

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

Application 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 Carriers of Last Resort in Certain Rural Exchanges

DOCKET NO. 20-2618-01

ORDER

ISSUED: November 10, 2020

I. INTRODUCTION

In this order, the Public Service Commission (PSC) denies the Motion for Partial Summary Judgment (“Motion”) filed by Citizens Telecommunications Company of Utah d/b/a Frontier Communications (“Frontier”) on July 27, 2020, seeking dismissal of one of the claims for relief brought by E-Fiber Moab, LLC (“E-Fiber Moab”) and E-Fiber San Juan, LLC (“E-Fiber San Juan”) (collectively, “E-Fiber”).

II. BACKGROUND

A. Procedural History

On April 20, 2020, E-Fiber¹ filed two separate applications with the PSC in Docket Nos. 20-2618-01 and 20-2619-01 for certificates of public convenience and necessity (CPCN) pursuant to Utah Code Ann. § 54-8b-2.1, requesting authority to operate as a provider of facilities-based local exchange telecommunications service in the Moab and Thompson exchanges within Grand and San Juan Counties in Docket No. 20-2618-01, and in the La Sal, Monticello, Blanding,² Bluff, and Mexican Hat exchanges within San Juan County in Docket No. 20-2619-01. These exchanges are currently served by Frontier as the incumbent local exchange carrier. The applications request (1) designation as a carrier of last resort (COLR), as defined in Utah Code Ann. § 54-8b-15(1)(b)(ii); and (2) an order that E-Fiber will be eligible to

¹ E-Fiber, i.e., E-Fiber Moab and E-Fiber San Juan are newly formed, wholly owned affiliates of Emery Telephone.

² E-Fiber seeks authority to provide service in the Blanding exchange excluding the White Mesa community where E-Fiber does not have the requisite permission from the Ute Mountain Ute Tribe Reservation.

receive distributions from the Universal Public Telecommunications Service Support Fund (“UUSF”). We refer to both applications, collectively, as the “E-Fiber Application.”

On July 27, 2020, Frontier filed its Motion, along with the Declaration of Carl E. Erhart in Support of Motion for Summary Judgment.

On August 25, 2020, (1) E-Fiber filed its Memorandum in Opposition to Frontier’s Motion for Partial Summary Judgment along with the Declaration of Brock Johansen in Opposition to Frontier’s Motion for Partial Summary Judgment (“E-Fiber’s Opposition”), (2) the Office of Consumer Services (OCS) filed its Memorandum in Opposition to Frontier Communications’ Rule 56(a) Motion for Partial Summary Judgment (“OCS Memo in Opposition”) and its Rule 56(d) Motion for a Continuance to Conduct Discovery, (3) the Division of Public Utilities (DPU) filed its Memorandum Opposing Frontier’s Motion for Partial Summary Judgment (“DPU Memo in Opposition”), and (4) the Utah Rural Telecom Association (URTA) filed its Response to Frontier’s Motion for Partial Summary Judgment and Joinder in Applicants’ Memorandum in Opposition.

On September 1, 2020, the parties filed a Joint Stipulation and Request for Scheduling Conference and Request for Expedited Treatment, which the PSC granted on the same day in its Order Approving Joint Stipulation and Notice of Scheduling Conference.

On September 3, 2020, the PSC issued its Scheduling Order and Notice of Hearings.

On September 25, 2020, the DPU filed its Supplemental Memorandum Opposing Frontier’s Motion for Partial Summary Judgment (“DPU Supplemental Opposition”), and the OCS filed its Supplemental Memorandum in Opposition to Frontier Communications’ Rule 56(a) Motion for Partial Summary Judgment (“OCS Supplemental Opposition”). On October 9,

2020, Frontier filed its Reply in Support of Motion for Partial Summary Judgment (“Frontier Reply”).

Finally, on October 13, 2020, the PSC held oral argument on the Motion, in which Frontier, E-Fiber, URTA, DPU, and the OCS participated.

B. The E-Fiber Service

E-Fiber proposes to provide “all forms of local exchange public telecommunications services as a [COLR] on a facilities-based basis,”³ including “state-of-the-art carrier-grade voice over internet protocol [(VoIP)] telephone service[s]” and “high-speed wholesale broadband [i]nternet access.”⁴ E-Fiber defines its service as “carrier grade VoIP” for purposes of the E-Fiber Application, as “service [that] uses internet protocol, packet based technology at some points in the network to transmit or transport the voice signals.”⁵ E-Fiber proposes to provide “access to ordinary intraLATA and interLATA message toll calling, operator services, directory assistance, directory listings, and emergency services such as 911 and E911.”⁶

In further describing its services, E-Fiber explains that it intends to offer “the same voice service that is offered to all the customers in the exchanges of Emery, Carbon, and Wayne counties by Emery Telephone, Carbon/Emery Telcom, Inc. and Hanksville Telcom, Inc.”⁷ Specifically, E-Fiber states that, with Emery’s service, “[c]ustomers connect to the network at a fixed location in their home using a network powered and battery backed up traditional telephone

³ E-Fiber Application, at ¶ 4.c.

⁴ E-Fiber Application, at ¶ 15 and Direct Test. of B. Johansen, at lines 348-351.

⁵ Memorandum in Opposition to Frontier’s Motion for Partial Summary Judgment (“Memorandum in Opposition”), at 9 (*quoting* Declaration of Brock Johansen, ¶ 5).

⁶ Direct Test. of B. Johansen, at lines 438-443.

⁷ Memorandum in Opposition, at 9 (*quoting* Declaration of Brock Johansen, ¶ 4).

connected into a RJ11 jack. ... For customers on fiber facilities, the analog signal travels across the copper wire in the home to an Optical Network Terminal (“ONT”) that can be installed on the side of the home or placed inside the outer wall of the home to take advantage of the customer’s power and climate control. The ONT communicates with the switch through access equipment across a dedicated private IP transport network. Emery Telcom’s voice services are not dependent upon an Internet connection in the customer’s home. If a call originates and terminates inside the Emery Telcom network, then the call never leaves the Emery Telcom network. For calls originating or terminating outside the Emery Telcom network, the Emery Telcom switch is connected to a designated tandem switch via one of two redundant transport systems: (a) a TDM transport system; or (b) an IP over a private peering connection transport system.”⁸

With E-Fiber’s network, the ONT converts electric analog signals transmitted to and from the customer’s traditional analog telephone into IP data packets that are then transported to and from E-Fiber’s network.⁹ The ONT is proprietary equipment that is owned, controlled, managed, repaired, and replaced by E-Fiber at no cost to the customer and the customer does not pay for nor lease the ONT from E-Fiber.¹⁰ The ONT will be located on the outside of the customer’s home. The E-Fiber voice service will not rely on, require, or utilize a broadband connection at the customer’s location.¹¹

⁸ *Id.* at 10.

⁹ E-Fiber’s Response to OCS DR 2.1, attached to the OCS Supplemental Memorandum as Exhibit A.

¹⁰ E-Fiber’s Response to OCS DR 2.5 and 2.6, attached to the OCS Supplemental Memorandum as Exhibit A.

¹¹ Johansen Declaration, at ¶ 9.

C. The Motion for Partial Summary Judgment

Based on the facts above, the Motion requests that the PSC first determine whether it has jurisdiction to grant E-Fiber's CPCN to be designated as a rate-of-return regulated COLR. The Motion states that E-Fiber proposes to "offer two services – wholesale broadband internet service and retail Voice over Internet Protocol ("VoIP") voice service."¹²

Then, if the PSC determines it has subject matter jurisdiction, the Motion seeks dismissal of the E-Fiber Application on three grounds: "*First*, E Fiber will offer services that cannot be regulated by [the PSC] and, therefore, it cannot be designated as a 'rate-of-return regulated' carrier of last resort. *Second*, E Fiber admits that it will not meet the obligations of a carrier of last resort. *Third*, [the PSC] lacks legal authority to rule that Frontier is not eligible to receive UUSF distributions based on any criteria other than those set forth in Utah Code § 54-8b-15(4) or Utah Admin. Code R746-8-401."¹³

III. LEGAL STANDARD

Although the PSC does not often consider motions for summary judgment, we deem the Utah Rules of Civil Procedure and case law interpreting them as persuasive authority under our Utah Admin. Code R746-1-105. Summary judgment shall be granted if the "moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). On "summary judgment, the adjudicator may look outside the pleading to survey the available evidence, drawing all reasonable inferences in the light most favorable to the non-movant, to determine whether any issues of

¹² Motion, at 5.

¹³ Motion, at 2.

[material] fact exist to be resolved at trial or hearing.”¹⁴ “A disputed fact is material if it affects the rights or liabilities of the parties.”¹⁵

At the outset, we observe that the purpose of the motion for summary judgment is to allow a controversy to be settled as a matter of law if the movant can show there are no disputed facts as shown by the pleadings, depositions, admissions, and answers to interrogatories and other documents in order to save the time, trouble, and expense of a hearing.¹⁶ If “the party moved against is being defeated without the privilege of a trial, the court should carefully scrutinize the ‘submissions’ and contentions he makes thereon to see if his contentions and proposals as to proof of material facts, if resolved in his favor, would entitle him to prevail; and if it so appears, the motion for summary judgment should be denied and a trial should be had for the purpose of resolving the disputed issues of fact and determining the rights of the parties.”¹⁷

In our proceedings, parties typically file written testimony ahead of the hearing and in many cases, our hearings (particularly CPCN application hearings) are typically not as complex or long as a trial in court. As a general matter, motions for summary judgment have less of an impact on the time, expense, and resources that are spent in our proceedings. And in this case in particular, this is more evident since motion practice did not occur at the beginning of the proceeding. In fact, responsive motions to the Motion were filed contemporaneously with the

¹⁴ *Application of Dominion Energy Utah for Approval of a Natural Gas Clean Air Project and Funding for the Intermountain Industrial Assessment Center*, Docket No. 19-057-33, Order Denying Office of Consumer Services’ Motion to Dismiss Application, or In the Alternative, Motion for Summary Judgment Denying Application, at 5 (Utah PSC, April 27, 2020).

¹⁵ *Alliant Techsystems, Inc. v. Salt Lake Bd. of Equalization*, 2012 UT 4, ¶ 31, 270 P.3d 441.

¹⁶ *See Rich v. McGovern*, 551 P.2d 1266, 1267-1268 (Utah 1976).

¹⁷ *Id.* at 1268.

written testimony,¹⁸ to allow time for the PSC to issue an order on the merits (assuming an evidentiary hearing were held), consistent with the 240-day statutory deadline for CPCN applications.¹⁹ All of the testimony has been filed and our hearing on the merits is scheduled to occur in two days. Given our observations above, the record in this case would have to be indisputably clear that no genuine dispute as to any material fact exists before we would dispense of the case as a matter of law.

IV. DISCUSSIONS, FINDINGS, AND CONCLUSIONS

A. Subject Matter Jurisdiction - Federal Preemption

We address whether the PSC has subject matter jurisdiction to grant the E-Fiber Application including to be designated as a rate-of-return regulated COLR. Frontier argues that “[u]nder Rule 12 of the Utah Rules of Civil Procedure ... the PSC is obligated to dismiss an action ‘whenever it appears by suggestion of the parties or otherwise that the [PSC] lacks [subject matter] jurisdiction.’”²⁰ Citing the Carbon/Emery Order of Dismissal, Frontier contends that the PSC has previously determined that it does not have jurisdiction to require a VoIP service provider to obtain a CPCN to operate within the state of Utah.²¹ In addition, Frontier states that the question of federal preemption of state regulations over carriers seeking to provide VoIP and other internet communications services was also recently addressed by the 8th Circuit

¹⁸ For example, DPU and the OCS filed their Supplemental Opposition Memorandums September 25, 2020, the same day that parties filed their direct testimony. In addition, Frontier filed its Reply October 9, 2020, and parties filed their rebuttal testimony October 16, 2020.

¹⁹ Utah Code Ann. § 54-8b-2.1(3)(d).

²⁰ Motion, at 6-7 (citing *In the Matter of the Request for Agency Action of Carbon/Emery Telecom., Inc. v. 8x8, Inc.* (“*Carbon/Emery v. 8x8*”), Utah PSC Docket No. 12-2302-01, Nov. 27, 2012 Order of Dismissal for Lack of Jurisdiction, at 13 (citing Utah R. Civ. P. 12(h)(2)) (“Carbon/Emery Order of Dismissal”).

²¹ Motion, at 7.

in *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 720 (8th Cir. 2018) (“*Charter Advanced*”). Frontier then argues that, “[l]ike the VoIP service providers in *Carbon/Emery v. 8x8* and *Charter Advanced* [], E Fiber proposes to provide interconnected VoIP service in the Local Exchanges.”²² During oral argument, Frontier’s counsel further argued that E-Fiber’s service “uses a broadband connection from the customer’s home or the user’s location to send and receive voice communication[] [and that] [t]he connection over the public internet or private network is not necessary for it to be a broadband connection.” Hr’g Tr. at 23:4-8.

In response, E-Fiber contends that it proposes to provide “public telecommunications service.” E-Fiber’s Opposition, at 15. E-Fiber also disputes Frontier’s characterization of E-Fiber’s services, specifically that it proposes to provide interconnected “VoIP” as that term is defined by state and federal law because its voice service does not require a broadband connection at the user’s location. *Id.* at 2. During oral argument, in describing the voice service in the diagram representing a configuration of the E-Fiber network and voice service,²³ E-Fiber’s counsel explained that “if the customer is ... subscribing to a voice only service, ... [the] port is not activated. There is no access to the internet for the ... voice service customer.” Hr’g Tr. at 25:21-26:1.

DPU supports E-Fiber’s contention and states that its “voice offering does not use a broadband internet connection and therefore does not meet the definition of unregulatable VoIP service under Utah law.” DPU Supplemental Opposition, at 5. The OCS also supports E-Fiber’s

²² *Id.* at 8.

²³ The diagram is attached as Exhibit 5 to the Frontier Reply and was submitted by E-Fiber in response to DPU data request 1.7.

position and states that “E-Fiber’s proposed service lies outside [the FCC’s] definition [of interconnected VoIP] because E Fiber’s service does not rely on, require, or utilize a broadband connection at the user’s location.” OCS Supplemental Opposition, at 12.

In reviewing the diagram illustrating E-Fiber’s network, we observe that there are two separate and distinct lines that are depicted: 1) the red line representing “Voice VLAN (Private IP)” for voice only which, according to the diagram, “transports voice traffic to the switch/P[ublic] S[witch] T[elecommunications] N[etwork], and 2) the blue line representing “Data VLAN (Public IP)” for broadband services, including data and “3rd Party VoIP phone service” which is connected to the public internet.

E-Fiber has provided, and the record contains, sufficient material facts which we view in the light most favorable to E-Fiber at this stage, to satisfy subject matter jurisdiction. On this basis, we cannot dismiss the E-Fiber Application and therefore deny the Motion. Frontier will have the opportunity to challenge E-Fiber’s, DPU’s and OCS’s evidence concerning the nature of E-Fiber’s voice service during the evidentiary hearing.

B. Whether State Law Bars Regulation of E-Fiber Services Depends on the Type of Service It Proposes to Offer.

Next, Frontier argues that state law bars the PSC from “granting E Fiber’s proposal to provide VoIP and broadband service in the Local Exchanges.” Motion, at 8. But that “[a]s a threshold question, however, the [PSC] should determine whether, pursuant to Utah Code [Ann.] § 54-19-103(1), [it] lacks jurisdiction to grant E Fiber’s request to operate as a rate-of-return regulated carrier of last resort in the local exchanges.” Motion, at 9.

Utah Code Ann. § 54-19-103(1) states, “[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.” Frontier states that, on its face, this Section prohibits the PSC from regulating E-Fiber’s services.

During oral argument, Frontier explained that E-Fiber’s proposed service fits within the definition of “Internet protocol-enabled service” which Utah Code Ann. § 54-19-102(1) defines as “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.” Hr’g Tr. at 19:11-25. Frontier concludes, accordingly, that E-Fiber’s service is barred from state regulation. Hr’g Tr. at 20:6-11. Given the opportunity to comment on how the parties reconcile the use of “voice” in this definition with the definition of “[v]oice over Internet protocol service” in Utah Code Ann. § 54-19-102(2), most responded that the “voice” referenced in the definition of “Internet protocol-enabled service” was something less than “VoIP” as defined in Utah Code Ann. § 54-19-102(2). Counsel for Frontier responded that he believed it was the same. Hr’g Tr. at 77:8-12. Assuming Frontier is correct, issues of material fact exist in the record challenging Frontier’s characterization of E-Fiber’s voice service as the same VoIP service that is defined in and barred from regulation under state law.

We note that the same Section, § 54-19-103(2)(c)(v), states that “[t]he regulatory prohibition in Subsection (1) does not ... (c) affect or modify ... (v) the application of Section 54-8b-2.1.” Whether E-Fiber’s service fits into this carve-out turns on the type of voice service that it proposes to offer. Frontier relies on the same facts that we reference above and which are disputed by E-Fiber, DPU, and the OCS, to support its arguments that E-Fiber’s voice service is

an interconnected VoIP voice service. On this basis, we cannot dismiss the E-Fiber Application and therefore deny the Motion. Frontier will have the opportunity to challenge E-Fiber's, DPU's, and OCS's evidence concerning the nature of E-Fiber's voice service during the evidentiary hearing.

C. We Decline to Decide Whether E-Fiber Meets the Definition of Carrier of Last Resort

Third, Frontier argues that E-Fiber admits “that it cannot provide public telecommunications service to any customer or class of customers that requests it in the Local Exchanges and, therefore, cannot be designated as a ‘carrier of last resort.’” Motion, at 11. Frontier provides that “Utah Code [Ann.] § 54-8b-15 defines ‘carrier of last resort’ as either (i) an ‘incumbent telephone corporation,’ or (ii) 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.’” *Id.* Frontier correctly notes that E-Fiber “is not an ‘incumbent telephone corporation,’” and therefore “to qualify as a ‘carrier of last resort’ it must have a CPCN and ‘an obligation to provide public telecommunications service to any customer or class of customers that requests service within the local exchange.’” *Id.*

Frontier's argument is premature at this stage of the proceedings. We will decide whether to grant the E-Fiber Application, including to grant E-Fiber's request for a CPCN to operate in the local exchanges and as set forth in the Application, after the conclusion of the evidentiary hearing. On this basis, we deny the Motion.

D. We Decline to Decide Whether the PSC Lacks Authority to Adopt Criteria for UUSF Eligibility that Differs from the Criteria in Utah Code Ann. § 54-8b-15

Finally, Frontier argues that a rate of return regulated COLR, such as Frontier, is eligible to receive UUSF distributions if it meets the requirements for eligibility set forth in Utah Code Ann. § 54-8b-15. Frontier states that, consequently, the PSC cannot “rule that Frontier is ineligible to receive UUSF distributions based on different factors not identified in the statute.” Motion, at 12. In response, E-Fiber states that “Frontier’s eligibility for UUSF does not need to be determined in this case.”²⁴ We agree with E-Fiber that eligibility for UUSF need not be determined at this stage of the proceedings; therefore, we decline to make that decision at this time. On this basis, we deny the Motion.

E. **Order**

Based on our findings and conclusions we reach throughout this order, we deny Frontier’s Motion.

DATED at Salt Lake City, Utah, November 10, 2020.

/s/ Yvonne R. Hogle
Presiding Officer

²⁴ E-Fiber’s Opposition, at 25.

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Approved and Confirmed November 10, 2020, as the Order of the Public Service
Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Gary L. Widerburg
PSC Secretary
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CERTIFICATE OF SERVICE

I CERTIFY that on November 10, 2020, a true and correct copy of the foregoing was served upon the following as indicated below:

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