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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

<p><b>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</b></p>	<p>Docket No. 20-2618-01</p> <p><b>DIVISION SUPPLEMENTAL MEMORANDUM OPPOSING FRONTIER MOTION FOR PARTIAL SUMMARY JUDGMENT</b></p>
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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 Supplemental 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 deny summary judgment.

## INTRODUCTION

On July 27, 2020 Frontier filed a Motion for Partial Summary Judgment seeking summary judgement on four legal questions. Parties including the Division filed responsive memorandums on August 24, 2020. The Office also filed a Rule 56(d) Motion for a Continuance to Conduct Discovery on August 24, 2020. The Division supported the Office's Rule 56(d) Motion. On September 1, 2020 the Parties to this Docket filed a Joint Stipulation and Request for Scheduling Conference. On September 3, 2020 the Commission held a scheduling conference and issued a Scheduling Order. Pursuant to the September 3, 2020 Scheduling Order the Division files this supplemental memorandum.

In its Motion for Partial Summary Judgment Frontier sought summary judgment on four issues. 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). (*Id.* 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). (*Id.* 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"). (*Id.* at p.12)

The Division incorporates its August 24, 2020 Memorandum in Opposition herein and will provide supplemental briefing only with respect to the issues of federal preemption and

application of Utah Code § 54-8b-19(103). The Division addressed these two issues in its August 25, 2020 Memorandum in Opposition with the information it had at the time, but lacked sufficient discovery to regarding the facts to which the law must be applied. The Division has conducted further discovery 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 exchange and are not preempted by federal law. Similarly, the voice service proposed by E Fiber does not require a broadband connection. Therefore, the voice service offered does not meet the definition of VoIP such that regulation is prohibited by §54-19-103.

#### RESPONSE TO FRONTIER STATEMENT OF FACTS NOT GENUINELY IN DISPUTE

The Division incorporates its statement of facts not genuinely in dispute from its august 24, 2020 Memorandum in Opposition with the following exceptions:

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 Division further disputes that the service offering, although referred to as VoIP meets the definition of VoIP under Utah Code Ann. § 54-8b-103. E Fiber’s service offering will not require a broadband connection. (See Attachment 1, E Fiber Response to Division DR 1.5).

#### STATEMENT OF ADDITIONAL MATERIAL FACTS

1. E Fiber’s proposed voice service offering does not require a broadband internet connection. (E Fiber Response to Division Data Request 1.6, Attachment 1).
2. E Fiber’s proposed voice service will use an optical network terminal (ONT) that will remain part of E Fiber’s network and not become customer premises equipment. (E Fiber Response to Division Data Request 1.4, 1.5, Attachment 1).

## 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).

The Division addressed both the question of whether E Fiber is ineligible for designation as a carrier of last resort until it is fully able to serve the entire service territory as well as the Commission’s authority to determine reasonableness of costs to be recovered through the UUSF. The Division’s positions on those issues have not changed and will not be repeated herein. The Division adopts its legal analysis as set forth in its August 25, 2020 Memorandum in Opposition.

The Commission should deny summary judgment on the questions of federal preemption or state law restriction on VoIP regulation. The service offerings proposed by E Fiber do not involve a net protocol conversion and therefore are not preempted by federal law. Similarly the retail voice offering does not use a broadband internet connection and therefore does not meet the definition of unregulatable VoIP service under Utah law.

### Federal Law Does Not Preempt Regulation of the Services E Fiber Seeks Approval to Provide.

Frontier argues that federal law preempts the Commission from granting E Fiber’s application. (Frontier Motion at p.7). Frontier relies on this Commission’s 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 8<sup>th</sup> 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). Many flavors of VoIP technology are preempted from state regulation. However, the services as proposed to be offered by E Fiber do not fall into the categories of preempted service.

Historically states have regulated intrastate telephone service and the FCC has regulated interstate telephone service along with “information” services such as internet protocol. The transition to a variety of forms of telephone services relying on internet protocol based transport and switching has left intrastate telephone service in regulatory limbo. The FCC has continually declined to classify all VoIP as preempted “information service” under 47 U.S.C.A. § 153 (24). *Charter*, 903 F.3d 715, 720 FN3 (“while the FCC would be able to announce a classification decision regarding VoIP, it has so far declined to do so.”). Even in *Charter* where the FCC could have exercised its own primary jurisdiction the FCC filed an amicus brief arguing that the court should not construe the FCC’s orders to reach a definitive resolution of the matter for all VoIP service while simultaneously not providing meaningful guidance on the issue its self. *Id* at FN4.

This leaves a difficult question for state regulators to grapple with. The lowest cost option for telephone services to rural areas is commonly through the use of data rather than analog transfer for at least some portion of a point to point transmission of the voice signal. Most often this is also using some version of internet protocol. At the same time, the federal programs do not supply sufficient funding on their own for rural incumbent local exchange carriers to provide universal service and recover a fair rate of return. If the FCC did intend to fully preempt the field

of modern telecommunication or does so going forward, where does that leave the states? Would states be prohibited from providing incentives for rural universal service coverage? This outcome is untenable.

E Fiber's proposed service is factually distinct from the service ruled on in *Charter* and the holding in *Charter* does not apply directly. In *Charter* the service provider was offering an interconnected VoIP service that was additional service to the broadband internet that was being provided by the same entity. *Id* at 717. The service relied on customer premise equipment ("CPE") to convert traditional TDM signal to IP for transport. *Id* (explaining that the service relied on a CPE device to convert TDM to IP via CPE and utility owned switching to convert the IP signal back to TDM to send on). The conversion to IP in *Charter* was performed on customer equipment so they enter the provider's network as an IP signal and terminate or exit the provider's network as a TDM signal. As the dissent noted, the only practical difference was that the initial conversion to IP happened on the customers equipment rather than on the equipment of the provider. *Id* at 722. While the distinction is seemingly minor it does in fact distinguish the service offered by E Fiber.

In this case there is no net protocol conversion as there was in *Charter*. The E Fiber service is most factually similar to the service that the FCC concluded was telecommunications service *In the Matter of Petition for Declaratory Ruling That at&t's Phone-to-Phone Ip Telephony Servs. Are Exempt from Access Charges*, 19 F.C.C. Rcd. 7457, 7472 (2004) ("end-user customer originates by placing a call using a traditional touch-tone telephone... utilizes AT&T's Internet backbone for IP transport, and is converted back from IP format before being terminated at a LEC switch, is a telecommunications service...") E Fiber has represented that the

equipment that will be used at the customer's location is not CPE and will remain part of the E Fiber system. (See Attachment 1). As a result, the signal generated from the customer's telephone will enter E Fiber's system as an analog traditional telephone signal and similarly exit E Fiber's system as a traditional telephone signal. Similar to the *AT&T* FCC ruling the E Fiber service as described by E Fiber is a telecommunications service and the intrastate portion of that service is subject to state regulation.

E Fiber's proposed phone service using internet protocol is not a net conversion or an information service and remains subject to state regulation. Unless or until the FCC or a controlling federal court holds that the IP in the middle type of service offering provided by E Fiber is a preempted information service, this Commission should not extend the *Charter* ruling.

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

Through further discovery the Division has confirmed that the proposed service offering for voice telephone service from E Fiber will not require a broadband internet connection. (See Attachment 1, E Fiber Response to Division DR 1.6). Therefore, Utah Code §54-19-103(1) does not prohibit the regulation of E Fiber's voice service. 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 does not meet the definition of VoIP under Utah law. Having some part of the pathway for the service travel as an internet protocol signal alone is simply not enough to meet the statutory definition. As a result, the prohibition on regulation of VoIP found in §54-19-103(1) does not apply.

#### CONCLUSION

For the reasons stated herein and those incorporated by reference from the Division's August 25, 2020 Memorandum in Opposition, the Commission should deny summary judgment.

Submitted this 25th day of September 2020.

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