- 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: December 16, 2020

I. INTRODUCTION

In this order, the Public Service Commission (PSC) denies 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 Carriers of Last Resort in Certain Rural Exchanges. 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-Fiber[1] 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

[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.

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

We limit the remaining procedural history to the testimony that was filed in the docket and incorporate by reference the procedural history from our Order in Frontier's Motion for Partial Summary Judgment, issued November 10, 2020.

On June 24, 2020, E-Fiber filed the direct testimony of Brock Johansen and Darren Woolsey.

On September 25, 2020, the Division of Public Utilities (DPU) filed the direct testimony and exhibits of Ronald Slusher; the Utah Rural Telecom Association (URTA) filed the direct testimony and exhibits of Douglas Meredith; the Office of Consumer Services (OCS) filed the direct testimony and exhibits of Alyson Anderson; and Citizens Telecommunications Company of Utah d/b/a Frontier Communications ("Frontier") filed the direct testimony and exhibits of Carl E. Erhart, and the direct testimony of John H. Hansen.

On October 16, 2020, the DPU filed the rebuttal testimony of Mr. Slusher; the OCS filed the rebuttal testimony of Ms. Anderson; URTA filed the rebuttal testimony and exhibits of Mr. Meredith; and E-Fiber filed the rebuttal testimony and exhibits of Mr. Johansen.

On October 19, 2020, Frontier filed the rebuttal testimony of Mr. Erhart.

On October 26, 2020, the OCS filed the surrebuttal testimony of Ms. Anderson, URTA filed the surrebuttal testimony of Mr. Meredith, and E-Fiber filed the surrebuttal testimony of Mr. Johansen.

On October 27, 2020, Frontier filed the sur-rebuttal testimony and exhibits of Mr. Erhart and the surrebuttal testimony of Mr. Hansen. In addition to the pre-filed testimony that was filed by the parties, we received many comments from the public throughout the proceeding.

Finally, on November 12, 2020, the PSC held the evidentiary hearing in which all parties participated.

B. The E-Fiber Service and the E-Fiber Network

E-Fiber proposes to provide "state-of-the-art carrier-grade voice over internet protocol [(VoIP)] telephone service[s]" and "high-speed wholesale broadband [i]nternet access."[3] E-Fiber states that it will provide "all forms of local exchange public telecommunications services as a [COLR] on a facilities-based basis."[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 will 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."[6] E-Fiber proposes to offer the service using its state-of-the-art

[3] E-Fiber Application, at ¶ 15 and Direct Test. of B. Johansen, at lines 348-351.
[4] E-Fiber Application, at ¶ 4.c.
[5] Memorandum in Opposition to Frontier's Motion for Partial Summary Judgment ("Memorandum in Opposition"), at 9 (*quoting* Declaration of Brock Johansen, ¶ 5).
[6] Memorandum in Opposition, at 9 (*quoting* Declaration of Brock Johansen, ¶ 4).

fiber to the home network. It begins with an Optical Network Terminal ("ONT") that can be installed on the side of the home or placed inside the outer wall of the home. Hr'g Tr. at 41:25-42:5. The ONT connects to the existing house wire through an RJ-11 port on the ONT. *Id.* at 29:19-23. When a customer places a call, the ONT will receive the analog signal that travels across the customer's copper house wire via the RJ-11 port, and will then convert the signal to IP to enable the data packets to travel through E-Fiber's private internet in a dedicated VLAN. E-Fiber's switch will then convert the signal so that the call can be transmitted and terminated at the public switched telephone network ("PSTN"). *Id.* at 31:1-6.

The dedicated VLAN that travels through E-Fiber's private internet is enclosed in the same single fiber optic cable as the VLAN that contains all other information data packets and connects to the public internet, up to the network router. *Id.* at 29:1-3. When the voice data packets get to the network router, they then "jump[ ] on an IP core from there"[7] so that the voice signal connects directly to the PSTN. *Id.* at 31:18-20 and at 43:17-18. Unlike other companies that do not separate voice data packets from all other information data packets, E-Fiber separates the voice data packets that are transmitted through the private Internet VLAN from all other data packets, to give priority to the voice data packets. *Id.* at 112:19-24 and at 32:1-4.

[7] *Id.* at 29:4-5.

III. DISCUSSIONS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

A. E-Fiber's Voice Service and Utah Law

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." Voice over Internet Protocol ("VoIP") is 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.

Utah Code Ann. § 54-19-102(2) ("VoIP Statute").

1. E-Fiber's service meets the definition of VoIP service in the VoIP Statute.

i. E-Fiber's voice service enables real-time, two-way communication originating from or terminating at the user's location in Internet protocol or successor protocol.

It is undisputed that E-Fiber's network, once built, will enable real time, two-way communication originating from or terminating at the user's location. E-Fiber witness Brock Johansen testified at hearing that granting E-Fiber's application "will allow the deployment of upgraded fiber to the home [("FTTH")] facilities …" Hr'g Tr. at 60:9-12. He confirmed that the FTTH facilities will include an ONT, which is "a piece of equipment that will be owned by the [E-Fiber] entities and installed at the home."[8] Mr. Johansen also confirmed that the user's telephone will connect to the ONT using the "existing in-home telephone copper wire network."[9] According to Mr. Johansen, once the voice signal is received by the ONT, "… [t]he ONT

[8] Hr'g Tr. at 29:14-18.
[9] *Id.* at 29:19-23.

converts [the signal] to digital, [and then it] converts it to [I]nternet [P]rotocol, goes over to the switch [which] converts it back down to digital, and then it will [be handed] off TDM[10] to … a Frontier customer." Hr'g Tr. at 31:1-6. Mr. Johansen clarified that the E-Fiber network is "going to have one physical fiber from the ONT back to the network router … the second box, [a]nd … will be jumping back … on an IP core" to the PSTN. *Id.* at 29:1-5. For a call made in reverse, Mr. Johansen also confirmed that a call that originates at the PSTN, would go through E-Fiber's "voice switch and be converted to IP for transport through the [E-Fiber] system to the ONT." *Id.* at 33:2-8. (See also Figure 1 in Douglas Meredith direct testimony, at 7.)

The statutory VoIP definition also requires that the voice service being provided must originate from or terminate at the user's location in Internet protocol or a successor protocol. Utah Code Ann. § 54-19-102(2). While E-Fiber contends that its voice service originates and terminates in analog signal,[11] the record requires us to find otherwise. According to the diagram depicting E-Fiber's network, the network begins with the ONT which is installed at the user's location and is marked as the "demarcation point."[12] For an outgoing call, the user picks up the phone and makes the call using the "Existing House Wire, RJ-11 (Analog)" which connects to the ONT with an "RJ-11" port. Hr'g Tr. at 31:1-6. The existing house wire is on the user's side

[10] Time division multiplexing or "TDM" is a method of putting multiple data streams in a single signal by separating the signal into many segments, each having a very short duration. Each individual data stream is reassembled at the receiving end based on timing.

[11] *See* DPU Attachment 1 to Division of Public Utilities' Supplemental Memorandum Opposing Frontier's Motion for Partial Summary Judgment.

[12] *See* Frontier Exhibit 5 to Citizens Telecommunications Company of Utah d/b/a Frontier Communications' Reply in Support of Motion for Partial Summary Judgment and Figure 1 in Douglas Meredith direct testimony, at 7; *see also*, Exhibit C (E-Fiber's responses to data requests 2.2-2.4) to Citizens Telecommunications Company of Utah d/b/a Frontier Communications' Unopposed Motion for Leave to Submit Late-Filed Exhibits, October 2, 2020 in which E-Fiber explained that the demarcation point is the RJ-11 port on the ONT.

of the demarcation point and is, therefore, the user's wiring and responsibility.[13] E-Fiber's ONT converts the analog signal to Internet protocol to initiate its transmission through E-Fiber's network to the PSTN for delivery to the intended recipient.[14] In reverse, E-Fiber's ONT receives a call in Internet protocol, which is converted to analog at the RJ-11 port that connects with the user's "existing house wire." Hr'g Tr. at 33:2-8. The conversion is necessary to enable E-Fiber's FTTH technology to communicate and interface with the user's existing house wire. The ONT is a critical component of E-Fiber's network, and of the voice service to the end user.

The PSC acknowledges that the user will hear an analog signal when making or receiving a phone call. However, the signal that E-Fiber's network understands, and that originates and terminates at E-Fiber's ONT installed at the user's home, is Internet protocol. This signal is converted to analog so that it can travel through the existing house wiring in the user's home, to connect the call to the user. The fact that a user hears an analog signal when making or receiving a call neither makes the service "dial up" or "analog" service, [15] nor supports E-Fiber's contention that its voice service originates and terminates in analog. The evidence shows that E-Fiber proposes in its applications to provide voice service over a FTTH network, not over dial up connections. For these reasons, we find that E-Fiber's voice service originates from and

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[13] *Id.*, Exhibit C (E-Fiber's responses to data requests 2.2-2.4) to Citizens Telecommunications Company of Utah d/b/a Frontier Communications' Unopposed Motion for Leave to Submit Late-Filed Exhibits, October 2, 2020 in which E-Fiber explained that the demarcation point is the RJ-11 port on the ONT.

[14] Hr'g Tr. at 31:1-6.

[15] *See Big River Tel. Co., LLC v. Southwestern Bell Tel. Co.*, 440 S.W.3d 503 (Mo. Ct. App. 2014), 2014 Mo. App. LEXIS 623 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) in which the court of appeals found the Missouri's PSC finding that "in order to use its voice communication services, the CLEC's customers were required to use broadband connections since the CLEC did not offer dial-up or analog service." The Missouri PSC relied on language from a United States Supreme Court decision noting that "dial-up connections are … known as 'narrowband.'" And that "'[b]roadband' Internet service, by contrast, transmits data at much higher speeds." *Id.*, at 514.

terminates at the user's location (at the ONT) in Internet protocol, and therefore conclude that it satisfies this part of the definition of VoIP service under the VoIP Statute.

ii. E-Fiber's voice service uses a broadband connection.

The VoIP Statute requires a broadband connection at the user's location for voice service to be considered VoIP. E-Fiber and others argue that E-Fiber's service does not meet this part of the VoIP service definition.[16] E-Fiber states that "[a] voice only customer would not have a broadband connection at their location,"[17] and explains that "[i]f a customer elects to have voice and broadband Internet service, the ONT will be configured so that the RJ-45 ethernet ports and the RJ-11 ports are activated."[18] "The voice traffic will be transported through the RJ-11 ports of the ONT to the [PSTN] by private IP addressing on one data link across a virtual local area network (VLAN); and the Internet traffic will be transported through the RJ-45 ethernet ports of the ONT to the public Internet by public IP addressing on a completely separate data link across a separate VLAN." *Id.*, at 1.5.

This argument suggests that a broadband connection is the same as broadband Internet access service. We conclude that it is not. A broadband connection is not defined in Title 54, so we will look to other sources to define the term. Generally, a broadband connection is a type of transmission technology, such as Digital Subscriber Line (DSL), cable modem, fiber, wireless, among others, that enables the user to transmit data over the Internet. *See*

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[16] *See*, e.g., Declaration of Brock Johansen, attached to E-Fiber's Memorandum in Opposition to Frontier's Motion for Partial Summary Judgment, (August 25, 2020); Douglas Meredith rebuttal testimony, p. 9, at 183-186 (referencing other parties who dispute that E-Fiber's service uses a broadband connection).
[17] See DPU Attachment 1 (p. 2, 1.1) to Division of Public Utilities' Supplemental Memorandum Opposing Frontier's Motion for Partial Summary Judgment (September 25, 2020).
[18] *Id.* (p. 3, 1.5).

https://www.fcc.gov/general/types-broadband-connections. According to the FCC, "broadband connection" is a "[a] wired line … 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 exceeding 200 kilobits per second (kbps) in at least one direction."[19] A key characteristic of a broadband connection is the speed of transmission. E-Fiber testified at hearing that with its FTTH network, compared to the capacity of its affiliate's coaxial plant's (which is able to transmit information at "under a gig download and about 100 [gigs] upload"[20]), "you can have whatever speed you want." E-Fiber further testified that "all you've gotta do in the future as the customer needs more and more speeds, instead of going in and redoing your copper or coax plant, you just go the customer and put a new electrical device on the end, a new ONT, and a new OLT back at your location. And you can turn up 100 by 100 gig …" Hr'g Tr. at 44:14-21. We recognize that E-Fiber separates the path of transmission of its voice service that travels through a private VLAN from its information service that travels through a public VLAN; however, both data packets travel as IP through the same single fiber optic cable. Hr'g Tr. at 37:12-18. And in fact, the voice data packets have priority over all other data packets, as we describe in the next paragraph.

In addition, in describing fiber technology as a type of broadband connection, the FCC states "[t]he same fiber providing … broadband [Internet service] can also simultaneously

[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] Hr'g Tr. at 23:8-10.

deliver voice … and video services, including video-on-demand."[21] Thus, a broadband connection, using the same fiber, transmits not only information, but also voice and video services. E-Fiber acknowledges that its voice service is converted to IP data packets for purposes of transmission over private Internet through a private VLAN, over the same fiber optic cable that will carry all the other data.[22] In addition, Mr. Meredith testified at hearing that the distinction between the data packets containing the information and the data packets containing the voice signal that are traveling across E-Fiber's network, is the IP addressing. Specifically, in response to the question of "whether what is moving across from one end to the other in between the home and the switch and the Internet is distinguishable,"[23] Mr. Meredith testified, "you're asking essentially if the packets that are traveling between the ONT and the network router, which is the box, the third box to the right, the box that's closest to the public Internet and the voice switch – … – if they are distinguishable. And I … believe they are because the data VLAN are public IP addresses. It really boils down to the IP addressing protocol that's being used. The data packets have a public IP address, and the voice packets have a private IP address." Hr'g Tr. at 112:9-20. In fact, Mr. Meredith later testified that, as he understood Mr. Johansen's testimony, the "voice packets using private IP is over a separate VLAN configuration and actually has *priority* over the data packets." Emphasis added. *Id.*, at 21-24. Mr. Johansen had earlier testified that some companies do not separate their voice data from other data but E-Fiber does "so that we have all the data for that call."[24] We understand this to mean that because the data packets

[21] *See* https://www.fcc.gov/general/types-broadband-connections.
[22] *See* Hr'g Tr. at 29:2-5.
[23] Hr'g Tr. at 112:4-8.
[24] Hr'g Tr. at 32:1-4.

containing the voice signal are given priority over and separated from all the other data packets, the voice data packets would be delivered faster and more reliably than all other data, including data accessed over the public Internet.

Finally, with respect to whether a broadband connection is the same as internet access, the FCC has recognized that "[a] broadband connection may or may not provide the end user with internet access."[25] E-Fiber also concedes that its voice service is provided over a private IP network.[26] The fact that E-Fiber's voice-only customer does not subscribe to or activate public Internet service is not dispositive of whether a broadband connection exists, as recognized by the FCC. Therefore, as noted by the FCC, VoIP service can be provided over both the public Internet and private Internet networks.[27] The VoIP Statute requires only that the service use a broadband connection, not that it use broadband Internet access service.

In E-Fiber's case, the evidence shows that the technology that facilitates the transmission of information data to the public Internet is the same technology used to transmit the voice data. The IP data packets travel through the same fiber optic cable (albeit via separate VLANs). While the voice service data could travel through the same VLAN as all the other information data, E-Fiber configured its network in such a way to give its voice data higher priority over any other data. Without this technology, E-Fiber customers would neither be able to access the public Internet, nor make or receive phone calls. Thus, we conclude that this technology is the

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[25] 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).
[26] *See* Mr. Johansen's testimony that the voice "traffic that's converted from analog to voice – to IP-in-the-middle is on a private VLAN with only one path to the switch, and it's got private IP addresses." Hr'g Tr. at 34:19.
[27] *See* *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges ("AT&T Order"),* 19 F.C.C.R. 7457 P 6 (2004), WC Docket No. 02-361, ¶ 3.

broadband connection E-Fiber uses to provide voice services and public Internet access to its customers, satisfying the second part of the definition of VoIP service under the VoIP Statute.

iii. E-Fiber's voice service permits a user to receive a phone call that originates on the PSTN and to terminate a phone call to the PSTN.

The last part of the definition of VoIP service under the VoIP Statute requires that the voice service permit a user to receive a phone call that originates on the PSTN and to terminate a phone call to the PSTN. No party disputes that E-Fiber's voice service will allow a user to receive a phone call that originates on the PSTN and to terminate a phone call to the PSTN, and the record evidence supports that finding. Additionally, E-Fiber testified at various points that it intends to provide VoIP service. For example, in direct testimony, E-Fiber states "[o]ur facilities will provide carrier grade Voice over Internet Protocol ('VoIP') service and high-speed wholesale broadband Internet access."[28] Also, its application indicated that the "[a]pplicant will … bring updated facilities, access to high speed broadband and state-of-the-art carrier-grade voice over internet protocol telephone service to customers in these exchanges."[29] This testimony makes it difficult for us, with the additional evidence we cite above, to find that E-Fiber does not provide VoIP service, as defined in the VoIP Statute.

2. Neither the Utah Universal Service Fund ("UUSF") Statute, Utah Code Ann. § 54-8b-15, nor the National Exchange Carrier's Association ("NECA") Guidelines, Change Our Findings and Conclusions regarding E-Fiber's Voice Service.

E-Fiber contends that the Utah legislature intended the PSC to regulate its voice service. Specifically, Mr. Johansen testified at hearing that, "even in the new USF statute, … the Public

[28] B. Johansen direct testimony, pp. 16-17, at 348-351.
[29] E-Fiber Application at ¶ 15.

Service Commission now can regulate connections … – it uses Internet protocol or a functionally equivalent technology standard to enable an end user to initiate or receive a call from the public switched telephone network. The new S.B. 130, which is now codified in 54-8b-15, states that the Public Service Commission has the ability to regulate and can provide USF for connections that have IP protocol that enables an end user to reach the public switched network." Hr'g Tr. at 35:9-19. We do not disagree that the UUSF Statute provides funding for qualifying carriers of last resort, as well as one-time funding for non-rate-of-return regulated carriers of last resort to deploy "access lines; connections; or wholesale broadband Internet access service." Utah Code Ann. § 54-8b-15(2)(b), and (3), subsections (c) and (d). We also recognize that the UUSF Statute defines "connection" as "an authorized session that uses Internet protocol or a functionally equivalent technology standard to enable an end-user to initiate or receive a call from the public switched network."

Nevertheless, the UUSF Statute does not deal with the issue of whether we can regulate VoIP services. It deals with a revenue fund that the legislature created to promote the deployment of networks and facilities capable of providing access lines, connections, or wholesale broadband Internet access services. We acknowledge that many companies, including E-Fiber's parent company Carbon/Emery Telcom and other similar incumbent carriers, currently use and have used this fund to upgrade their traditional telecommunications systems and networks by deploying access lines, connections, or wholesale broadband services.[30] In addition,

[30] Carbon/Emery Telcom, along with other similar incumbent competitive local exchange carriers are legacy incumbents that bought their local exchange assets from US West in 1999. These incumbents did not have fiber networks to begin with; however, this fund has allowed them to upgrade their networks.

we recognize that other competitive local exchange carriers, including those designated as "eligible telecommunications carriers" have requested, and been granted, one-time disbursements from the UUSF. However, their requests and our reasoning for granting such requests do not implicate the question of whether the services provided are VoIP services. That is a separate question.

We analyze whether we can assert regulatory jurisdiction over VoIP services under the VoIP Statute. Even assuming the UUSF Statute indicated that the PSC can regulate VoIP services, among all of its current language (which as far as we can see, it does not), this would mean that it conflicts with the VoIP Statute. In that case, statutory rules of construction would require the PSC to determine which statute controls. And courts have long embraced the canon that the more specific of two competing statutory provisions controls a more general one.[31] In this case, the VoIP Statute would be the more specific statute and would thus control because it is a direct prohibition on regulation. Where the Utah Legislature has specifically prohibited us (and others) from regulating a defined technology type, we will interpret that prohibition conservatively. But such a conservative interpretation is not necessary in this case because, as we have previously concluded, the UUSF and VOIP statutes are not in conflict.

URTA and E-Fiber also contend that certain NECA guidelines support E-Fiber's argument that the PSC can regulate E-Fiber's voice service. Specifically, Mr. Meredith indicates that the use of IP transport in the delivery of voice traffic does not convert the service from basic

[31] *Traynor v. Turnage*, 485 U.S. 535, 547-48, 108 S. Ct. 1372, 99 L.Ed. 2d 618 (1988) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." (citation omitted).

local exchange service to VoIP service.[32] He explains that the use of IP transport is "widely used in the industry by regulated local exchange companies …." and that "[i]n fact, due to the widespread deployment of IP transport by regulated local exchange carriers, [NECA] produced Reporting Guideline 8.11 entitled 'Providing Local Exchange Telephone Service Using Voice over Internet Protocol (VoIP) Technology'."[33] At hearing, Mr. Meredith confirmed that NECA guidelines address the question of whether a network constitutes an information service or a telecommunication service, and that the NECA guideline in question instructs rural carriers on "how this particular service will be regulated at the federal level."[34] Mr. Meredith also acknowledged that the NECA guidelines "do not … address individual state laws that may restrict the jurisdiction of particular [p]ublic [s]ervice [c]ommissions." *Id.*, at 107:25-108:3. We agree. Therefore, the NECA guidelines do not affect our conclusion that the VoIP Statute prohibits our regulation of E-Fiber's VoIP service.

B. E-Fiber's Voice Service is an Internet Protocol-Enabled Service that We are Prohibited from Regulating under Utah Law.

Utah Code Ann. § 54-19-102(1) ("IP-ES Statute") defines "Internet protocol-enabled service" 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.

The DPU, OCS, and E-Fiber argue that the voice referenced in the IP-ES Statute is not the same as the VoIP that is defined in the VoIP Statute. Frontier indicates that it is the same VoIP service that is defined in the VoIP Statute. The FCC has indicated that VoIP service is an

[32] *See* D. Meredith rebuttal testimony, p. 5, at 99-104.
[33] *Id.*
[34] Hr'g Tr. at 107:3-5, and at 15-17.

IP-enabled service.[35] We note that the definition of "Internet protocol-enabled service" in the IP-ES Statute is broader than the VoIP service definition in the VoIP Statute. The facts we reference above, which support our finding that E-Fiber's voice service is VoIP service that we cannot regulate under the VoIP Statute and that we incorporate here, also support our finding that E-Fiber's voice service meets the statutory definition of "Internet protocol-enabled service," and is therefore also barred from regulation under the IP-ES Statute.

As described in Section A(1)(i) of our Order, E-Fiber proposes to offer voice services using its FTTH network which will use IP to transport data packets related to both E-Fiber's voice and wholesale broadband services.[36] For each service, E-Fiber will use the ONT at the end-user's home to transmit this data along a single fiber optic cable through at least a portion of its network, either to the PSTN in the case of its voice service or to the public Internet in the case of its broadband internet access service.[37] E-Fiber's proposed voice service and wholesale broadband service each reflect "[a] 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 Ann. § 54-19-102(1). Those services are, therefore, both "Internet

[35] *See* FCC's Notice of Proposed Rulemaking, *In the Matter of IP-Enabled Services*, adopted February 12, 2004, released March 10, 2004, WC Docket No. 04-36, 04-28 (stating "[i]n this Notice of Proposed Rulemaking (Notice), we examine issues relating to services and applications making use of Internet Protocol (IP), including but not limited to voice over IP (VoIP) services (collectively, 'IP-enabled services')" and, in a footnote, explaining that "the term 'IP-enabled services,'" as used there – "includes services and applications relying on the Internet Protocol family. IP-enabled 'services' could include the digital communications capabilities of increasingly higher speeds, which use a number of transmission network technologies, and which generally have in common the use of the Internet Protocol. Some of these may be highly managed to support specific communications functions. IP-enabled 'applications' could include capabilities based in higher-level software that can be invoked by the customer or on the customer's behalf to provide functions that make use of communications services. Because both of these uses of IP are contributing to important transformations in the communications environment, this Notice seeks commentary on both, and uses the term 'IP-enabled services' to refer to 'applications' as well as 'services'.")

[36] *Supra*, n. 12.

[37] *Id.*

protocol-enabled services" and, pursuant to Utah Code Ann. § 54-19-103(1), cannot be regulated by the PSC either "directly or indirectly."

E-Fiber, DPU, and the OCS nevertheless argue that E-Fiber's voice service is not the type of voice service that state law prohibits the PSC from regulating. In addition to the arguments we note above in Section A of our Order, E-Fiber contends that a PSC finding that state law prohibits the regulation of E-Fiber's voice service would not be consistent with the PSC's decisions to grant CPCNs to other companies that provide similar services. E-Fiber does not, however, cite to any specific cases to support its statement. E-Fiber further contends that such a finding would result in the deregulation of all other companies that provide similar services. We do not agree. Our decision here is applicable only to E-Fiber, and is based on the specific facts presented in the record of this case. In this order we have not analyzed facts and evidence related to any other company, nor to any other services.

C. It is not Necessary for us to Conclude at this time whether E-Fiber's Proposed Service is Preempted from State Regulation by Federal Law.

Because we have found and concluded that state law prohibits us from regulating the service E-Fiber has proposed to provide, it is not necessary for us to evaluate whether federal law preempts state law with respect to the service E-Fiber proposes to provide.

IV. CONCLUSION

Based on the foregoing record, we find and conclude that both the VoIP Statute and the IP-ES Statute prohibit us from regulating E-Fiber's voice service. We recognize that E-Fiber is unique in requesting that the PSC regulate its voice service. However, when confronted with requests for a finding that VoIP services can and should be regulated under Utah law, we have

similarly found and concluded that our laws prohibit us from doing so. For example, in *In the Matter of the Request for Agency Action of Carbon/Emery Telcom, Inc. v. 8x8, Inc.*, Docket No. 12-2302-01, we indicated that we did not have jurisdiction to regulate 8x8's VoIP service, citing the then-newly enacted Chapter 19, Title 54, "Regulation of Internet Services" statute, as well as the FCC's order in connection with the Vonage Holdings Corporation case.[38]

Utah state policy is to: "(1) … (4) allow flexible and reduced regulation for telecommunications corporations and public telecommunications services as competition develops." Utah Code Ann. § 54-8b-1.1. Even though we have jurisdiction over telecommunications services, the Utah Legislature, like legislatures across the country, is increasingly encouraging reduced regulation of telecommunications companies. Utah Code Ann. § 54-8b-3, for example, allows the PSC to find that a "telecommunications corporation or service" should be exempted from oversight in areas with "effective competition," based on certain criteria, including

> (a) the extent to which competing telecommunications services are available from alternative telecommunications providers; (b) the ability of alternative telecommunications providers to offer competing telecommunications services that are functionally equivalent or substitutable and reasonably available at comparable prices, terms, quality, and conditions; (c) the market share of the telecommunications corporation for which an exemption is proposed; (d) the extent of economic or regulatory barriers to entry; (e) the impact of potential competition . . .[39]

Nevertheless, we issue our order in this case without prejudice. We do not take lightly a statutory prohibition against asserting jurisdiction over a specific technology. While our state law

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[38] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (FCC 04-267 Memorandum Opinion and Order, released November 12, 2004).

[39] Utah House Bill 59 (Utah Code Ann. § 54-8b-3), 2017, Amend a provision relating to telecommunications, available at https://legiscan.com/UT/text/HB0059/id/1560645/Utah-2017-HB0059- Enrolled.pdf

prohibits us from regulating E-Fiber's voice services with the record before us, we might conclude otherwise with different facts. For example, the record indicates that while E-Fiber did not plan to take ownership of the coaxial plant of its affiliated non-regulated entity, E-Fiber was willing to use this plant to provide voice services until its FTTH was to be built. However, there was no evidence related to the costs and revenues between the regulated and unregulated entity assuming such agreements. Finally, there was also little to no evidence on the record about the coaxial plant's network and the type of voice service that could be offered using that network since our understanding is that the unregulated entity uses the coaxial plant to offer video services only. Also, the final record was unclear on whether E-Fiber intends to use its regulated affiliate's network to provide voice services to E-Fiber customers.

ORDER

For the reasons set forth in this order, we deny E-Fiber's application for a CPCN. This denial is without prejudice.

DATED at Salt Lake City, Utah, December 16, 2020.

/s/ Yvonne R. Hogle
Presiding Officer

Approved and Confirmed December 16, 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
DW#316754

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the PSC within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the PSC fails to grant a request for review or rehearing within 30 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on December 16, 2020, a true and correct copy of the foregoing was served upon the following as indicated below:

By Email:

Kira M. Slawson (kslawson@blackburn-stoll.com)
Brock Johansen (bjohansen@emerytelcom.com)
E Fiber Moab, LLC

Kira M. Slawson (kslawson@blackburn-stoll.com)
Brock Johansen (bjohansen@emerytelcom.com)
E Fiber San Juan, LLC

Phillip J. Russell (prussell@jdrslaw.com)
Gregory C. Brubaker (gregory.c.brubaker@ftr.com)
Attorneys for Citizens Telecommunications Company of Utah d/b/a Frontier Communications

Kira M. Slawson (kslawson@blackburn-stoll.com)
Brett N. Anderson (bretta@blackburn-stoll.com)
Blackburn & Stoll, L.C.
Attorneys for the Utah Rural Telecom Association

Patricia Schmid (pschmid@agutah.gov)
Justin Jetter (jjetter@agutah.gov)
Robert Moore (rmoore@agutah.gov)
Assistant Utah Attorneys General

Madison Galt (mgalt@utah.gov)
Division of Public Utilities

Alyson Anderson (akanderson@utah.gov)
Bela Vastag (bvastag@utah.gov)
Alex Ware (aware@utah.gov)
(ocs@utah.gov)
Office of Consumer Services

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Administrative Assistant