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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

**Applications of E Fiber Moab, LLC and
E Fiber San Juan, LLC for Certificates of
Public Convenience and Necessity to
Provide Facilities-Based Local Exchange
Service and Be Designated as Carriers of
Last Resort in Certain Rural Exchanges**

E FIBER MOAB, LLC AND E FIBER SAN
JUAN, LLC'S PETITION FOR REVIEW,
REHEARING OR RECONSIDERATION
OF THE COMMISSION'S DECEMBER 16,
2020 ORDER

DOCKET NO. 20-2618-01

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Pursuant to §§ 54-7-15 and 63G-4-301 of the Utah Code, and R746-1-101 through 801 of the Utah Administrative Code, E Fiber Moab, LLC (“E Fiber Moab”) and E Fiber San Juan, LLC (“E Fiber San Juan”) (collectively E Fiber Moab and E Fiber San Juan shall be referred to herein as “E Fiber”) respectfully petition the Utah Public Service Commission’s (the “Commission”) to review, rehear, or reconsider the issues enumerated below from its December 16, 2020 Report and Order (the “Order”).

I. INTRODUCTION

E Fiber filed Applications for Certificates of Public Convenience and Necessity on April 20, 2020, seeking authority to provide local exchange services in the local exchanges of Thompson, Moab, LaSal, Monticello, Blanding, Bluff, and Mexican hat in Grand and San Juan

counties (the “Applications”). E Fiber prefiled testimony in support of its Applications. The Office of Consumer Services (the “Office”), the Division of Public Utilities (the “Division”), and the Utah Rural Telecom Association (“URTA”) prefiled testimony in support of the Applications. Frontier Communications prefiled testimony in opposition to the Applications and filed a Motion for Partial Summary Judgment (“MSJ”) on July 27, 2020. A hearing on the MSJ was held on October 13, 2020. The Commission issued its Order on the MSJ on November 10, 2020, denying the MSJ and reserving the issues for trial. On November 12, 2020, the Commission held a hearing (the “Hearing”) on E Fiber’s Applications. E Fiber, the Division, the Office, URTA, and Frontier Communications presented evidence on numerous issues at the Hearing.

On December 16, 2020, the Commission issued its Order denying E Fiber’s Applications on the grounds that Utah Code § 54-19-101, et seq. prohibits the Commission from regulating E Fiber’s proposed telecommunications service because it is voice over internet protocol service (“VoIP”) or Internet protocol-enabled service. Specifically, the Commission determined that:

1. E Fiber’s voice service meets the definition of VoIP service in Utah Code Ann. § 54-19-102(2) because the service:
 - a. enables real-time, two-way communication originating from or terminating at the user’s location in Internet protocol or successor protocol;
 - b. uses a broadband connection at the user’s location; and
 - c. permits a user to receive a phone call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.¹
2. E Fiber’s voice service is an Internet protocol-enabled service under Utah Code Ann. § 54-19-102(1); and
3. Under Utah Code 54-19-103(1), the Commission is precluded from regulating E Fiber’s proposed voice service.

¹ Order, pp. 5-12.

E Fiber respectfully submits that the Commission's Order is not consistent with Utah Code Ann. §54-8b-1.1; §54-8b-2.1; §54-8b-15; §54-19-102 and 103, and that the Order rests on errors of fact and law. E Fiber respectfully asks this Commission to review, reconsider, and rehear the following issues and correct and modify its Order accordingly:

1. The Commission's Determination that it is prohibited from regulating E Fiber's proposed service pursuant to Utah Code Ann. §54-19-103 is erroneous given the panoply of E Fiber's proposed services; the legislative intent of Utah Code §54-19-101 et seq.; the status of regulated telephone service when §54-19-101 et seq. was enacted; and the intervening eight years of regulation by the Commission of telephone service just like E Fiber's proposed service.
2. The Commission's Determination that E Fiber's voice service originates and terminates at the user's location in internet protocol or a successor protocol is a legal error. The evidence submitted illustrates that E Fiber's voice service originates at the user's location as analog phone service and terminates to the user's location as analog phone service – not Internet protocol. Any conversion to internet protocol resides solely within the E Fiber network.
3. The Commission's determination that E Fiber's voice only service uses a broadband connection at the user's location is legal error. A broadband connection is, by definition, a connection to the Internet. The uncontroverted evidence submitted by E Fiber demonstrates that its voice only service does not connect to the Internet.
4. The Commission misconstrued Utah Code §§ 54-19-102 and 103 when it erroneously determined that E Fiber's voice only service is an Internet protocol-enabled service.
5. The Commission erroneously failed to properly consider the provisions of Utah Code §54-19-103(2)(c). Utah Code §54-19-103(2)(c) specifically provides that the regulatory prohibition in Subsection (1) does not: (c) affect or modify the application of § 54-8b-2.1. Although the Applications were brought under Utah Code 54-8b-2.1, the Commission's Order did not address, nor consider this provision of law.
6. The Commission has erroneously applied a different legal standard to E Fiber's CPCN Application than it has applied to other providers' CPCN Applications.

Support for this Petition for Review, Rehearing, and Reconsideration of the Commission's decisions on the issues identified above is set forth in the following.

II. ARGUMENT

The Commission, in its Order, declined to exercise jurisdiction over E Fiber's proposed service because the Commission determined that it is precluded from regulating E Fiber's service by Utah Code Ann. §54-19-103 since E Fiber's voice service uses internet protocol in the call path. The conclusion is incorrect for several reasons. Given the evidence presented in the prefiled testimony of Brock Johansen, Douglas Meredith, Ron Slusher, and Alyson Anderson, and testimony offered at the hearing, this determination was legal error.

1. **The Commission's Determination that It is Prohibited from Regulating E Fiber's Proposed Service Pursuant to Utah Code Ann. §54-19-103 is Erroneous.**

The Commission determined that it is prohibited from regulating E Fiber's proposed service pursuant to Utah Code Ann. §54-19-103 because the Commission concluded that the service proposed to be provided by E Fiber is Voice over Internet Protocol ("VoIP") service, or Internet protocol-enabled service. This conclusion is erroneous given the panoply of telecommunications services beyond local exchange service proposed to be offered by E Fiber; the legislative intent of Utah Code §54-19-101 et seq.; the status of regulated telephone service when §54-19-101 et seq. (the "VoIP Statute") was enacted; and the intervening eight years of regulation by the Commission of telephone service just like E Fiber's proposed service.

a. **E Fiber Proposes to Offer a Variety of Public Telecommunications Services for Which a CPCN Should be Granted.**

E Fiber proposes to offer a variety of public telecommunications services. The Applications indicate they are seeking authority to provide all forms of local exchange public telecommunications service. (Applications, ¶4.c). Brock Johansen testified that E Fiber proposed to provide every public telecommunication service identified in the Emery Telephone Tariff.

(Johansen Rebuttal, Lines241-252). The tariff services include, but are not limited to, network access line service, number reservation service, teleselect service, intraexchange special access service, directory assistance directory, listings, customer calling features, centrex service payphone service, lifeline, and linkup, integrated service digital networks (ISDN), primary rate interface (PRI), traditional direct inward dialing (DID). (Johansen Rebuttal, BJ-R03).

As demonstrated in Section 6, below, in considering and granting other Applications for CPCN, the Commission has not required applicants to all provide the same service, but rather the Commission has approved applications for CPCN if the application will provide “public telecommunications services.” (See Dockets 20-2623-01; 20-2621-01; 20-2616-01; 19-2615-01 discussed in more detail below). The Commission’s focus in its Order was on the services provided across a residential gateway ONT, without consideration of the other telecommunications services that E Fiber will provide. For example, for T1 service or DID service, E Fiber will use a different ONT model that delivers DS1s to the customer. This is a public telecommunications service for which E Fiber should be granted a CPCN.

b. Legislative History and Status of Regulated Telecommunications at Time of Enactment and Since Suggest Rate of Return Regulated Carriers Should Not be Affected by Utah Code §54-19-101 et seq.

When Utah Code Ann. §54-19-101 et seq. was enacted in 2012, Senator Bramble testified in legislative hearings and on the Senate Floor that the intent of the legislation was to codify the status quo at the federal level which was that VoIP was part of the Internet and should not be subject to regulation by state agencies. It is instructive to look at the state of regulated telecommunications service at the time the VoIP Statute was enacted. At the state level, in 2012, the evidence shows that Emery Telephone, Carbon/Emery Telcom, Inc., and Hanksville Telcom,

Inc., which are all rate of return regulated companies (the “Emery Rate of Return Regulated Companies”), were switching their voice traffic using the Metaswitch which was installed in 2006-2007. (Hearing Tr. 36:17-19).

The Metaswitch is a digital switch that is connected to access equipment via fiber across a dedicated path. (Johansen Rebuttal, BJ-R01, ¶10). The Metaswitch has, since its installation, used TDM and IP transport over copper and fiber facilities. (Johansen Rebuttal, BJ-R01, ¶¶11, 12. Therefore, at the time Utah Code §54-19-101 et seq. was enacted, the Emery Rate of Return Regulated Companies were already using internet protocol within their networks to transmit local exchange service for their customers.

This practice was consistent with the FCC’s Order *In Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephone Services are Exempt from Access Charges*, WC Docket No. 02-361 which was issued April 21, 2004 (the “ATT IP in the Middle Case”). In the ATT IP in the Middle case the FCC determined that use of IP transport technology in the middle of the call path within a provider’s network does not transform the voice service from telecommunications service to information service.² Through the lens of the ATT IP in the Middle Case, a rate of return regulated carrier of last resort in Utah using internet protocol in the middle of the call path would not convert the regulated service to an unregulated VoIP or IP enabled service. In fact, there was no suggestion that enactment of the VoIP Statute was intended to, or would, have any effect on rate of return regulated local exchange service – whether or not rate of return local exchange carriers used internet protocol technology in their voice networks.

² ATT IP in the Middle Case, ¶¶1, 12, and 24.

As demonstrated above, at the time the VoIP Statute was enacted, Emery Telephone was utilizing internet protocol technology for transport in its network; the Emery Rate of Return Regulated Companies have continued to use internet protocol technology for transport; and the Commission has continued to regulate Emery's services as a rate of return regulated carrier of last resort. As stated by the bill sponsor, Utah Code Ann. §54-19-101 et seq., was meant to codify this federal treatment, not expand it to reclassify local exchange services provided by the Rate of Return companies.

Additionally, both the Division and the Office have testified that they believe E Fiber's proposed service is not prohibited from regulation under Utah Code §54-19-101 et seq. Specifically, Alyson Anderson on behalf of the Office stated "E Fiber's proposed service is not the type of VoIP service that is preempted by federal law or exempted from regulation by Utah Code 54-19-103(1). (Anderson Rebuttal, Line 30). Further, Ron Slusher of the Division testified that in his review of the E Fiber proposed service, he does not believe E Fiber's voice service meets the criteria of Utah Code §54-19-102(2). (Slusher Direct, Lines 44-54).

Therefore, E Fiber asks the Commission to review and reconsider its legal determination that it is prohibited from regulating E Fiber's proposed service because it will use IP technology solely within its network in the call path over the network. This is not what the legislature intended, nor is it consistent with the Commission's treatment of other rate of return regulated service since the enactment of the VoIP Statute. As indicated in the Rebuttal Testimony of Brock Johansen, the Commission has consistently regulated the voice service of Emery

Telephone, Carbon/Emery Telcom, Inc., and Hanksville Telcom, Inc. without consideration of whether such companies use IP technology in the transport of voice signals.³

2. The Commission’s Determination that E Fiber’s Voice Service Originates and Terminates at the User’s Location in Internet Protocol or a Successor Protocol is Erroneous.

In the inquiry of whether E Fiber’s voice service meets the definition of VoIP in the VoIP Statute, the Commission must first find that E Fiber’s voice service “enables real time, two-way voice communication originating from or terminating at the user’s location in Internet protocol or a successor protocol.” U.C.A. §54-19-102(2). There is no dispute that E Fiber’s voice communication enables real time, two-way communications. The relevant legal question is whether E Fiber’s proposed voice service originates from and terminates at the user’s location in Internet protocol or a successor protocol. On page 8 of the Order, the Commission determined that E Fiber’s proposed voice service does originate from and terminate at the user’s location in Internet protocol. This legal finding is erroneous and contrary to the evidence presented in the docket. E Fiber takes exception to many of the legal conclusions made by the Commission in its analysis of this issue. Out of an abundance of caution, E Fiber will identify all of the erroneous conclusions contained in Section III.A.1.i of the Commission’s Order.

- *“While E Fiber contends that its voice service originates and terminates in analog signal, 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.’” Order, p. 6.*

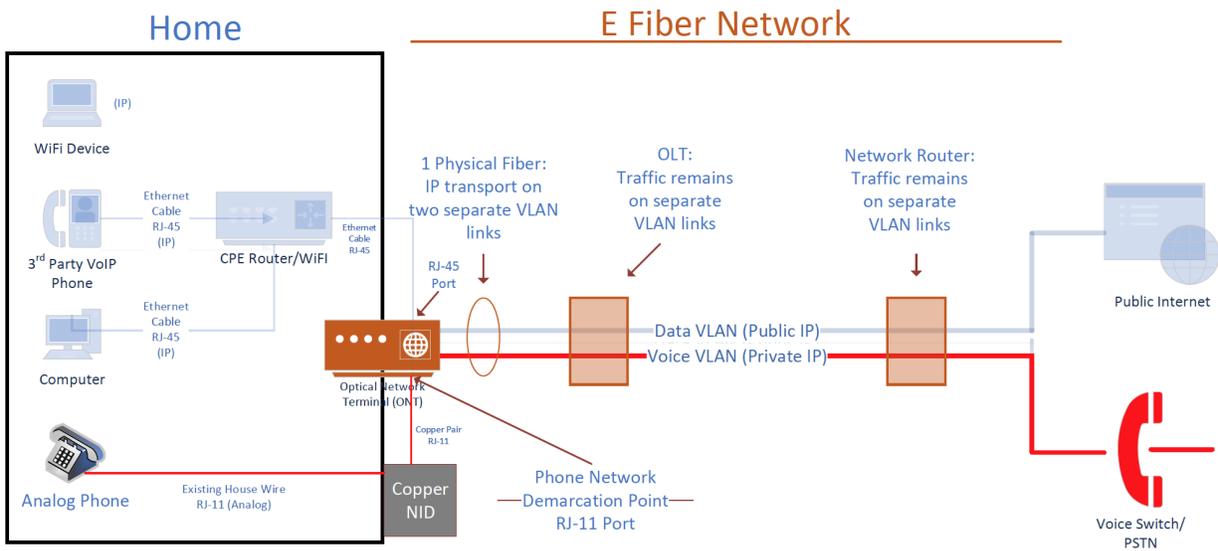
³The Commission, in its Order on page 17 states that “E Fiber contends that a PSC finding that state law prohibits the regulation of E Fiber’s voice service would not be consistent with the PSC’s decisions to grant CPCN’s to other companies that provide similar services. E Fiber does not, however, cite to any specific cases to support its statement.” This is not accurate. E Fiber refers the Commission to the Johansen Rebuttal, Lines 333-338. E Fiber provides additional specific examples in Subsection II. B, below.

This is not accurate. The diagram depicting E Fiber’s network is found in the Direct Testimony of Douglas Meredith, Line 135. It is included below for ease of reference (highlighted to show the voice signal).

Diagram 1 – 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.



As noted in Diagram 1, E Fiber identifies the demarcation point between the customer premise and the telephone network as the RJ-11 port on the ONT, not the ONT generally.

Furthermore, Douglas Meredith testified that:

“The voice service begins with an analog phone at the customer location with a standard RJ-11 jack plugged into the existing home wire. The phone signal is routed to the E Fiber ONT. The RJ-11 port on the ONT is the network demarcation point (this is similar to the network demarcation point in a traditional Network Interface Device (“NID”). The demarcation point signifies the point where the Applicants’ network ends and the customer CPE begins.” (Meredith Direct Testimony, Lines 137-144).

Accurately identifying the point of demarcation is important, particularly when the Commission tries to describe where the voice signal is converted from an analog signal to Internet protocol for

transport. To satisfy Internet protocol origination requirement, the signal must be in Internet protocol at the consumer side of the demarcation point. However, at this point the signal has already been converted within the E Fiber network to analog in order to use devices attached to the RJ-11 port.

In describing a call terminating at an E Fiber customer's home, the Commission mistakenly states:

- *“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.” Order, p. 7, emphasis added.*

The Commission’s conclusion is not accurate, factual, or supported by the evidence. The RJ-11 port, the point of demarcation, has no ability to convert signals. The digital to analog conversion is performed within the ONT on the E Fiber side of the demarcation point. This is indicated in the testimony of Brock Johansen, “the ONT converts the analog signal that’s coming from the customer into our device. The ONT converts it to digital, converts it to IP, goes over to the switch. The switch converts it back down to digital, and then it will hand it off TDM to, like, a Frontier customer.” (Hearing Tr. 31:1-6). “Specifically, the protocol conversion of the voice traffic occurs in the Applicants’ network at the INID/ONT.” (Johansen Rebuttal Testimony, Lines 484-488). Additionally, the testimony of Douglas Meredith bolsters this point. Mr. Meredith states, “For calls between the Applicants’ end users and Frontier end-user customers, the Applicants’ customer’s analog call is converted into a digital/optical signal on the Applicants’ network.” (Meredith Rebuttal Testimony, Lines 65-67). Finally, even Frontier’s witness, Jack Hansen, makes this same point when he says, “For voice applications, the ONT

functions to sample the analog voice conversation from the customer's phone set and convert it to digital." (Hansen Direct, Lines 104-105).

As demonstrated above, the undisputed evidence is that the voice signal is converted from analog to IP, or IP to analog, (depending on whether the call is originating or terminating) in the ONT, not at the RJ-11 port. The RJ-11 port is where the user connects to the E Fiber telephone network, the point of demarcation. The signal is analog on both sides of the RJ-11 port and remains analog until the signal reaches the component within the ONT where the analog to digital conversion occurs—in every instance this is on the E Fiber side of the demarcation point and is within the E Fiber network where the customer has no access. Therefore, in E Fiber's network configuration, on the customer's side of the demarcation point, which is the user's location, the voice signal is always an analog signal, and is never IP. This is further demonstrated by the fact that a customer is unable to connect any IP device to the RJ-11 port. There is no literally no IP enabled device that will work on E Fiber's voice network: The RJ-11 port only accepts analog devices because it is a narrowband port and is incapable of providing broadband access, as will be discussed in more detail below.

- *"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."*

There is no testimony in any of the prefiled testimony, and there was no testimony offered at the Hearing that indicates that Internet protocol is the only signal that E Fiber's network understands. Rather, the evidence in the record indicates that E Fiber's network understands analog, internet protocol, and time-division multiplexing signals, in addition to myriad other transport signals. See Johansen Rebuttal Testimony, Lines 453-455 and Exhibit BJ-R01, ¶11.

Additionally, this conclusion is not relevant in determining whether E Fiber's proposed service is VoIP under the VoIP Statute. The question that needs to be answered in a VoIP inquiry is not whether the signal that originates or terminates at E Fiber's ONT is in Internet protocol or analog. In the first place, the two-way voice communications do not originate or terminate at the ONT.⁴ Moreover, the relevant inquiry is whether the "two-way voice communications" originates from or terminates to the user's location in Internet protocol or a successor protocol. As demonstrated below, the answer to that question, is unequivocally "no."

- *"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."*

There is no evidence in the record indicating that an Internet protocol signal cannot travel through the existing house wiring. On the contrary, an IP signal can travel across the copper wiring in a home (and does when a customer subscribes to broadband service and the RJ-45 port is activated). However, in E Fiber's network when a customer is a voice only customer, only the RJ-11 port is activated and all signals on the user's side of the point of demarcation are analog.

- *"The fact that a user hears an analog signal when making or receiving a call neither makes the service "dial up" or "analog" service, 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."*

The Commission's reference to dial up service in this legal conclusion is perplexing. Dial-up service refers to a way to connect to the Internet using analog telephone service and a "dial up modem." There was no evidence presented, nor any discussion in any of the testimony of a "dial up" connection to the Internet. Dial up service is not broadband service. Instead dial

⁴ See Johansen Rebuttal Testimony, Lines 597-600 ("There is no dispute that the ONT does not originate or terminate telecommunications.")

up service is a narrowband service utilizing analog phone service to access data servers. E Fiber requests that the Commission review and clarify this conclusion. In referring to the “dial up” service, the Commission cites to *Big River Tel. Co., LLC v. Southwestern Bell Tel. Co.* (“*Big River*”).⁵ Upon reviewing of this case, it is difficult to understand the point the Commission is making with the citation of this case. In the *Big River* case, Big River Telephone Company (“*Big River*”) a competitive local exchange carrier (“CLEC”), appealed from a report and order issued by the Missouri Public Service Commission (“PSC”) that denied Big River’s complaint against the ILEC (“ATT”) related to a dispute about access charges that were billed to Big River by ATT. Big River claimed the access charges were improperly assessed on information or enhanced services; ATT claimed that the charges were properly assessed because Big River was providing interconnected voice over internet protocol services (I-VoIP) and under the interconnection agreement and the state statute I-VoIP was subject to such charges. The PSC determined that the services provided by Big River were I-VoIP and the charges billed by ATT were, therefore, due and owing. On appeal of the PSC’s ruling, Big River makes four arguments.

It is the third argument for which the Utah Commission cited this case – namely was the PSC’s determination that Big River’s traffic constituted I-VoIP unreasonable? Specifically, Big River argued that the PSC improperly defined “broadband” and erroneously concluded that Big River’s traffic required a broadband connection, and therefore met the statutory definition of I-VoIP.⁶ Ultimately, the Missouri Court of Appeals found that the Missouri PSC’s determination

⁵440 S.W.3d 503 (Mo. Ct. App. 2014, citing Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005).

⁶It is somewhat confusing that the Commission cited this case in this particular section of its Discussion, Findings of Fact and Conclusion of Law. It would seem that the Commission is citing this case in support of its finding that E Fiber’s voice service requires a broadband connection (Section A.1.ii, rather than Section A.1.i which is entitled “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.

that Big River's service was I-VoIP was NOT unreasonable. The record in the Big River case demonstrates that Big River stipulated that its service was VoIP; it stipulated that the voice traffic originated with Big River telephone service customers using IP-enabled customer premises equipment; and most importantly, Big River stipulated that in order for it to provide telephone service, Big River partners with cable and DSL providers to provide telephone service in IP format over those companies last mile facilities which are broadband connections.⁷

Despite these stipulated facts, including the fact that Big River uses broadband connections at the customer's locations to provide its IP telephone service, Big River argued that Big River's customers don't actually need a broadband speed to make a call, so there should be no finding that a "broadband connection" is required. In other words, Big River argued that because it is "technologically possible for voice services to be provided in IP-format at a speed equal to or slower than dial-up, those services cannot constitute VoIP or I-VoIP."⁸ The Missouri PSC (and ultimately the Missouri Court of Appeals) rejected this argument and found that "because Big River does not provide service over dial-up connections, and because its service is designed for and marketed to customers that use a broadband connection, a broadband connection is required."⁹ In reaching this decision, the PSC specifically found that "Big River's service connections should ...be considered to be broadband regardless of the specific speed of the connection because they are faster than analog dial-up service." The PSC relied upon language from a United States Supreme Court decision where the U.S. Supreme Court discussed

⁷*Big River* at 513-514.

⁸*Id.*

⁹*Id.*

dial-up connections (known as narrowband), or “slower speed, connections vs. Broadband Internet service by contrast, that “transmits data at much higher speeds.”¹⁰

While the Missouri PSC and the Missouri Court of Appeals reached the correct conclusion in the Big River case, the inquiry in the Big River case was not the same inquiry that the Utah Commission is required to make. There was no question in the Big River case that Big River was providing VoIP telephone service, using IP-enabled customer premise equipment, and an Internet connection at the user’s location. The question that Big River asked the Missouri PSC and the Court to determine was whether that Internet connection was a narrowband (slow) connection, or a broadband (fast) connection to the Internet. Big River argued that if the connection were determined to be a narrowband connection, Big River’s voice service did not “require” a broadband connection at the user’s location, so the service did not meet the definition for VoIP service.

The Utah Commission cites the Big River case and the Nat’l Cable Case in support of their finding that E Fiber’s service originates and terminates in IP. However, a thorough review and analysis of both cases demonstrates that both the Big River case and the Nat’l Cable Case actually support E Fiber’s contention that its voice service does not originate or terminate at the user’s location in Internet protocol and does not require a broadband connection.

As indicated above, in the voice-only customer scenario for which E Fiber petitions the Commission, the only means for connecting the user to the E Fiber network and the PSTN is the RJ-11 port. The RJ-11 port allows the customer to have traditional analog voice service only. As the Commission is aware, before the advent of broadband, traditional analog voice service could

¹⁰*Big River* at 514, citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005) (“*Nat’l Cable Case*”).

be used to transmit faxes or for “dial up” connections to the Internet. In fact, as stated by the United States Supreme Court in 2005, the Nat’l Cable Case cited by the Commission:

“the traditional means by which consumers in the United States access the network of interconnected computers that make up the Internet is through “dial-up” connections provided over local telephone facilities. . . Using these connections, consumers access the Internet by making calls with computer modems through the telephone wires owned by local telephone companies. . . Technological limitations of local telephone wires, however, retard the speed at which data from the Internet may be transmitted through end-user’s dial up connections. Dial-up connections are therefore known as narrowband or slow speed, connections.

Broadband internet service, by contrast, transmits data at much higher speeds. There are two principal kinds of broadband Internet service: cable modem service and Digital Subscriber Line (DSL) service.”¹¹

Upon review of the Commission’s Order there appears to be some confusion about the RJ-11 port and the VLAN connection between the RJ-11 port and the E Fiber Metaswitch. E Fiber offers additional explanation below, but to the extent the Commission needs additional evidence on this issue, E Fiber requests review, reconsideration, and rehearing as needed.

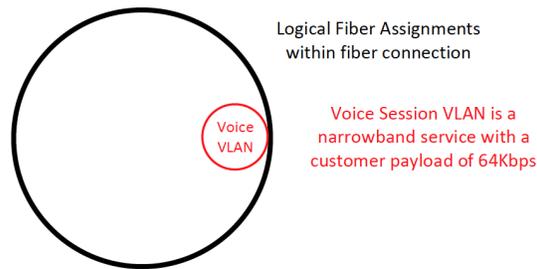
As the Commission should be aware, the RJ-11 port on the ONT, which is activated for a voice only customer, is a narrowband port meaning it cannot support bandwidth in excess of 64 Kbps and it can only interact with the customer’s other narrowband devices, that provide service over the PSTN, such as an analog telephone, a dial-up modem, a point-of-sale credit card machine, a fax machine, or telemetry equipment. All of these services “dial” a number on the PSTN. The RJ-11 port is not compatible with Internet protocol enabled customer premise equipment. (Hearing Tr. 30:8-17). It can only interface with the PSTN. The RJ-11 port is configured to use a voice grade session to connect with the Metaswitch. The RJ-11 port is connected to the Metaswitch (PSTN) via a voice session VLAN. (See Diagram 1 above, red line

¹¹Nat’l Cable Case at 975.

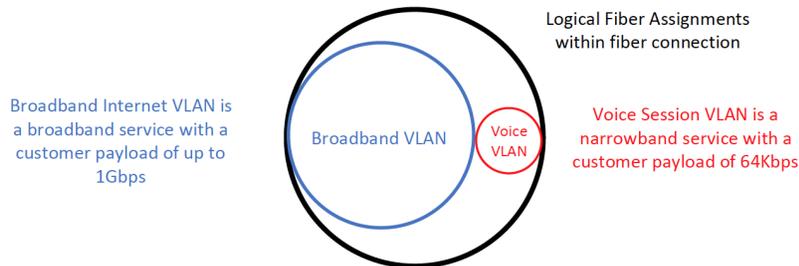
connected to the Metaswitch). As demonstrated in Diagram 2 below, the voice session VLAN is a narrowband path that offers a “payload” of 64 kbps of customer available data to the Metaswitch - the only destination point.

Diagram 2 – Cross Section of Fiber VLANs from ONT to OLT

1. Customer subscribes only to Voice Service



2. Customer subscribes to Voice Service and Broadband Service



The Voice Session VLAN is designed to be the equivalent of a DS0 to communicate with the Metaswitch. By definition and design, the voice VLAN in E Fiber’s network is narrowband. Broadband devices, as discussed in further detail below in Section 3, operate across a much larger frequency band, and can, therefore, transmit data at higher (broadband) speeds, but they cannot connect to the RJ-11 port and the voice-only service provided by the Applicant. This demonstrates two things: (1) E Fiber’s voice only service does not originate or terminate at the

user's location in IP format; and (2) that E Fiber's voice service does not use or require a broadband connection, as will be discussed in further detail in Section 3, below.

- *“For these reasons, we find that E-Fiber’s voice service originates from and 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 services under the VoIP statute.”*

The Commission's conclusion above is erroneous, and E Fiber requests that the Commission review and reconsider this legal finding. The Commission commits legal error when it erroneously concludes that the two-way voice communication originates from and terminates at the user's location (the ONT) in Internet protocol. As demonstrated previously, the ONT is not the user's location, it is part of the E Fiber network. The user's location is on the user's side of the point of demarcation (RJ-11 port). At this point of demarcation, the signal is analog on the consumer side and analog on the E Fiber side and is converted from analog to digital at another component within the ONT. Further, the two-way voice communication does not originate or terminate at the ONT. The ONT cannot originate a call but can only serve to convert an analog call to digital and then to IP for transport. The Commission is erroneously equating the user's location with the ONT installed by E Fiber on the customer's home, rather than the analog handset and/or analog equipment used by the customer on the customer's side of the demarcation point. No IP compatible equipment or broadband equipment can be used by the user in a voice-only customer scenario. Therefore, it is impossible that the voice communications originate or terminate at the user's location in IP format.

Moreover, Brock Johansen testified that the “voice service proposed by Applicants does not originate from or terminate to the end user in Internet protocol format. The Applicants’ voice service originates from and terminates to the user’s handset (telephone) in analog electrical

format, not Internet protocol format. It is only converted to Internet protocol on the E Fiber network for transport across the network.” (Johansen Rebuttal Testimony, Lines 533-537).

Similarly, Douglas Meredith testified “the voice service proposed by Applicants does not originate from or terminate to the end user in Internet Protocol format. The Applicants’ voice service originates from and terminates to the user’s handset (telephone), in analog electrical format, not Internet Protocol format.” (Meredith Rebuttal, Lines 179-182).

The undisputed evidence is that the voice communications enter the E Fiber network from the user’s side of the demarcation point (originate from) as analog signals. Similarly, the voice communications exit E Fiber’s network to the user’s side of the demarcation point (terminate to) as analog signals. E Fiber respectfully requests that the Commission reconsider this conclusion of law in light of the evidence presented on this matter.

3. The Commission’s Determination that E Fiber’s Voice Only Service Uses a Broadband Connection at the User’s Location is Legal Error.

The Commission determined that E Fiber’s voice service uses a broadband connection at the user’s location. This conclusion is legal error under State and Federal law and should be reconsidered and modified by the Commission. The Commission began with a discussion of broadband “generally” and stated that a broadband connection is a type of transmission technology, such as DSL, cable modem, fiber, wireless, among others, that enables the user to transmit data over the Internet. The Commission then cites to the FCC’s definition of “broadband connection” as “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 (kpbs) in at least one

direction.”¹² According to Mr. Meredith, “a broadband connection is a high-speed connection to the Internet.” (Meredith Rebuttal, Lines 192-193). The question that the Commission should have asked is whether an E Fiber voice only customer is able to transmit (receive or send) data/information to the Internet at a broadband equivalent speed.

However, armed with an accurate definition of “broadband connection” the Commission enters into a labored analysis of E Fiber’s voice transmission path. The Commission states “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.” This is correct. However, the Commission doesn’t stop there. The Commission goes on to state “however, both data packets travel as IP through the same single fiber optic cable.” This conclusion is only true if a customer has voice and broadband service. However, with a voice only customer, E Fiber only activates one narrowband VLAN connection for the customer – a private VLAN that goes only to the public switched telephone network with a customer payload of 64Kbps. “The VLAN connection is a call path from the ONT to the end-office switch.” It is “not a broadband connection.” (See Meredith Rebuttal, Lines, 192-196). The Voice Session VLAN is a narrowband connection. (See Diagram 2 above).

While the FCC correctly describes that “the same fiber providing your broadband can also simultaneously deliver voice (VoIP) and video services,”¹³ in the case of a voice only E Fiber customer, the fiber providing the customer’s voice service is not carrying or delivering any data or video services. “Applicants’ use of IP transport from the customer switch does not allow a customer to transmit “video and non-voice data.” (Meredith Rebuttal, Lines 133-137).

¹²47 CFR §1.7001(a)(1).

¹³ <https://www.fcc.gov/general/types-broadband-connections>

Therefore, the Commission’s conclusion on page 10 of the Order that “thus, a broadband connection, using the same fiber, transmits not only information, but also voice and video services” is inapposite to the facts at hand. With an E Fiber voice only customer, the only signal on the fiber is a voice signal VLAN going to the PSTN, and the only devices that can be connected at the customer’s location are narrowband devices which connect to the PSTN such as analog telephones, a dial-up modem, a point of sale credit card machine, a fax machine, or telemetry equipment. Furthermore, the mere fact a particular medium has both data and voice does not reclassify those services. For example, an old copper line that has DSL on it along with the voice traffic does not mean that the DSL “broadband connection” is delivering the voice. Rather, the voice and the data would just be on the same physical path (whether that path is copper, wireless, fiber, or coaxial cable. If the Commission’s position were to be adopted, DSL provided with TDM transport only (no internet protocol technology in the transport) would also be considered internet protocol enabled service, and any medium that allowed for the joint transport of voice and data would transform traditional voice service to VoIP just by allowing the sharing of the physical path.

The Commission next concludes that a broadband connection is not the same as internet access. The Commission states that “the FCC has recognized that ‘[a] broadband connection may or may not provide the end user with internet access.’” (Order at p. 11¹⁴). While it is accurate that the broadband connection used in an interconnected VoIP service may or may not provide the user with Internet access service, by definition, a broadband connection must allow the user to transmit information to the Internet. In the case of a VoIP service where the user

14 Citing 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>)

doesn't have broadband internet access service, the user is still transmitting information to the internet—the voice signals are being transported across the public Internet, and thus the connection is a “broadband connection.” Contrast the E Fiber voice only service where it is undisputed that the user is not transmitting anything to the Internet. Rather, the voice signals are being transmitted to the PSTN, and only the PSTN, using the narrowband VLAN.

Finally, the Commission refers to the ATT IP in the Middle case for the proposition that “VoIP service can be provided over both the public Internet and private Internet networks.” As a point of clarification, the FCC actually said “VoIP can be provided over the public Internet or over private IP networks,” rather than “private Internet.”¹⁵ In this case, the FCC makes it clear that “the Internet” is separate and distinct from “a private IP network.” However, the FCC’s determination of whether ATT’s service should be subject to access charges was ultimately not dependent on whether ATT’s voice services were transported over the Internet or over a private IP network. In fact, the FCC said “some commenters argue that ATT’s specific service should not be assessed interstate access charges because it utilizes the Internet rather than a private IP network.” The FCC rejected this approach and stated:

“These commenters, however, fail to explain why using the Internet, as opposed to a private IP network or some other type of network, is at all relevant to our analysis of whether ATT’s specific service should be assessed interstate access charges, particularly where ATT merely uses the Internet as a transmission medium without harnessing the Internet’s broader capabilities. In the IP Enabled Services rulemaking proceeding we may draw such distinctions, but we have not done so under our current rules. . . We do not believe that a service of the type described above – which provides no enhanced functionality to the end user due to the conversion to IP – is the kind of use of the Internet or interactive services that Congress sought to single out for exceptional treatment. . . We see no benefit in promoting one party’s use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules, particularly where, based on the record before us, end users have received no benefit in terms of additional functionality or reduced prices.”

¹⁵ATT IP in the Middle Case at ¶3.

The ATT Order was issued on April 21, 2004, one month after the IP-Enabled Services Notice of Proposed Rulemaking was issued, and squarely in the middle of the FCC NPRM comment period. The Federal definition of Interconnected VoIP Service was enacted June 29, 2005.(70 FR37286). While the FCC in the ATT in the Middle Order did not make a distinction between services provided over the Internet versus services provided over a private IP network, the FCC modified that with the adoption of 47 CFR §9.3 and the definition of Interconnected VoIP Service. As of June 29, 2005, Interconnected VoIP Service must require a broadband connection from the user's location; and a broadband connection, by definition, requires a user to be able to transmit information to the Internet. 47 CFR §1.7001(a)(1) (Emphasis supplied).

The Commission correctly stated, "A key characteristic of broadband connection is the speed of transmission." (Order, p. 9). Then in the next few sentences the Commission gave examples from the record of the high broadband speeds that would be available across E Fiber's proposed fiber network. However, the Commission failed to understand that these speeds will not be available to a voice only customer. The voice only customer will only have access to the narrowband path from the Metaswitch to the ONT through an analog signal provided by E Fiber at the point of demarcation, the RJ-11 port. All transmissions by the customer would be limited to 64 Kbps, and the voice VLAN would only transport such narrowband signal that could dial into the PSTN (the entire path from the customer's equipment to the switch would remain narrowband). The broadband speeds cited by the Commission would only be available across the RJ-45 port and broadband VLAN which are inactive on a voice only customer.

Under all methods of analysis, E Fiber's voice service, which uses IP technology to transport the voice signal to the PSTN across a narrowband connection, should not be considered to be a VoIP or Internet enabled service using a broadband connection. The undisputed evidence is that the voice service has no access or connection (at any speed) to the Internet; and the voice service provides no enhanced functionality or advanced voice features to the end user. (Johansen Rebuttal, Lines 570-576).

Based on the foregoing, the Commission's determination that E Fiber's voice only service uses a broadband connection, is a legal error. E Fiber respectfully requests that the Commission reconsider this conclusion and modify the Order accordingly.

4. The Commission Misconstrued Utah Code §§ 54-19-102 and 103 When it Erroneously Determined that E Fiber's Voice Only Service is an Internet Protocol-enabled Service.

The Commission also erroneously concluded that E Fiber's proposed voice service is an Internet protocol-enabled service that it is prohibited from regulating under Utah Code 54-19-102(1). Utah Code Ann. § 54-19-102(1) defines "Internet protocol-enabled service as any 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." As the Commission is aware Utah Code 54-19-102 has two parts: 1) Internet protocol-enabled service ("IP Enabled Service"); and 2) Voice over Internet protocol service ("VoIP Service"). Both sections of this code refer to voice communications. The voice communications referred to in the definition of VoIP Service must "permit 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." The voice communications in the IP Enabled Service have no such requirement. As a result, E Fiber,

URTA, the Office, and the Division argued that the “voice communications” referenced in the IP Enabled Services definition meant something different than the voice communications in the VoIP Services definition. The Commission erroneously rejected this argument and held that since the IP Enabled Service definition is broader than the VoIP Service definition, E Fiber’s voice only service, which the Commission determined to meet the VoIP Services definition, necessarily falls within the broader IP Enabled Services definition. The Commission erred in this determination.

First, as a matter of statutory construction, the Commission’s interpretation of the IP Enabled Services definition in Utah Code §54-19-102(1) renders the definition of VoIP Services in Subsection (2) superfluous or redundant. If all VoIP Service is IP Enabled Service, there is no statutory reason to have the definition for VoIP Service at all. Another way of saying this is, if IP Enabled Service includes all services that use any IP technology in any manner, there is no need to have a separate definition of VoIP. E Fiber reminds the Commission that a statute cannot be read to render some words in the statute “altogether redundant” or “superfluous.”¹⁶ Additionally, when interpreting the language of a statute, the Supreme Court reads the plain language of a statute as a whole, and interprets its provisions in harmony with other statutes in the same chapter and related chapters, avoiding any interpretation which renders parts or words in a statute inoperative or superfluous in order to give effect to every word in the statute.¹⁷

More likely, the legislature included the definition of VoIP in Utah Code Ann. §54-19-102(2), to apply to services that permit a user to receive a telephone call that originates on or terminates to the public switched network. The IP Enabled voice service would be other types of

¹⁶ *Gustafson v. Alloyd Co., Inc.*, 513 US 561,576 (1995). See also *Monarrez v. UDOT* 2016 UT 21, ¶11

¹⁷ *State v. Rushton*, 2017 UT 21, ¶11, 395 P.3d 52, citing *Monarrez v. UDOT* 2016 UT 21, ¶11.

voice service that are not connected to the PSTN (for example, voice service offered in gaming, FaceTime, Microsoft Teams, or Zoom). Because the E Fiber voice service at issue only connects to the PSTN, when considering whether such service can be regulated, the Commission should look to the definition of VoIP service – not IP enabled services.

Additionally, the Supreme Court of Utah tackles questions of statutory construction, its “overarching goal is to implement the intent of the legislature.”¹⁸ As discussed above, and as shown in the testimony, the intent of the legislature in enacting Utah Code Ann. §54-19-101 et seq. was to codify the current treatment of VoIP at the federal level. As demonstrated herein, at the federal level, the use of IP technology in a rate of return carrier’s call path had no regulatory effect on the service. Use of IP technology in transport did not transform the service from a regulated service to an unregulated service. See the ATT In the Middle Case and the NECA Reporting Guideline 8.11 attached to the Meredith Direct Testimony, DDM-01. If the legislative intent in enacting Utah Code Ann. §54-19-101 et seq. was to codify the federal treatment of VoIP, the statute should have no effect on rate of return regulated carriers.

This is further supported by consideration of Utah Code Ann. §54-8b-15 which was substantially modified in 2017. In the modification of §54-8b-15, the Legislature specifically expressed an intention to regulate public telecommunications service that uses internet protocol technology. Utah Code Ann. § 54-8b-15(2)(b) specifically provides that the UUSF “shall provide a mechanism for a qualifying carrier of last resort to obtain specific predictable, and

¹⁸ *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (“It is well settled that when faced with a question of statutory interpretation, ‘our primary goal is to evince the true intent and purpose of the Legislature.’” (citation omitted)).

sufficient funds to deploy and manage, for the purpose of providing service to end users, networks capable of providing: (i) access lines; (b) connections; or (iii) wholesale broadband internet access.”

Under Utah law, a Connection is specifically defined 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.”¹⁹ Wholesale broadband internet access is defined as “the end-user loop component of Internet access provided by a rate of return regulated carrier of last resort that is used to provide, at retail: (i) combined consumer voice and broadband internet access service; or (ii) stand-alone consumer broadband only internet access.

The Legislature in 2017 specifically included services that utilize IP technology in the services that a rate of return regulated carrier of last resort can obtain UUSF support for. If such services were interpreted, or intended, to not be subject to regulation, the provider could not provide those service and be a rate of return regulated carrier. There is no way to harmonize the Commission’s interpretation of Utah Code Ann. §54-19-101 et seq. as a prohibition on regulating any service that use IP technology, with the Legislature’s identification of particular services that use IP technology as eligible for rate of return regulation. Clearly the legislature did not intend to eliminate from regulation all voice service that includes IP in the call path.

One rule of statutory construction provides that if there is a conflict between statutes, the statute that most recently took effect (“later in time”) controls. In this case, Utah Code 54-19-101 et seq. was enacted in 2012. At the time it was enacted it had no effect on rate of return regulated voice service. In 2017, the Legislature enacted Utah Code Ann. §54-8b-15 which

¹⁹ Utah Code Ann. §54-8b-15(1)(c).

expressly provides for certain service to be rate of return regulated. The Commission's current interpretation of Utah Code 54-19-101, et seq. puts these statutes in conflict with one another. Under the "later in time" rule of statutory construction, Utah Code §54-8b-15 controls and the services proposed to be offered by E Fiber should be subject to rate of return regulation by the Commission. E Fiber respectfully requests that the Commission review and revise its Order in light of the rules of statutory construction and the legislative intent.

Second, with E Fiber's voice only service and wholesale broadband internet access service, it is not the use of Internet protocol that enables the user to send or receive voice communications. Rather, the Internet protocol is a method of transport only, like TDM. The fact that the transport is provided via IP technology is NOT what allows the user to send or receive the voice communication. It makes no logical sense that a signal transported via TDM will be regulated, but that exact service transported via IP technology is prohibited from being regulated. The addition of the IP transport does not add any integrated capabilities or added features and does not allow the user to send or receive the call. The purpose of the law was to prevent regulation of the Internet and those services provided across the Internet that were already preempted from State regulation by Federal laws. When looking at whether a service, which provides no enhanced functionality to the end user due to the conversion to IP service, is the kind of use of the Internet or interactive services that Congress sought to single out for exceptional treatment, the FCC in the ATT IP in the Middle Order found that it was not.²⁰ Similarly, the use of IP technology in the transport of E Fiber's voice service has no effect on the functionality of

²⁰ ATT IP in the Middle, ¶17.

the service and is not the type of Internet Protocol-enabled service that Congress sought to single out for exceptional treatment. The E Fiber service literally has nothing to do with the Internet.

The Commission should modify the Order accordingly.

5. The Commission erroneously failed to properly consider the provisions of Utah Code §54-19-103(2)(c).

Utah Code §54-19-103(2)(c) specifically provides that the regulatory prohibition in Subsection (1) does not: (c) affect or modify the application of § 54-8b-2.1. Although the Applications were brought under Utah Code 54-8b-2.1, the Commission’s Order did not address, nor consider this provision of law. E Fiber respectfully requests that the Commission review and reconsider its Order in light of Utah Code Ann. §54-19-103(2)(c).

6. The Commission Erred When It Applied a Different Legal Standard to E Fiber’s Application for CPCN than that Applied to Other Recent Applicants.

Finally, the Commission’s failure to grant E Fiber’s Applications because E Fiber proposes to use IP transport is not consistent with the Commission’s decisions to grant CPCNS to other companies that have applied for CPCNs. In particular, in the Commission’s Order on page 17, the Commission states “we recognized 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 that our laws prohibit us from doing so.” By way of example, the Commission referenced the In the Matter of the Request for Agency Action of Carbon/Emery Telcom, Inc. v. 8x8, Inc., Docket No. 12-2302-01. However,

the facts of that matter are the exact opposite of the facts in this petition. In that proceeding, Bryan R. Martin, Chairman and CEO of 8x8 Inc., testified:²¹

- “All of 8x8’s offerings require that the customer have a broadband Internet connection.”
- “8x8 customers must purchase broadband Internet connectivity from a third party.”
- “Customers must use the broadband Internet connection provided by a third party in order to make use of 8x8’s services.”
- “Traditional telephony equipment cannot process communications encoded in Internet protocol format and will not function with 8x8’s service offerings without specialized customer premises equipment.”
- “8x8’s services can be provided to any location where broadband Internet connectivity is available. This means that the customer can move their device from one geographic location to another and continue to make use of 8x8’s service.”

In the 8x8 case, the Commission, in justifying its order to declare 8x8’s service as VoIP, cited the nomadic VoIP Vonage Order²² which states, “that VoIP services are unquestionably interstate in nature. VoIP services are nomadic and presence-oriented, making identification of the end points of any given communications session completely impractical and frankly unwise.” The facts of the E Fiber Applications are the opposite of the facts in the 8x8 case and, therefore, support a completely different ruling—the exact opposite ruling, in fact.

Further, the Commission overlooked the four more timely and relevant Dockets of:

- 20-2623-01, Application of Arcadian Infracom 1, LLC for CPCN to Provide Interexchange Telecommunications Services, filed September 22, 2020 (“Arcadian, LLC”)
- 20-2621-01, Application of Hudson Fiber Network, Inc.’s for CPCN to Provide Resold and Facilities-based Public Telecommunications Services, filed June 23, 2020 (“Hudson”)
- 20-2616-01, Application of Arcadian Infracom, Inc.’s for CPCN to Provide Interexchange Telecommunications Services, filed March 19, 2020 (“Arcade, Inc.”)
- 19-2615-01, Application of Time Warner Cable Business LLC for CPCN to Provide Interexchange Telecommunications Services, filed July 23, 2019 (“Time Warner”)

²¹ Docket No. 12-2302-01, See Commission Order, p.6, dated November 27, 2012, citing Affidavit of Bryan R. Martin, filed September 20, 2012.

²² 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).

In each of the above referenced Applications for CPCN, the Applicants identified the proposed service in the Applications; the Division made a recommendation; and the Commission approved the Applications. In no instance was any testimony offered to clarify whether the services to be provided by each applicant used any form of IP technology in the service. However, review of the information in the Applications reveals that in each instance the service almost certainly uses IP technology:

Arcadian, LLC, Docket 20-2623-01:

- Application for CPCN to Provide Interexchange Services. Applicant seeks certification to provide point-to-point, private line, non-switched transport services.
- Applicant does not have facilities or property in the State but will construct facilities to provide services upon receiving CPCN and customer demand.
- Applicant seeks to be a facilities-based provider of dark and lit fiber networks to enterprise customers. Applicant builds dark fiber networks and lit fiber based intrastate and interstate telecom facilities for the purpose of point-to-point services high-capacity transport services. Applicant seeks authority to provide point-to-point, private line, non-switched transport services utilizing optical technology including multi-wavelength optical technology over dedicated fiber facilities to connect customer provided equipment to customer-provided and/or Applicant provided equipment at various locations.
- Optical conversion equipment will be used to enable bi-directional conversion between optical signals so communications can be received and transmitted at endpoints. Applicant's customer base will consist solely of business and enterprise customers, and no residential customers.
- Applicant will not be providing traditional switched local exchange service within Utah.
- Because Applicant may be routing its new fiber builds through areas previously unserved or underserved by fiber providers, these routes will provide increased internet coverage, increased network capacity, lower latency, and improved broadband access. Through purposeful use of these facilities and services to meet the business goals and Applicant's customers' needs for high-capacity fiber transport, Applicant and its customers will help spur economic development throughout Utah, as well as financial stability and long-term sustainability in communities across Utah.

There can be no doubt that Arcadian's network will use IP technology under the standards applied to E Fiber, and that Arcadian is not proposing to provide any traditional

switched local exchange service, yet the Commission concluded that it could (and did) grant a CPCN to Arcadian, notwithstanding the alleged prohibition Utah Code 54-19-103. The Arcadian Application is particularly troublesome because it was filed (and granted) in the middle of the E Fiber Applications. In what have been an effort to address the E Fiber proceedings, the Commission asked the Division whether a CPCN is applicable or needed for the proposed interexchange service. The Division concluded in its Comments, *inter alia*, that Arcadian seeks authority to offer interexchange telecommunications facilities and light wave connections but is not intending to offer internet protocol service.²³ Rather, the service is solely the light wave signal transmissions on a fiber line.²⁴ On this basis, the Commission approved the Application for CPCN with no apparent consideration of Utah Code §54-19-101 et seq.

Hudson Fiber Network, Inc., Docket 20-2621-01:

- Applicant seeks CPCN to operate as a provider of resold and facilities based public telecom services.
- Applicant will primarily provide point to point telecom service such as Private Line, Ethernet, Wavelength and similar services to wholesale customers.
- Applicant will provide these services using facilities owned by ESI and its subsidiaries (collectively “Extenet”). Applicant provides most of its services using fiber optic cable along with other equipment and facilities.
- Through Hudson Fiber Network, Extenet also provides private lines or IP-based transport services to other carrier and enterprise customers.
- HFN will not furnish switched voice services or dial tone. HFN does not presently plan to offer local exchange service in Utah.

Again, the record only contains the Application, the Recommendation from the Division, and the Commission Order. However, the Application specifically states that Hudson will not furnish switched voice services, dial tone, or local exchange service in Utah, and that Applicant

²³ E Fiber suspects that what the Division actually meant was “internet access services.”

²⁴ Would this not be an IP enabled service?

will provide Ethernet, Wavelength, and IP-based transport services. Nevertheless, the Commission approved the Application for CPCN, without consideration or discussion of the alleged prohibition on regulating IP enabled services, or services that use IP technology.

Arcadian, Docket 20-2616-01:

- The Application in this Docket was very similar to the Application discussed for Docket 20-2623-01. The description of the services was nearly identical.
- Applicant seeks CPCN to provide point to point, private line, non-switched transport services.
- Applicant seeks to be a facilities-based provider of dark and lit fiber networks to enterprise customers. Applicant builds dark fiber networks and lit fiber based intrastate and interstate telecom facilities for the purpose of point-to-point services high-capacity transport services. Applicant seeks authority to provide point-to-point, private line, non-switched transport services utilizing optical technology including multi-wavelength optical technology over dedicated fiber facilities to connect customer provided equipment to customer-provided and/or Applicant provided equipment at various locations.
- Optical conversion equipment will be used to enable bi-directional conversion between optical signals so communications can be received and transmitted at endpoints. Applicant's customer base will consist solely of business and enterprise customers, and no residential customers.
- Applicant will not be providing traditional switched local exchange service within Utah.
- Because Applicant may be routing its new fiber builds through areas previously unserved or underserved by fiber providers, these routes will provide increased internet coverage, increased network capacity, lower latency, and improved broadband access. Through purposeful use of these facilities and services to meet the business goals and Applicant's customers' needs for high-capacity fiber transport, Applicant and its customers will help spur economic development throughout Utah, as well as financial stability and long-term sustainability in communities across Utah.

Again, there can be no question that the services proposed to be provided by Arcadian would utilize IP technology or constitute IP enabled services under the standards applied to E Fiber, yet the Commission approved Arcadian's Application.

Time Warner, Docket 19-2615-01:

- Applicant seeks CPCN to provide facilities-based interexchange services in Utah. Applicant proposes to offer point to point, point to multipoint, and multipoint to multipoint dedicated non-voice high capacity transmission services that connect one or more customer designated locates and/or to the company. The service may utilize Ethernet interfaces, optical fiber and/or coaxial cable facilities.
- Applicant will not be providing traditional switched local exchange service in Utah. Applicant will provide primarily facilities based private line, ethernet, and data/wide area network services to business customers.

Again, there can be no question that the services proposed to be provided by Time Warner would utilize IP technology or constitute IP enabled services under the standards applied to E Fiber, yet the Commission approved Time Warner's Application.

E Fiber is not suggesting that the Commission should not have approved the above-identified Applications for CPCN. Rather, the purpose of this discussion is to demonstrate that the Commission erroneously applied a different legal standard to the E Fiber Applications than it did to the above Applications. Consistent with Utah Code §54-8b1.1, E Fiber proposes to facilitate access to high quality, affordable public telecommunications services, offers a wider choice for public telecommunications services for the residents and business of San Juan and Grand counties, and facilitates the efficient development and deployment of an advanced telecommunications infrastructure. Further, E Fiber intends to provide local exchange service or other public telecommunications services as the terms are defined in Utah Code Ann. §54-8b-2.1, and E Fiber met the statutory requirements of Utah Code Ann. §54-8b-2.1. As a result, E Fiber respectfully requests that the Commission review its decision against E Fiber in light of the standard applied in the above identified applications and modify the Order accordingly.

III. CONCLUSION

Based on the foregoing, E Fiber respectfully requests review, rehearing or reconsideration of the Commission's Order as set forth herein.

Dated this 15th day of January, 2021.

BLACKBURN & STOLL, LC



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of E Fiber's Petition for Review, Rehearing or Reconsideration, Docket No. 20-2618-01 was sent to the following individuals by email and/or mailing a copy thereof via first-class mail, postage prepaid (as indicated), this 15th day of January, 2021:

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