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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

<p>In the Consolidated Matter of:</p> <p>The Applications of E Fiber Moab, LLC and E Fiber San Juan, LLC for a Certificate of Public Convenience and Necessity to Provide Facilities-Based Local Exchange Service and Be Designated as a Carrier of Last Resort in Certain Rural Exchanges</p>	<p>Docket No. 20-2618-01</p>
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REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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

ARGUMENT

Frontier’s Motion seeks summary judgment on three of E Fiber’s requests for relief. *First*, the Motion seeks judgment denying E Fiber’s request to be designated a “rate-of-return regulated” carrier on the grounds that E Fiber intends to offer services that cannot be regulated by this Commission.¹ *Second*, the Motion seeks judgment denying E Fiber’s request for a CPCN on the grounds that E Fiber cannot meet the obligations of a carrier of last resort. *Third*, the Motion seeks judgment denying E Fiber’s request that the Commission rule that Frontier is not eligible to receive UUSF distributions on the grounds that this Commission lacks the legal authority to issue such a ruling. As set forth below, there are no genuine issues of material fact on these three matters and Frontier is entitled to judgment as a matter of law.

I. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT REGARDING E FIBER’S REQUESTS FOR RELIEF.

There exist no genuine issues of material fact with respect to the issues addressed herein. E Fiber, the Division of Public Utilities (“DPU”) and the Office of Consumer Services (“OCS”) each purport to dispute certain facts identified in Frontier’s Motion, but either do not raise a genuine dispute or their alleged disputes are not material to the Motion. “An issue is ‘genuine’ if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.” *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). “[T]he mere existence of genuine issues of fact . . . does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case.” *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah

¹ Frontier’s Motion also questioned whether this Commission lacks jurisdiction to grant certain of the relief sought by E Fiber based on federal preemption principles. (See Motion at 7-8). Frontier is foregoing any additional briefing on this issue at this time because, as discussed further below, the undisputed facts demonstrate that the Motion should be granted on state law grounds.

Ct. App. 1994). “A dispute is material only if it matters for the resolution of the case.” *Rapoport v. Martin*, 2018 UT App 163, ¶ 7, 432 P.3d 772.

“On claims for which it will not carry the burden of proof at trial, the moving party may demonstrate its entitlement to judgment as a matter of law by pointing to an absence of evidence establishing one or more of the elements of the plaintiff’s claim.” *Pioneer Home Owners Assn. v. TaxHawk Inc.*, 2019 UT App 213, ¶ 30, 457 P.3d 393 (citing *Salo v. Tyler*, 2018 UT 7, ¶¶ 2, 22-32, 417 P.3d 581. “Once the moving party does so, to defeat summary judgment the non-moving party, who bears the burden of proof at trial, must produce affirmative evidence, beyond mere reliance on the pleadings, showing that ‘there is a genuine issue for trial.’” *Id.*

As the Applicant, E Fiber has the burden to demonstrate that it is entitled to the relief it seeks. *See, e.g., Utah Dept. of Bus. Reg., Div. of Pub. Utilities v. Pub. Serv. Commn*, 614 P.2d 1242, 1245 (Utah 1980) (“In the regulation of public utilities by governmental authority, a fundamental principle is: the burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the commission, the commission staff, or any interested party or protestant; to prove the contrary.”); *Fuller-Toponce Truck Co. v. Pub. Serv. Commn.*, 96 P.2d 722, 726 (Utah 1939) (“The burden was on plaintiff . . . to establish that public convenience and necessity required the service which it proposed to offer.”). As such, to defeat summary judgment, E Fiber bears the burden to demonstrate that there is a genuine issue for trial with respect to each of its requests for relief at issue in this Motion.

As set forth below, E Fiber has failed to identify any genuine issue for trial with respect to either of its three claims at issue in the Motion.

A. There is No Genuine Issue for Trial Regarding E Fiber’s Request for “Rate-of-Return Regulated” Carrier Designation

The Motion cites Utah Code § 54-19-103(1) and asserts that Utah law bars the Commission from regulating the services that E Fiber intends to offer. Utah Code § 54-19-103(1) states that “[a] state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol-enabled service *or* voice over Internet protocol service.”² There are no genuine disputes as to whether E Fiber’s proposed services are “Internet protocol-enabled services.”

There are no genuine disputes as to the services that E Fiber intends to offer or with respect to the manner in which E Fiber will provide those services or the equipment it will deploy to do so. E Fiber proposes to build a fiber-to-the-home network in the Local Exchanges,³ placing an Optical Network Terminal (“ONT”) on or inside the homes of each of its customers.⁴ Once this fiber network is deployed, E Fiber proposes to provide retail voice service to end-use customers and wholesale broadband service to its unregulated affiliates, ET&V and Emery Telcom and Video, LLC, which will sell retail internet and video service to end-use customers.⁵ Each of these services will be enabled by the use of Internet-protocol (“IP”) to transport data packets all the way through E Fiber’s network.

E Fiber described the manner in which it will provide its proposed services in a diagram of its network in response to DPU data request 1.7,⁶ which is reproduced below:

² Emphasis added.

³ See Exhibit 1 (E Fiber Response to DPU DR 1.5) (“E Fiber will be deploying fiber to the home.”).

⁴ See Exhibit 3 (E Fiber Response to Frontier DR 2.1) (“E Fiber will connect to the homes and businesses using an Optical Network Terminal”); Exhibit 4 (E Fiber Response to Frontier DR 3.1) (“The ONT can be installed inside or outside the home depending on the circumstances.”).

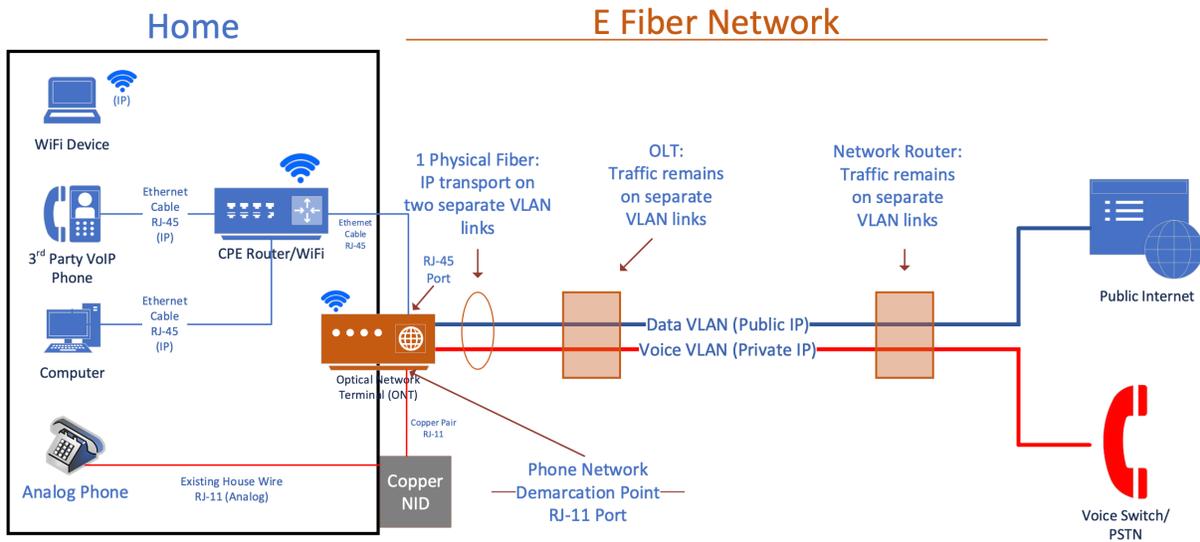
⁵ See Exhibit 1 (E Fiber response to DPU DR 1.5) (“This fiber will be used for voice service and wholesale broadband Internet access service); Exhibit 2 (E Fiber response to Frontier DR 1.33) (“ET&V will provide retail internet service and Emery Telcom Video, LLC will provide retail video service using Applicants’ fiber.”)

⁶ See Exhibit 5 (Exhibit DPU DR 1.7).

E Fiber Network Services Over Fiber

Below is a configuration for E Fiber voice and broadband services at a residential location.

For voice only service, the Data VLAN, the RJ-45 port(s) and WiFi on the ONT are not activated. Only the RJ-11 port providing analog voice is activated on the ONT. The Voice VLAN transports voice traffic to the switch/PSTN.



The diagram demonstrates the following undisputed facts that apply to E Fiber's retail voice service and its wholesale broadband service:

- E Fiber will install the ONT at the end-user's home;
- The ONT will utilize IP to transport packets to the optical line terminal ("OLT");
- Transport from the ONT to the OLT will utilize a single physical fiber with two separate virtual area network ("VLAN") links, one for broadband internet service and one for the voice service (if the customer subscribes to both services);
- The OLT will utilize IP to transport packets to the network router;
- The IP transport from the OLT to the network router will utilize separate VLAN links, assigning private IP addresses for the voice service and public IP addresses for the broadband internet service;

- The network router will utilize IP transport to route data signals to the public internet and will utilize IP transport to route voice signals to Carbon/Emery Telcom, Inc.’s Metaswitch soft switch, which is considered part of the public switched telephone network (“PSTN”);⁷
- This network will utilize IP transport to enable E Fiber voice customers to send and receive voice communications;⁸
- This network will utilize IP transport to enable end-use customers to send and receive data and video communications.⁹

These undisputed facts show that E Fiber will utilize IP transport beginning at the ONT and continuing all the way through its network to enable the end-user to send or receive voice, data, or video communications.

As set forth in Section II.A., below, Frontier is entitled to judgment as a matter of law with respect to E Fiber’s request for designation as a “rate-of-return regulated” carrier.

⁷ See Exhibit 1 (E Fiber Response to DPU DR 1.2) (noting that E Fiber “services will be provided utilizing Carbon/Emery Telcom, Inc.’s existing Metaswitch softswitch through a sharing agreement.”); Exhibit 7 (E Fiber Response to OCS DR 2.9) (“The Internet traffic will have a public IP address and will be routed through a separate virtual local area network data links (VLANs) along the fiber to the Public Internet. The voice traffic will be converted at the ONT to IP data packets, will be given a private IP address, and will be routed through a separate VLAN to the Carbon/Emery switch which is a class 5 switch that is registered with the Local Exchange Routing Guide and is considered part of the PSTN.”)

⁸ See Exhibit 2 (E Fiber response to Frontier DR 1.32) (“Applicants will provide voice service utilizing circuit switched connections that use Internet protocol or a functionally equivalent technology standard that enables an end-user to initiate or receive calls from the public switched network.”); Exhibit 8 (Johansen Decl.) ¶ 5 (noting that E Fiber’s proposed voice service “uses internet protocol, packet based technology at some points in the network to transmit or transport the voice signals.”); Exhibit 8 (Johansen Decl.) ¶ 10 (“The ONT communicates with the switch through access equipment across a dedicated private IP transport network.”); Exhibit 9 (URTA Direct Test. Douglas Meredith) at lines 114-117 (noting that Applicants’ voice “service is familiar to everyone as plain old telephone service (“POTS”) with the one exception that the Applicants seek to use ... privately addressed Internet Protocol transport within their network.”).

⁹ See Exhibit 2 (E Fiber response to Frontier data request 1.33) (“ET&V will provide retail internet service and Emery Telcom Video, LLC will provide retail video service using Applicants’ fiber.”).

B. There is No Genuine Issue for Trial Regarding E Fiber’s Request for Carrier of Last Resort Designation

E Fiber requests a CPCN in each of the Local Exchanges so that it can be eligible to receive UUSF distributions pursuant to Utah Code § 54-8b-15. The Motion asserts that E Fiber does not meet the obligations of a “carrier of last resort,” and that, therefore, E Fiber is not entitled to receive a CPCN.

There are no genuine disputes as to the facts relevant to the question of whether E Fiber meets the definition of a “carrier of last resort” in Utah Code § 54-8b-15(1)(b). E Fiber does not “currently have fiber facilities constructed to enable them to provide service to all customers or classes of customers who request service in the Local Exchanges.”¹⁰ E Fiber proposes to conduct a “phased in” approach to building its fiber network and providing service to customers in the Local Exchanges.¹¹ E Fiber “anticipate[s] 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.”¹² E Fiber has indicated that “[a]s fiber facilities are constructed in the Local Exchanges . . . [it] will offer service to the residents and businesses in the Local Exchanges.”¹³ Even after E Fiber’s proposed fiber facilities are completely built out, certain remote locations will still be subject to line extension tariffs.¹⁴

As set forth in Section II.B., below, Frontier is entitled to judgment as a matter of law with respect to E Fiber’s request for designation as a carrier of last resort.

¹⁰ See E Fiber Mem. Opp. MPSJ at 6-7 (response to Frontier SOF No. 7).

¹¹ See *id.* at 7 (response to Frontier SOF No. 8).

¹² Direct Testimony of Brock Johansen at lines 112-115 (emphasis added).

¹³ *Id.* at 110-112.

¹⁴ See *id.* at 7-8 (response to Frontier SOF No. 9).

C. There is No Genuine Issue for Trial Regarding E Fiber’s Request for a Commission Ruling that Bars Frontier from Receiving UUSF Distributions

The Motion asserts that the Commission lacks legal authority to grant E Fiber’s request that the Commission bar Frontier from ever receiving UUSF distributions for its operations in the Local Exchanges. On this matter, the Motion raises a purely legal challenge to E Fiber’s request for relief and, as such, there are no genuine issues of material fact.

As set forth in Section II.C., below, Frontier is entitled to judgment as a matter of law with respect to E Fiber’s request that the Commission bar Frontier from ever receiving UUSF distributions for its operations in the Local Exchanges.

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

As set forth further below, Frontier is entitled to judgment as a matter of law with respect to each of E Fiber’s three requests for relief identified in the Motion.

A. E Fiber Cannot Be Designated a “Rate-Of-Return Regulated” Carrier

E Fiber’s request to be designated a “rate-of-return regulated” carrier to gain access to UUSF distributions should be denied on the grounds that E Fiber will offer services that cannot be regulated by this Commission. A “rate-of-return regulated” carrier is one that is “subject to regulation under [Utah Code] Section 54-4-4.” Utah Code § 54-8b-15(1)(f). E Fiber is not “subject to regulation under Section 54-4-4” because the Commission is barred from regulating the services that E Fiber proposes to offer. Utah Code § 54-19-103(1) states that “[a] state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol-enabled service or voice over Internet protocol service.”¹⁵ No party in this proceeding has disputed that the retail

¹⁵ See Motion at 10.

voice and wholesale broadband services that E Fiber intends to offer are “Internet protocol-enabled services,” and, as such, this Commission may not regulate those services. Separately, the retail voice service that E Fiber proposes to offer, which it has described as “carrier-grade VoIP,” also constitutes a “voice over Internet Protocol service” under Utah law that is not subject to the Commission’s regulation.

1. E Fiber’s Proposed Services Are Internet Protocol-Enabled Services

“Internet protocol-enabled service” is “any service, functionality, or application that uses Internet protocol or a successor protocol that enables an end-user to send or receive voice, data, or video communications.” Utah Code § 54-19-102(1). E Fiber, the DPU, and the OCS each argue that E Fiber’s proposed “carrier grade VoIP” service does not constitute “voice over Internet protocol service,” but none have addressed the question of whether E Fiber’s proposed services satisfy the definition of “Internet protocol-enabled service.” The prohibition in Utah Code § 54-19-103(1) against Commission regulation of “voice over Internet protocol service” applies equally to “Internet protocol-enabled service.” That is, this Commission is barred from regulating E Fiber’s services if they satisfy the statutory definition of “Internet protocol-enabled service” but not the statutory definition of “voice over Internet protocol service.” As such, Frontier is not required to show that E Fiber’s proposed voice service is a “voice over Internet protocol service” to demonstrate that this Commission is barred from regulating E Fiber’s proposed services. Instead, this Commission need only determine whether the undisputed facts show that E Fiber’s proposed services are “Internet protocol-enabled services.” They do.

The undisputed facts show that E Fiber’s proposed services constitute “Internet protocol-enabled services.” E Fiber will utilize IP to transport data packets for both its retail voice and its

wholesale broadband service. As noted in Section I, above, E Fiber proposes to build a fiber-to-the-home network in the Local Exchanges, placing an ONT, powered by its customers' premises, on or inside the homes of each of its customers. Once this fiber network is deployed, E Fiber proposes to provide voice service to end-use customers and wholesale broadband service to its unregulated affiliates, who will sell retail internet and video services to end-use customers. For each service, E Fiber will utilize the ONT at the end-user's home to transmit data packets along a single fiber optic cable using IP throughout E Fiber's network, either to the PSTN in the case of its voice service or to the public internet in the case of the broadband internet service. E Fiber's proposed voice service and wholesale broadband service each constitute "any service, functionality, or application that uses Internet protocol or a successor protocol that enables an end-user to send or receive voice, data, or video communications." Utah Code § 54-19-102(1). Those services are, therefore, both "Internet protocol-enabled services" and, pursuant to Utah Code § 54-19-103(1), this Commission may not regulate those services "either directly or indirectly."

2. E Fiber's Proposed Retail Voice Services is a VoIP Service

Frontier need not prove that E Fiber's voice service is "voice over Internet protocol service" under Utah law. Nevertheless, the undisputed facts show that E Fiber's "carrier grade VoIP" is a VoIP service under Utah Code § 54-19-102(2), which defines VoIP 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 a public switched telephone network and to terminate a call to the public switch telephone network.

E Fiber’s network satisfies prongs (a) and (c). E Fiber admits that its fiber voice service will enable real time, two way voice communications that originate from and terminate at an ONT powered by the customer’s home and attached either inside or on the customer’s home (i.e., at the customer’s location) in IP.¹⁶ E Fiber further admits that its voice service will permit a customer to receive and terminate calls on or to the PSTN.¹⁷

On the remaining prong, E Fiber claims that its voice service does not use a broadband connection because its voice customers will not have Internet access and the ONT transmits its IP data packets “across a dedicated private IP transport network.”¹⁸ The FCC defines the term “broadband connection” as “wired line or wireless channel that terminates at an end-user location or mobile device and enables the end user to receive information from and/or send information to the Internet at information transfer rates 200 kilobits per second (kbps) in at least one direction.”¹⁹ However, the FCC has recognized that “[a] broadband connection may or may not provide the end user with internet access.”²⁰ And whether the connection is over the public Internet or a private IP network is irrelevant.²¹ E Fiber’s network uses a broadband connection from the customer’s home (or “user’s location”) to send and receive voice communications and satisfies prong (b).

¹⁶ See E Fiber Mem. Opp. at 10-11 (¶¶ 8-10).; see also *In the Matter of Ensuring Continuity of 911 Communications*, Report and Order, 30 FCC Rcd 8677, 8680, 2015 WL 4741032, *3, ¶ 11 (FCC August 7, 2015) (“[M]odern fiber and cable networks do not provide power to operate *necessary equipment at the subscriber location*, including network devices (e.g., cable modems, *optical network terminals*) and telephones.” (emphasis added)).

¹⁷ E Fiber Mem. Opp. at 10-11 (¶¶ 8-10).

¹⁸ *Id.*

¹⁹ 47 C.F.R. § 1.7001(a)(1); *In the Matter of Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, Report and Order and Second Further Notice of Proposed Rulemaking, WC Docket Nos. 19-195, 11-10, 34 FCC Rcd 7505, 7536, 2019 WL 3716422, *23, ¶ 73 n.219 (FCC Aug. 6, 2019).

²⁰ *Voice Telephone Services: Status as of December 31, 2018*, FCC, Industry Analysis Division, Office of Economics and Analytics, p. 4, n.7 (March 6, 2020) (<https://docs.fcc.gov/public/attachments/DOC-362881A1.pdf>).

²¹ See *In the Matter of the Investigation into the Continued Use of Verizon Washington D.C. Inc.’s Copper Infrastructure to Provide Telecommunications Services*, 2015 WL 9257703 (D.C. P.S.C., Dec. 4, 2015) Order No. 18051 (Dkt. No. 1102) (ONT utilized to provision Verizon’s FiOS digital voice service used broadband connection to connect to Verizon’s private IP network that was separate from the broadband connection used to provide customers with public Internet access).

3. The Commission May Not Regulate E Fiber's Proposed Services

As a result of the foregoing, this Commission “may not, directly or indirectly, regulate” the services that E Fiber intends to provide. Utah Code § 54-19-103(1). Because E Fiber’s proposed services would not be “subject to regulation under Section 54-4-4,” it cannot be designated a “rate-of-return regulated” carrier and Frontier is entitled to judgment as a matter of law and E Fiber’s request for such designation should be denied.

B. E Fiber Cannot Meet the Obligations of a Carrier of Last Resort

The undisputed facts demonstrate that E Fiber cannot meet the obligations of a carrier of last resort and, therefore, it is not entitled to the benefits of that designation. E Fiber seeks to be designated a carrier of last resort pursuant to Utah Code § 54-8b-15(1)(b)(ii), which defines “carrier of last resort” as a telecommunications corporation that has a CPCN and “an obligation to provide public telecommunications service to any customer or class of customers that requests service within the local exchange.” E Fiber does not currently have any facilities in any of the Local Exchanges. It has a plan to build out a fiber-to-the-home network in the Local Exchanges over a five-year period and will provide service to customers in the Local Exchanges as its build-out progresses. As such, E Fiber will not be in a position to meet the carrier of last resort obligations in the Local Exchanges until the end of its five-year build-out plan and, even after that build-out is complete, some customers will be required to pay E Fiber to extend lines to provide service to those customers.

E Fiber seeks a CPCN in the Local Exchanges, which have “fewer than 5,000 access lines and that [are] controlled by an incumbent telephone corporation with fewer than 30,000 access lines in the state.” Utah Code § 54-8b-2.1(4). As such, if the Commission were to grant E Fiber’s

request for a CPCN, it must also “impose an obligation upon [E Fiber] to provide public telecommunications services to any customer or class of customers who requests service within the local exchange.” *Id.* E Fiber is not able to meet these carrier of last resort obligations now and won’t be able to meet them for some time in the future. The Commission should not grant the CPCN until E Fiber is able to meet those obligations.

Parties responding to the Motion have asserted that 1) competitive entrants should be given a grace period between the date that the Commission issues an order imposing on a competitive entrant the carrier of last resort obligations and the date on which the competitive entrant is actually required to meet those obligations, and 2) that the failure to allow such a grace period will eliminate competition. Those arguments are misplaced for the following reasons.

First, the plain language of Utah Code § 54-8b-2.1(4) does not permit the sort of grace period for which the responding parties advocate. Rather, it states that when if the Commission grants a CPCN to a competitive entrant in the rural exchanges, the Commission “shall impose an obligation” on that competitive entrant “to provide public telecommunications services to any customer or class of customers who requests service within the local exchange.” Utah Code § 54-8b-2.1(4). The statute does not leave room for the Commission to waive the carrier of last resort obligations for a period of time while a competitive entrant builds out its proposed network. If E Fiber is to receive an exemption from those obligations for several years, then the parties and the Commission would first be required to proceed pursuant to Utah Code § 54-8b-3. That statute states that the Commission may, “after a public notice and hearing, issue an order exempting any telecommunications corporation or public telecommunications service from any requirement” of Title 54. Presumably, this would allow the Commission to exempt E Fiber from the carrier of last

resort obligations of Utah Code § 54-8b-2.1(4), but the Commission must consider certain enumerated factors and find that E Fiber is subject to effective competition in the Local Exchanges and that exempting E Fiber from the obligations is in the public interest. *See* Utah Code § 54-8b-3(4)-(6). No party has asked the Commission to exempt E Fiber from those obligations pursuant to the exemption statute and no party has submitted testimony addressing the statute's enumerated factors. As such, the Commission should deny E Fiber's request for a CPCN because the undisputed facts demonstrate that E Fiber cannot meet the obligations of a carrier of last resort.

Second, Frontier's position in this case does not eliminate competition in the small rural exchanges. E Fiber has selected a business model that will take five years to deploy and that it cannot economically justify without subsidies from the UUSF. E Fiber could have selected an approach that allowed it to meet the carrier of last resort obligations from the outset, such as one that leverages existing infrastructure to provide services while building out the proposed new network. Alternatively, E Fiber could have requested an exemption from the carrier of last resort obligations pursuant to Utah Code § 54-8b-3, which would have allowed the Commission and the parties to weigh the statutory factors associated with the exemptions and perhaps would have allowed the Commission to impose conditions on UUSF distributions during the period that E Fiber could not meet the carrier of last resort obligations. Frontier's position in this docket is not anti-competitive. Frontier only opposes the type of competition presented by E Fiber's application, in which a competitive entrant cannot meet its carrier of last resort obligations during a period in which it is paid millions of dollars from an account funded by Utah customers (including Frontier's own customers) to build out a new network while relying on Frontier to continue to provide service to the most expensive to serve customers under its obligations as a carrier of last resort.

E Fiber cannot comply with the carrier of last resort obligations as is required of a competitive entrant pursuant to Utah Code § 54-8b-2.1(4) and its Application should be denied.

C. E Fiber Agrees with Frontier that this Commission Lacks Legal Authority to Rule that Frontier Can Never Be Eligible to Receive UUSF Distributions

In its Motion, Frontier sought partial summary judgment denying E Fiber's requests that this Commission adopt criteria for UUSF eligibility that differ from those set forth in Utah Code § 54-8b-15 and that the Commission issue a ruling that E Fiber is eligible to receive UUSF distributions and Frontier is not.²² As discussed in the Motion, the plain language of Utah Code § 54-8b-15 does not grant the Commission the legal authority to adopt alternative criteria for UUSF eligibility and that, as a matter of law, E Fiber's request should be denied.

In response to the Motion, E Fiber agrees with Frontier's legal argument and acknowledges that "judgment by this Commission that it is precluded from adopting criteria for UUSF eligibility which are not included in Utah Code § 54-8b-15 is appropriate."²³ E Fiber goes on to agree that "Frontier's eligibility for UUSF does not need to be determined in this case."²⁴

E Fiber acknowledges that its initial proposal requesting that the Commission rule that Frontier was ineligible to receive UUSF distributions was driven by comments filed earlier in this docket by others that "it is not in the public interest for duplicative networks to be funded by the UUSF."²⁵ E Fiber, the DPU, and the OCS each assert that this Commission has the tools to address that concern through application of Utah Code § 54-8b-15(4), which requires this Commission to determine the "rate-of-return regulated carrier of last resort's reasonable costs" when deciding

²² E Fiber's request was set forth in the Direct Testimony of Brock Johansen at lines 194-368.

²³ E Fiber Mem. Opp. MPSJ at 23-24.

²⁴ E Fiber Mem. Opp. MPSJ at 25.

²⁵ *Id.* at 23 & n.74.

whether the carrier is eligible for UUSF distributions. Frontier agrees with this assertion. This Commission is required by statute to review the eligible expenditures of a rate-of-return regulated carrier of last resort to determine the level of “reasonable costs” when deciding that carrier’s eligibility for UUSF distributions, and that is equally true when there are two such carriers operating within a single exchange.

Parties have suggested that this Commission should provide guidance as to what costs will and will not be considered “reasonable” in a circumstance in which two carriers operate in the same local exchange. Some guidance may be warranted, but Frontier is concerned about expanding the scope of this docket to include an issue about which additional stakeholders would likely desire to be heard. If the Commission believes it is appropriate to provide the requested guidance, Frontier suggests that the Commission open a separate docket to address this matter.

CONCLUSION

For the foregoing reasons, this Commission should grant Frontier’s Motion and rule as follows:

- A) E Fiber cannot be designated a “rate-of-return regulated” carrier,
- B) E Fiber cannot meet the obligations of a “carrier of last resort,” and
- C) This Commission cannot consider factors for UUSF eligibility other than those set forth in Utah Code § 54-8b-15 and cannot bar Frontier from receiving UUSF distributions.

Dated: October 9, 2020

JAMES DODGE RUSSELL & STEPHENS



By: _____

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Certificate of Service
Docket No. 20-2618-01

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