Phillip J. Russell (10445)
JAMES DODGE RUSSELL & STEPHENS P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Email: prussell@jdrslaw.com

Gregory C. Brubaker
Associate General Counsel
Frontier Communications
Telephone: (260) 241-3606
Email: gregory.c.brubaker@ftr.com

Counsel for Citizens Telecommunications Company of Utah d/b/a Frontier Communications

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Consolidated Matter of: The Applications of E Fiber Moab, LLC and E Fiber San Juan, LLC for a Certificate of Public Convenience and Necessity to Provide Facilities-Based Local Exchange Service and Be Designated as a Carrier of Last Resort in Certain Rural Exchanges	Docket No. 20-2618-01

RESPONSE OF FRONTIER COMMUNICATIONS TO 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

Pursuant to Utah Code § 54-7-15 and Utah Administrative Code R746-1-801, Citizens Telecommunications Company of Utah d/b/a Frontier Communications ("Frontier") hereby submits this Response to the Petition for Review, Rehearing or Reconsideration ("Petition") filed by E Fiber Moab, LLC and E Fiber San Juan, LLC (collectively "Applicants" or "E Fiber").

ARGUMENT

E Fiber's Petition seeks to expand this Commission's regulatory authority to include the obligation to regulate services that fall within the plain language definitions of "Internet protocol-enabled service" ("IP-Enabled Service") and "voice over Internet protocol" ("VoIP") service despite the Utah Legislature's clear statement barring this Commission from regulating those services either directly or indirectly. The Utah Code defines the terms IP-Enabled Service and VoIP as follows:

> (1) "Internet protocol-enabled service" means any service, functionality, or application that uses Internet protocol or successor protocol that enables an end-user to send or receive voice, data, or video communications.
>
> (2) "Voice over Internet protocol service" means 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 § 54-19-102(1)-(2).

It then explicitly states that "[a] state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol-enabled service or voice over Internet protocol service." Utah Code § 54-19-103(1). In an effort to avoid the plain language of these provisions, E Fiber incorrectly applies the statutory interpretation principles it cites, ignores applicable statutory interpretation principles that support the Commission's ruling, offers conclusory legal assertions without citation to legal authority, challenges the Commission's factual findings without marshaling evidence, and asserts facts not in the record in this matter. E Fiber's Petition fails to

offer any compelling reason for this Commission to change any finding or ruling in its December 16, 2020 Order ("Order") and, therefore, this Commission should deny the Petition.

As more fully set forth below, the Petition should be denied because I) the Commission correctly construed the definition of IP-Enabled Service, II) the Commission correctly construed the definition of VoIP and properly determined that E Fiber's voice service is VoIP, and III) none of E Fiber's remaining arguments justify granting any of the relief requested in the Petition.

I. THE COMMISSION CORRECTLY CONSTRUED THE DEFINITION OF INTERNET PROTOCOL-ENABLED SERVICE

In its Order, this Commission correctly construed the definition of IP-Enabled Service as that term is defined in Utah Code § 54-19-102(1) and E Fiber's Petition challenging the Commission's statutory interpretation should be denied. In interpreting a statute, the Commission must "look first to the statute's plain language to determine its meaning." *Bd. of Educ. of Jordan School Dist. v. Sandy City Corp.*, 2004 UT 37, ¶ 9, 94 P.3d 234. "[T]he best evidence of the legislature's intent is the plain language of the statute itself . . . ." *Bagley v. Bagley*, 2016 UT 48, ¶ 10, 387 P.3d 1000. Courts "presume that the legislature used each word advisedly." *Id*. "When [courts] can ascertain the intent of the legislature from the statutory terms alone, no other interpretive tools are needed, and [a court's] task of statutory construction is typically at an end." *Id*. (internal quotation marks excluded).

The Commission properly applied these principles of statutory interpretation when it determined the legislative intent of the statutory definition of IP-Enabled Service based on "the plain language of the statute itself." *Bagley*, 2016 UT 48, ¶ 10. The Commission determined that the term "voice" as used in the definitions of both IP-Enabled Service and VoIP has the same meaning, that the definition of "IP-Enabled Service" is "broader than the VoIP service definition,"

and that, therefore, "E Fiber's proposed voice service and wholesale broadband service each" constitutes an IP-Enabled Service. Order at 16. In doing so, the Commission properly interpreted both IP-Enabled Service and VoIP and should decline to reconsider its Order or otherwise adopt E Fiber's preferred definitions of those terms.

E Fiber proposes an alternative interpretation of IP-Enabled Service that cannot be reconciled with the statute's plain language. E Fiber asserts that the term "voice," when used in the definition of VoIP, "appl[ies] to services that permit a user to receive a telephone call that originates on or terminates to the public switched network," but that "voice," when used in the definition of IP-Enabled Service, means "other types of voice service that are not connected to the PSTN (for example, voice service offered in gaming, FaceTime, Microsoft Teams, or Zoom)." Petition at 25-26. As discussed below, the Commission's interpretation of IP-Enabled Service is correct, and the Commission should decline to adopt E Fiber's proposed interpretation.

A. E Fiber's Interpretation of IP-Enabled Service Violates Principles of Statutory Interpretation

E Fiber's proposed interpretation of "IP-Enabled Service" violates principles of statutory interpretation and should be rejected. E Fiber's assertion that the definition of "IP-Enabled Service" only includes voice service that does not connect to the public switched telephone network ("PSTN") violates the principle that "where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent." *Bryner v. Cardon Outreach, LLC*, 2018 UT 52, ¶ 9, 428 P.3d 1096 (internal quotation marks omitted). Courts "presume that the legislature used each word advisedly," *Bagley*, 2016 UT 48, ¶ 10, and must, therefore, presume that the legislature intended IP-Enabled Service to read broadly, consistent with its plain language. Nothing in the plain language of Utah Code § 54-19-102(1) supports E Fiber's assertion that voice

service is limited to service that does not connect to the PSTN. *See Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994) ("[C]ourts are not to infer substantive terms into the text that are not already there."). When E Fiber contends that the Utah Legislature's purpose in enacting Utah Code § 54-19-103 was to limit regulation of the Internet, it must necessarily rely on matters outside the plain language of the statute. E Fiber's request that this Commission assign a legislative purpose to a statute based on matters outside the plain language, and that contradict the statute's plain language, should be rejected.

In addition, E Fiber's argument that the term "voice" as used in the definitions of "IP-Enabled Service" and "VoIP" have different meanings violates the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995). As the Utah Supreme Court has noted, "it would be quite unusual for the legislature to use a term in one sense in one subsection of a statute and then to turn around and use the same term in a very different sense in a neighboring subsection of the same statute." *Irving Place Assocs. v. 628 Park Ave, LLC*, 2015 UT 91, ¶ 21, 362 P.3d 1241. E Fiber's contention that "voice" when used in the "VoIP" statute refers to services that permit a user to receive a telephone call that originates on or terminates to the PSTN, but that the "voice" service referenced in "IP-Enabled Service" *only* utilizes the Internet and *cannot* permit a user to receive a call that originates on or terminates to the PSTN violates this principle. *See* Petition at 25-26.

B. E Fiber's Arguments Do Not Support Its Preferred Definition of IP-Enabled Service

E Fiber offers several arguments in support of its preferred interpretation of Utah Code § 54-19-102 that rely on the incorrect application of various statutory interpretation principles or otherwise fail to support E Fiber's interpretation. E Fiber's arguments are addressed below.

First, E Fiber incorrectly asserts that its preferred interpretation is required by the principle that courts should not interpret statutes in a manner that "fails to render all parts relevant and meaningful" and "render[s] portions" of a statute "superfluous or inoperative." *Olsen v. Eagle Mt. City*, 2011 UT 10, ¶ 19, 248 P.3d 465. In responding to a party's invocation of this principle, the Utah Supreme Court has noted that such "[c]anons of construction . . . are not formulaic, dispositive indicators of statutory meaning." *Id*. Contrary to E Fiber's contention, "the expectation that legislators . . . tend not to speak in superfluous terms," *Olsen*, 2011 UT 10, ¶ 19, does not require an interpretation that would violate the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning," *Gustafson*, 513 U.S. at 570, or that would "infer substantive terms into the text that are not already there," *Berrett*, 876 P.2d at 370. The Public Service Commission of the District of Columbia has interpreted an identical statutory framework that defines IP-Enabled Service and VoIP in a manner identical to the Utah Code provisions at issue here and likewise ruled that VoIP is a type of IP-Enabled Service. *See In the Matter of the Investigation into the Continued use of Verizon Washington, DC, Inc.'s Copper Infrastructure to Provide Telecommunications Services*, 2015 WL 9257703 at *40 (¶ 96) (D.C. P.S.C., Dec. 4, 2015), Order No. 18051 (Dkt. No. 1102) ("Verizon DC Docket"). In reaching its conclusion, DC Commission rejected the argument, advanced by E Fiber here, that "IP-enabled" voice service refers only to communications that do not originate or

terminate on the PSTN. *Id*. Like the DC Commission, this Commission properly interpreted the plain language of "IP-Enabled Service" and E Fiber's Petition should be denied.

Second, E Fiber's reliance on the FCC's decision in *In the 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 ("ATT IP in the Middle Case") fails to provide any support for its proposed interpretation of Utah law. As noted above, E Fiber does not provide any citation to any source that would suggest that the Utah Legislature relied on the ATT IP in the Middle Case, or the FCC's distinction between "information services" and "telecommunication services" when it adopted the definition of IP-Enabled Service in Utah Code § 54-19-102. Moreover, as the Commission noted in its Order, the FCC has expressly stated that VoIP is a type of IP-enabled service. *See* Order at 15-16 & n.35 ("The FCC has indicated that VoIP service is an IP-enabled service."); s*ee also* ATT IP in the Middle Case, WC Docket No. 02-361, at ¶ 2 ("[T]he Commission recently adopted a Notice of Proposed Rulemaking concerning IP-enabled services, including Voice over Internet Protocol (VoIP)."). This entirely undercuts E Fiber's assertion that VoIP must be defined as something separate from IP-Enabled Service.

Third, E Fiber fails to show that the reference to "connections" in Utah Code § 54-8b-15 supports its preferred interpretation of IP-Enabled Service in Utah Code § 54-19-102. *See* Petition at 26-27. Utah Code § 54-8b-15(3) states that "subject to this section," the Commission shall utilize UUSF funds by a "rate-of-return regulated or non-rate-of-return regulated carrier of last resort" to fund the deployment of "networks capable of providing . . . connections." Utah Code § 54-8b-15 cannot require the Commission to ignore the plain language definitions of IP-Enabled Service or VoIP in Utah Code § 54-19-102 or otherwise force the Commission to find that any

carrier that deploys a network capable of providing "connections" is a "rate-of-return regulated" carrier. In addition, Utah Code § 54-8b-15(3) expressly states that it is "subject to this section," which includes the definition of "rate-of-return regulated" to mean "subject to regulation under Section 54-4-4." The reference to "connections" in Utah Code § 54-8b-15 does not change which carriers are, or are not, subject to regulation under Utah Code § 54-4-4. By contrast, Utah Code § 54-19-103 expressly states that a provider of IP-Enabled Service or VoIP service is not subject to rate regulation by this Commission. Section 54-8b-15, which regards the UUSF, cannot be read to grant this Commission the authority to regulate IP-Enabled Service or VoIP when Utah Code § 54-19-103 exists specifically to say that this Commission does not have that regulatory authority.

Finally, E Fiber fails to support its argument that the alleged legislative purpose of Utah Code § 54-19-102 was to mirror federal law. As noted above, "the best evidence of the legislature's intent is the plain language of the statute itself." *Bagley*, 2016 UT 48, ¶ 10. E Fiber cites various sources for the contention that the legislature intended to codify in the Utah Code the current treatment of VoIP at the federal level and then concludes that, in federal law, "[u]se of IP technology in transport did not transform the service from a regulated service to an unregulated service." Petition at 26. But that is exactly the result of the plain language of Utah Code §§ 54-19-102 and -103. Those statutes define IP-Enabled Service as those that utilize IP transport to enable an end-use customer to send or receive voice, data, or video communications and then bar this Commission from regulating such a service either directly or indirectly.

E Fiber's citation to sources other than the plain language of the Utah Code, including the statute's alleged legislative history, witness testimony in this docket, and rulings by the FCC, fails to support its argument. *See* Petition at 5-8 & 26. E Fiber references alleged statements by Senator

Bramble regarding the purpose of Utah Code § 54-19-101, et seq., but provides no citation to these alleged statements. Conclusory statements about legislative purpose offered by witnesses at the hearing are similarly without citation to any actual legislative history. E Fiber's legislative history argument is unavailing for the additional reason that the "statutory language is plain and unambiguous," and, therefore, this Commission should "not look beyond the same to divine legislative intent." *Bryner*, 2018 UT 52, ¶ 9; s*ee also Olsen*, 2011 UT 10, ¶ 22 ("Our textual analysis of the [statute] forecloses the need for parsing the legislative history in search of legislative intent," and "[i]f the legislature had intended" the interpretation proposed, "surely the legislature would have said so in the text of the [statute]."). Utah Code § 54-19-102 does not mirror the distinction between "information service" and "telecommunication service" in federal law. The Commission properly interpreted the definition of IP-Enabled Service.

C. The Commission Should Deny E Fiber's Petition

As discussed above, E Fiber has not provided this Commission with any basis to reconsider its Order or to grant a rehearing and, as such, this Commission should deny the Petition. E Fiber made clear in its Application that it sought designation as a "rate-of-return regulated" carrier of last resort and testified that, without such a designation and the corresponding access to UUSF funding, it could not make an economic case to deploy its proposed fiber to the home network FTTH system in the local exchanges at issue.[1]

[1] *See, e.g.*, E Fiber Moab Application ¶ 19 ("**Rate-of-Return Regulated Carrier.** Applicant affirmatively states that it seeks to be a rate-of-return regulated carrier of last resort [such that] Applicant will be eligible for UUSF."); Direct Testimony of Brock Johansen at line 58-60 ("[I]t is difficult to make a business case to deploy fiber infrastructure in the Local Exchanges without governmental assistance in the form of grant funding or universal service support."); *id*. at lines 128-29 ("A business case for deploying fiber infrastructure in the Local Exchanges without governmental assistance in the form of grants or universal service fund dollars cannot be made.").

E Fiber cannot be designated as a "rate-of-return regulated" carrier of last resort because the services it proposes to offer may not be regulated by the Commission. As noted in the Order, "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." Order at 16 (quoting Utah Code § 54-19-102(1)). Those services are, therefore, both IP-Enabled Service and, pursuant to Utah Code § 54-19-103(1), this Commission may not regulate those services "either directly or indirectly." This Commission's straightforward interpretation of Utah Code § 54-19-102 properly reflects the plain language meaning of the statue and the Petition should be denied.

II. THE COMMISSION CORRECTLY CONSTRUED THE DEFINITION OF VOIP AND PROPERLY FOUND THAT E FIBER'S VOICE SERVICE IS VOIP

The Commission should deny the Petition for the separate and independent reason that the Commission properly interpreted the provisions of the VoIP statute and correctly found that E Fiber's proposed voice service constitutes VoIP. VoIP is defined as any service that:

> (a) enables real time, two-way voice communication originating from or terminating at the user's location in Internet protocol or a successor protocol;
> (b) uses a broadband connection from the user's location; and
> (c) permits a user to receive a telephone call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.

Utah Code § 54-19-102(2) (the "VoIP definition").

E Fiber concedes that its proposed voice service is a service described in subsection (c) of the VoIP definition. E Fiber argues, however, that its proposed service does not meet the "user's location in Internet protocol" requirement in subsection (a) or the "broadband connection from the user's location" requirement in subsection (b). As set forth below, this Commission correctly

interpreted "user's location" to mean the optical network terminal ("ONT") at the user's home and "broadband connection" to refer to the speed of the connection with or without a connection to the Internet and, as such, the Commission correctly determined that E Fiber's voice service constitutes VoIP under Utah law.[2]

A. The Commission Properly Interpreted "User's Location" to Mean the ONT at the User's Home

The Commission correctly ruled that the term "user's location" as used in in subsections (a) and (b) of the VoIP definition refers to the user's home, rather than to the customer's side of the point of demarcation between the E Fiber network and the customer's inside wiring. The Commission found that E Fiber's proposed voice service satisfies the "user's location" requirement in the VoIP definition because "the network begins with the ONT which is installed at the user's location." Order at 6. The term "user's location" is not defined in the VoIP statute and the Commission must, therefore, rely on the "ordinary meaning" of the term. *See Olsen*, 2011 UT 10, ¶ 12 ("[W]hen the words of a statute consist of common, daily, nontechnical speech, they are construed in accordance with the ordinary meaning such words would have to a reasonable person familiar with the usage and context of the language in question." (internal quotation marks omitted)). The Commission applied the ordinary meaning of the term "user's location" when it found that the term referred to the user's home.

This Commission's interpretation of the term "user's location" is the same as the interpretation given by the Public Service Commission of the District of Columbia to the same

[2] The definition of "IP-Enabled Service" lacks the language regarding "user's location" or "broadband connection" and, therefore, E Fiber's arguments regarding those terms apply only to the definition of VoIP. The Commission's finding that E Fiber's voice and wholesale broadband services are "IP-Enabled Services" prevent this Commission from regulating those services whether or not E Fiber's voice service constitutes VoIP.

term in a virtually identical definition of VoIP. *See* Verizon DC Docket, 2015 WL 9257703 at *41 (¶¶ 100-03). In that docket, the DC Commission ruled that an FTTH system like the one proposed by E Fiber here—where the user's copper wiring is connected to an RJ-11 jack at an ONT at the user's home, and where the signal is converted from analog to IP (or from IP to analog) in the ONT—is a VoIP service because the "ONT is at the user's location by being at the customer premises." *Id*. at *41 (¶ 102). That is, both this Commission and the DC Commission have interpreted "user's location" in identical definitions of "VoIP" to mean the user's home.

E Fiber argues that "user's location" must be interpreted such that "the signal must be in Internet protocol at the consumer side of the demarcation point." Petition at 10. E Fiber offers no citation to any legal authority that would compel such a reading of the statute and nothing in the plain language of the statute supports that reading. To constitute VoIP, a service must enable a customer to make or receive calls "originating from or terminating at the user's location in Internet protocol or a successor protocol," and also requires that the service use a "broadband connection at the user's location." Nothing in the VoIP definition requires the term "user's location" to be defined by the location of the point of demarcation between E Fiber's network and the customer's inside wiring. The argument E Fiber makes here was also presented to and rejected by the DC Commission in the Verizon DC Docket when it found that "user's location" refers to the user's home. *See* Verizon DC Docket, 2015 WL 9257703 at *30 (¶ 74). In that docket, the DC Commission declined to adopt an argument that the "equipment and inside wiring that are owned or leased by the customer is the 'user's location,' while the carrier's network, which includes the ONT, which is owned by Verizon, is not." *Id*. This Commission properly applied the ordinary

meaning of the term "user's location" to mean the user's home in subsections (a) and (b) of the VoIP definition.

B. The Commission Properly Interpreted "Broadband Connection" to Refer to the Speed of the Connection With or Without a Connection to the Internet

The Commission correctly ruled that the phrase "broadband connection" in subsection (b) of the VoIP definition refers to the speed of the connection with or without a connection to the Internet. Order at 8-12. The term "broadband" is not defined in the VoIP statute. In Utah Code § 54-8b-15(1), the Utah Legislature defined the term "broadband Internet access service" to have the same meaning as that term was defined by the FCC in a provision relating to Internet freedom.[3] E Fiber argues that the term "broadband," as used in the VoIP definition, refers to high speed Internet connections or otherwise requires a connection to the Internet, consistent with the term "broadband Internet access service." The Commission properly rejected that argument. *See* Order at 8 ("[E Fiber's] argument suggests that a broadband connection is the same as broadband Internet access service. We conclude that it is not."). The Commission cited FCC statements that "a broadband connection may or may not provide the end user with internet,"[4] and that "VoIP can be provided over the public Internet or over private IP networks,"[5] and found that the "key characteristic of a broadband connection is the speed of transmission." Order at 9. The Commission then cited record evidence that the speeds at which E Fiber's system would transmit information were speeds that meet the "broadband" standard. *Id*. at 9-11.

[3] *See* Utah Code § 54-8b-15(1)(a) ("'Broadband Internet access service' means the same as that term is defined in 47 C.F.R. Sec. 8.2."). The FCC's definition of "Broadband Internet access service is now set forth in 47 C.F.R. § 8.1, which is the only provision in Title 47, Part 8 of the C.F.R., titled "Internet Freedom.").
[4] Order at 11 & n.25 (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))
[5] Order at 11 & n.27 (citing ATT IP in the Middle Case, WC Docket No. 02-361, ¶ 3).

This Commission's ruling on this point is shared by the DC Commission's ruling in the Verizon DC Docket. In that docket, a regulatory party argued "that the RJ-11 jack is not a broadband connection from the user's location." Verizon DC Docket, 2015 WL 9257703, *42 (¶ 104). E Fiber offers the same argument here. The DC Commission rejected that argument, finding that after a signal passes through the RJ-11 jack, the ONT converts the signal to IP and transmits the signal at broadband speeds. *Id*. This Commission reached the same conclusion.

In its Petition, E Fiber again claims that the term "broadband" means high speed Internet connectivity, offers the same arguments, and cites the same sources already considered by this Commission when it issued its Order. *See* Petition at 24.[6] This Commission has already considered E Fiber's contention that that "broadband" in the VoIP definition is the same as "broadband Internet access service" as defined elsewhere in the Utah Code. The Commission declined to adopt that position in its Order, has already addressed all of the legal authority cited by E Fiber in its Petition for that position, and should deny the Petition.

For these reasons, this Commission should deny the Petition's legal challenge regarding the interpretation of the terms "user's location" and "broadband" in the VoIP definition. E Fiber also makes a factual challenge which, for the reasons discussed below, this Court should likewise reject because E Fiber fails to marshal the evidence and offers new evidence to support its claims.

C. The Commission Properly Found that E Fiber's Proposed Voice-Only Service Utilizes a Broadband Connection and Constitutes VoIP

This Commission should reject E Fiber's challenge to the Commission's factual finding that E Fiber's voice-only service utilizes a "broadband connection" because E Fiber not only fails

[6] E Fiber also argues, for the first time, that its voice service is speed-limited such that it constitutes a "narrowband" connection. That argument is addressed in Section II.C., below.

to marshal the evidence in favor of this challenged fact but also introduces in its Petition a new, unsubstantiated claim with no evidence. As an initial matter, E Fiber's challenge to the Commission's ruling that E Fiber's voice service satisfies the "broadband connection" requirement in the VoIP definition relates *only* to the application of that ruling to E Fiber's voice-only service. Petition at 19-24. That is, E Fiber challenges the Commission's ruling that its voice service utilizes a "broadband connection" only as that ruling relates to an end-use customer that signs up for E Fiber's voice service but *does not* sign up for the retail broadband service offered by E Fiber's affiliate. E Fiber's claim that a voice-only customer would not have a broadband connection fails to support E Fiber's Petition for several reasons, as discussed below.

First, E Fiber's argument challenges the Commission's factual determination but fails to marshal the evidence in favor of the Commission's ruling. Petitions seeking reconsideration of a Commission order are governed by Utah Administrative Code R746-801. That rule requires that "[a] person that challenges a finding of fact in a proceeding brought under Subsection R746-1-801(1) shall marshal the record evidence that supports the challenged finding." Utah Admin. Code R746-1-801(2). In its Petition, E Fiber fails to "marshal the record evidence that supports the challenged finding" as required by the Commission rule. The record evidence supports the Commission's finding that E Fiber's voice service carried over the private VLAN through E Fiber's proposed fiber to the home network includes a "broadband connection."[7]

[7] *See, e.g.*, Direct Testimony of Brock Johansen at lines 323-325 ("The proposed build out . . . will bring state-of-the-art voice and broadband internet access service with 1 Gbps broadband speeds to the residents and businesses of Grand and San Juan counties."); 11/12/2020 Hearing Tr. at 44:13-23 (Mr. Johansen: "That's the beauty, Mr. Russell, of fiber. So if you put in the current Calix boxes, we are turning up synchronous gig services. But all you gotta do is upgrade the electronics after that, and you can have whatever speed you want. So, for instance, 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 to the customer and put a new electrical device on the end, a new ONT, and a new OLT back at

Second, E Fiber's argument that its voice-only service does not have a broadband connection relies on a new factual claim in its Petition that was made without reference to any evidence previously introduced in this docket. In its Petition, E Fiber asserts that, "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." Petition at 20; *see also* Petition at 23 ("All transmissions by the [voice-only] customer would be limited to 64Kbps."). At no point before or during the hearing did E Fiber introduce any evidence to assert, or even suggest, that E Fiber's voice-only service would be limited such that it could transmit IP signals at only 64Kpbs. Frontier has had no opportunity to conduct discovery or cross examination on E Fiber's new factual claims, and the Commission has not had an opportunity to consider them in issuing the Order. New claims presented in the Petition without any evidence cannot be a reason to reconsider the evidence submitted and issues presented at the hearing. As such, the Commission should not consider this new claim presented in the Petition.

Third, even if the Commission could consider E Fiber's new factual assertion related to its voice-only service, the Commission's Order should still not be disturbed. Assuming that E Fiber's voice-only service were deemed not to have a "broadband connection" as that term is used in the VoIP definition, that service continues to be an "IP-Enabled Service" that this Commission may not regulate pursuant to Utah Code § 54-19-103(1). In addition to the fact that E Fiber cannot be a "rate-of-return-regulated" carrier with respect to its voice-only service, there has been no

---

your location. And you can turn up 100 by 100 gig to that customer. You can turn up 40 channels of 100 gig to that customer, if you wanted. And so that's the nice thing.

That's why it's in the public interest to put fiber networks, because these WiFi networks, the cellular networks, the copper networks have limitations. The fiber, you just replace the electronics and you have more speed.

And so you asked what the capability of that fiber plant is? It's endless, Mr. Russell. It's endless.").

discussion in this docket as to whether it would be in the public interest to grant E Fiber's request for a CPCN to offer that voice-only service. The record evidence demonstrates that E Fiber expects, after a five-year build-out period, that it will have approximately 1,500 voice customers. *See* 11/12/2020 Hearing Tr. at 154:11-21. There is no evidence in the record that would allow the Commission to reach a conclusion as to how many of those approximately 1,500 E Fiber voice customers would be voice-only customers that would not also receive retail broadband internet access from one of E Fiber's affiliates. The record evidence indicates that E Fiber expects to have far more internet customers than voice customers,[8] which strongly suggests that there would be very few voice-only customers. There is also no evidence in the record to identify the potential UUSF costs of allowing E Fiber to build out a fiber to the home network to provide voice-only service that would be limited to transmission speeds of 64Kbps. It would not be in the public interest to grant E Fiber a CPCN to provide this voice-only service.

III. NONE OF E FIBER'S REMAINING ARGUMENTS JUSTIFY GRANTING ANY RELIEF REQUESTED IN THE PETITION

None of the remaining arguments set forth in the Petition support E Fiber's requests for relief. Frontier does not address all of E Fiber's arguments, but addresses several of them as set forth below.

A. E Fiber Fails to Distinguish its "Other Services" from IP-Enabled Service

E Fiber asserts that it should have been provided a CPCN to offer services other than the voice and broadband internet services that this Commission found to be IP-Enabled Service or

[8] The CONFIDENTIAL Exhibit 1 to the Direct Testimony of Darren Woolsey, containing E Fiber's Five-Year Proforma, in the tab titled "1-Summary Financials," identifies the expected number of voice and internet subscribers for each year of the five-year buildout plan and at the end of that buildout period.

VoIP, but fails to explain how those services can be regulated by this Commission. E Fiber asserts that it intends to offer "every public telecommunication service identified in the Emery Telephone Tariff," Petition at 4, including a "T1 service or DID service [for which] E Fiber will use a different ONT model that delivers DS1s to the customer." Petition at 5. E Fiber fails to explain, however, how those services will be provided in a way that is different from the voice and broadband internet services that this Commission has determined to be IP-Enabled Service. It appears that E Fiber proposes to use the fiber to the home network described in its application to provide these "public telecommunication services," which would still utilize Internet protocol to transmit the services through its network and would continue to constitute "any service, functionality, or application that uses Internet protocol or successor protocol that enables an end-user to send or receive voice, data, or video communications." Utah Code § 54-19-102(1). E Fiber has not shown that the Commission could regulate these "public telecommunication services" or why this Commission should grant a CPCN to allow E Fiber to provide just those services.

B. The Provisions in Utah Code § 54-19-103(2)(c) Do Not Change the Outcome of the Order

E Fiber requests that the Commission review Utah Code § 54-19-103(2)(c), which states that the regulatory prohibition regarding IP-Enabled Service and VoIP service in that statute does not affect or modify the application of the provisions relating to the grant or denial of a CPCN set forth in Utah Code § 54-8b-2.1. Frontier expects that the Commission was aware of and considered Utah Code § 54-19-103(2)(c) when it issued the Order and will address E Fiber's point on this matter only briefly. The regulatory prohibition in Utah Code § 54-19-103 does not prevent this Commission from granting a CPCN to an entity that seeks to deploy VoIP or any other IP-Enabled Service. As discussed in Section I.C., above, E Fiber made clear throughout this docket that it

required access as a "rate-of-return regulated" carrier, with corresponding access to UUSF funds, to build out the fiber to the home network contemplated in its application. Utah Code § 54-19-103(1) bars this Commission from regulating the services that E Fiber intends to offer and, as such, E Fiber does not qualify as a "rate-of-return regulated" carrier. The Commission denied E Fiber's Application on that basis, and the Commission's decision in this docket that it cannot regulate E Fiber's proposed services does not somehow result in a modification to the application of the CPCN requirements in Utah Code § 54-8b-2.1.

C. Commission Orders Affect Only the Parties to that Docket and E Fiber's Reliance on Other Dockets is Inapposite

This Commission denied E Fiber's Application because it sought an order that would guarantee it access to UUSF funds for its proposed fiber to the home system and other dockets that did not include such a request are not relevant to this proceeding.

E Fiber cites other Commission dockets for the proposition that the Commission granted CPCNs to other entities that proposed to utilize IP transport in the proposed network. Petition at 29-34. E Fiber distinguishes the facts of this docket from the facts before the Commission in *In the Matter of the Request for Agency Action of Carbon/Emery Telcom, Inc. v. 8x8, Inc.*, Docket No. 12-2302-01, and urges a different result. In that docket, the Commission found that the voice service offered by 8x8 constituted interconnected VoIP, which the Commission could not regulate as a result of federal law and, as such, it declined to require 8x8 to obtain a CPCN. Here, the Commission has ruled that E Fiber's proposed services constitute VoIP service and/or IP-Enabled Service, which the Commission cannot regulate as a result of state law. The fact that 8x8 and E Fiber have services that are not identical does not mandate that E Fiber receive a CPCN and be designated a "rate of return regulated" carrier.

E Fiber cites several other dockets in which "the Applicants identified the proposed service in the Applications; the Division made a recommendation; and the Commission approved the Applications," Petition at 31, essentially arguing that the Commission is required in this contested docket to grant E Fiber's request for a CPCN simply because it granted CPCNs in other, uncontested dockets. As discussed above, E Fiber requested that this Commission designate it a "rate-of-return regulated" carrier with access to UUSF support and indicated that it could not make the economic case to build out its proposed fiber to the home network without that designation. The Commission correctly determined that it could not regulate E Fiber's proposed services and that, as a result, it could not designate E Fiber as a "rate-of-return regulated" carrier. The Commission's Order in this docket is not premised on the notion that a party seeking to provide VoIP or IP-Enabled Service cannot qualify for a CPCN. Rather, the Commission's Order is that a party seeking to provide VoIP or IP-Enabled Service cannot be designated a "rate-of-return regulated" carrier, which E Fiber made clear was essential to its decision to build the proposed network.

E Fiber's citation to other dockets in which entities proposing to provide VoIP or other IP-enabled services were granted applications for CPCNs is, therefore, not relevant to the question of whether E Fiber's application should have been granted. The Commission correctly determined that E Fiber could not be designated a "rate-of-return regulated" carrier and correctly denied E Fiber's Application, which indicated that such designation was an essential requirement. None of the Commission's rulings in any of the dockets cited by E Fiber provide this Commission with a reason to reconsider its order or modify it in any way.

CONCLUSION

For the foregoing reasons, this Commission should deny E Fiber's Petition. The Commission correctly concluded that E Fiber's proposed voice and broadband internet service constitute IP-Enabled Service and that its voice service also constitutes VoIP, that pursuant to Utah Code § 54-19-103(1) the Commission cannot regulate those services, and that E Fiber cannot be designated a "rate-of-return regulated" carrier. As such, the Commission correctly denied E Fiber's Application and should deny E Fiber's Petition for the same reasons.

DATED: January 29, 2021

Respectfully submitted,

By: 

Phillip J. Russell
JAMES DODGE RUSSELL & STEPHENS
Counsel for Citizens Telecommunications Company of Utah

Certificate of Service
Docket No. 20-2618-01

I hereby certify that a true and correct copy of the foregoing was served by email this 29th day of January, 2021, on the following:

DIVISION OF PUBLIC UTILITIES

Chris Parker	chrisparker@utah.gov
Artie Powell	wpowell@utah.gov
Brenda Salter	bsalter@utah.gov
Ron Slusher	rslusher@utah.gov
Patricia Schmid	pschmid@agutah.gov
Justin Jetter	jjetter@agutah.gov
	dpudatarequest@utah.gov

OFFICE OF CONSUMER SERVICES

Michele Beck	mbeck@utah.gov
Alyson Anderson	akanderson@utah.gov
Robert Moore	rmoore@agutah.gov
Steven Snarr	stevensnarr@agutah.gov

E FIBER MOAB & E FIBER SAN JUAN

Kira M. Slawson	KiraM@blackburn-stoll.com
Brock Johansen	bjohansen@emerytelcom.com

URTA

Kira M. Slawson	KiraM@blackburn-stoll.com
Brett Anderson	BrettA@blackburn-stoll.com

/s/ *Phillip J. Russell*