." Subsection 102(2) defines voice over internet protocol service as any service that:

> (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.

Under the plain language of the statute, if the voice service being provided by E Fiber does not use a broadband internet connection from the user's location, the service likely does not meet the definition of VoIP under Utah law. As a result, the prohibition on regulation of VoIP found in §54-19-103(1) would not apply. At this time, the Division does not have sufficient evidence through discovery to opine further on the nature of the service. The Division supports the OCS' motion for additional discovery.

E Fiber Is Not Required to Serve All Customers Immediately

Frontier seeks summary judgment on the basis that E Fiber cannot meet its carrier of last resort obligations under Utah Code §54-8b-15(1)(B)(ii)(b) because it cannot provide service to any customer or class of customer that requests service as required. Frontier's position that a competitive entrant must have facilities capable of serving all customers prior to being granted competitive entry is not a viable reading of the competitive entry process. Such a determination would make competitive entry effectively impossible and thwart the purpose of allowing competitive entry.

When considered as part of the broader competitive entry statute the need for reasonable time is apparent. "'Often, statutory text may not be plain when read in isolation, but may become so in light of its linguistic, structural, and statutory context.' 'For this reason, our interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a *harmonious whole.*'" *Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶ 16, 308 P.3d 461, 467 (emphasis in original) (Citing to *State v. J.M.S. (In re J.M.S.)*, 2011 UT

75, ¶ 13, 280 P.3d 410). In the instant case, while Utah law states that the competitive entrant designated as a carrier of last resort must offer service to all customers who request it, it does not require that such service be immediately available. Interpretation of the statute in the way that Frontier suggests would make competitive entry impractical if not impossible. The interpretation requires some flexibility in the timing in order for it to work as a harmonious whole process for competitive entry. Even for existing carriers of last resort, some time is often required to provide service to certain customers.

Further supporting the need for some period to construct facilities is § 54-8b-2.1 that requires the Commission to grant an application for competitive entry if "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." Both conditions may be met without reference to a current ability to provide service to all customers in the exchange. Subsection (4) requires that if the Commission issues the CPCN to the competitive entrant, it must also " impose an obligation upon the competitive telecommunications corporation to provide public telecommunications services to any customer or class of customers who requests service within the local exchange." If the obligation required immediate availability of service to all customers, the Commission could both approve a CPCN and simultaneously find the utility in violation of its service obligations. This cannot be the result contemplated by the statute.

Similarly, the imposition of the carrier of last resort obligation to serve immediately as pre-condition to granting the certificate would require that any competitive entrant build out the entire service territory prior to having any authorization to serve customers. Such a build out

would be very difficult if not nearly impossible due to the high risk of installing plant without any assurance of the ability to ever use that plant to serve customers. The result would effectively thwart any meaningful ability to compete in rural exchanges with regulated services unless a new technology became available with very low capital costs.

Additionally, not all current carriers of last resort have the current facilities to serve all customers who request service. If that were the case, it would be necessary to install facilities to locations that have not ever requested service and are unlikely to request service on the chance that the customer might request service at some point in the future. Many utilities have a line extension policy in place to cover the extensive costs to extend service to remote locations with one or few customers. Even large statewide utilities that have carrier or last resort obligations do not build facilities to serve all customers immediately. Rather, they have various options such as line extension tariffs for certain difficult or expensive to serve customers.[2] Similarly, for example when a gas or electric utility seeks to expand service territory to a newly served area, the utility is not expected to have the ability to serve the new territory before it seeks approval to do so even though it will become a carrier with an obligation to serve comparable to a carrier of last resort in the new territory.[3]

The obligation to serve all customers or classes of customers must be subject to the reasonable time to install the facilities to do so after being granted competitive entry. The determination that the entrant has sufficient technical, financial, and managerial resources and

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[2] *See Ex.* Rocky Mountain Power Electric Service Regulation No. 12 "Line extension".
[3] *See Ex. Request of Dominion Energy Utah to Extend Natural Gas Service to Eureka, Utah,* Utah PSC Docket No: 19-057-31.

abilities to do so are necessary elements in the determination of whether to approve of the application. The analysis of those factors should include consideration of the ability to successfully build a system that will be capable of serving any customer or class of customer requesting service within a reasonable time. The law however, does not require that the system actually be built prior to being granted a CPCN.

The Commission Lacks Legal Authority to Adopt Criteria for UUSF Eligibility that Differ from Utah Code §54-8b-15 but is Granted Express Authority to Determine Reasonableness of Costs.

Frontier argues that a rate of return regulated carrier of last resort such as Frontier is eligible for UUSF so long as it meets the requirements in Utah Code § 54-8b-15 and that the Commission cannot find that Frontier is ineligible for UUSF based on new or different factors. (Frontier Motion at p. 12). Frontier asks this Commission to "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." (Frontier Motion at p. 17). There are two distinct questions that must be separated. The first is whether a carrier is eligible for UUSF and entitled to recovery of reasonable costs. The second is whether the costs that a utility seeks to recover are reasonable.

The Division does not dispute that the Commission is bound by its expressly granted authority. "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) (citing *Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n,* 754 P.2d 928, 930 (Utah 1988)). With respect to determining eligibility of Frontier for UUSF funding, the statute sets forth clear guidelines. So long as Frontier remains a rate of return regulated incumbent telephone corporation that provides qualifying services in

the local exchange to the extent that it can demonstrate that it has reasonable costs that exceed the defined revenues, the Division does not dispute that Frontier will remain eligible for UUSF funds.

Entitlement to recovery is expressly limited by the reasonable costs. Utah Code § 54-8b-15(4)(a)(ii) plainly conditions the UUSF funding to "reasonable costs, as determined by the commission…" The statute therefore grants specific authority to the Commission to make determinations of reasonableness of costs. The reasonableness of an eligible carrier's costs is often fact specific and may not be the type of evaluation that is subject to bright line rules. For that reason it may be reasonable for the Commission to provide guidance on a matter of first impression – two UUSF eligible carriers of last resort in the same territory.

Providing guidance on the reasonableness analysis is supported by § 54-8b-2(b) that states in relevant part, "[t]he fund shall provide a mechanism for a qualifying carrier of last resort to obtain specific, predictable, and sufficient funds…" Providing guidance before carriers expend funds on what the Commission will review for reasonableness of those expenses under expenses under § 54-8b-15(4)(a)(ii) goes to the heart of the requirement for such funds to be predictable. Therefore, while the Division is not expressing support or opposition to the terms of URTA's proposed test and intends to do so in its policy testimony, the Division supports Commission guidance on the reasonableness of expenses where two providers building overlapping service may not be economic. The Commission is within its plain grant of authority to make reasonableness determinations and providing advanced guidance for this unique situation furthers the statutory requirements of specific, predictable, and sufficient funding.

CONCLUSION

For the reasons stated herein, the Commission should withhold judgment on the two issues of preemption and prohibition on the regulation of VoIP service until further discovery is conducted and deny summary judgment on remaining issues in this docket. A competitive entrant with a carrier of last resort obligation is not required to have the ability to provide universal service on day one and such a ruling would thwart the purpose of the statute. The Commission has authority to determine the reasonableness of costs for UUSF purposes and it will further the express goals of the UUSF statute to provide guidance on the reasonableness evaluation if two carriers are certificated to serve the same territory.

Submitted this 25th day of August 2020.

/s/ Justin C. Jetter

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CERTIFICATE OF SERVICE

I certify that on August 25, 2020, I caused a true and correct copy of the foregoing to be filed with the Public Service Commission and served by the Utah Division of Public Utilities to the following in Utah Docket 20-2618-01 as indicated below:

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