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State of Utah
DEPARTMENT OF COMMERCE
Office of Consumer Services

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To: The Public Service Commission of Utah

From: The Office of Consumer Services

Michele Beck, Director
Alyson Anderson, Utility Analyst

Date: March 15, 2021

Subject: Docket 20-2618-01 Comments

In the Consolidated Matters of: 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.

BACKGROUND

On April 20, 2020 E Fiber Moab, LLC and E Fiber San Juan, LLC (collectively “E Fiber”), wholly owned subsidiaries of Emery Telcom HC, applied to the PSC for certificates of public convenience and necessity (“CPCN”) authorizing the applicants to operate as a provider of facilities-based local exchange telecommunications service in the Moab, Thompson, La Sal, Monticello, Blanding, Bluff, and Mexican Hat exchanges (“Exchanges”) in the state of Utah. The Exchanges are currently served by the incumbent telecom provider Citizens Telecommunications of Utah d/b/a Frontier Communications (“Frontier”). E Fiber also sought authority to be a rate of return regulated carrier of last resort (“COLR”) in the Exchanges and therefore qualified to seek support from the Utah Public Telecommunications Service Support Fund (“UUSF”). In the December 16, 2020 Order, the Utah Public Service Commission (PSC) denied the E Fiber applications without prejudice. On January 15, 2021 E Fiber petitioned for review, rehearing, or reconsideration of the PSC December 16, 2020 order. On that same day the Utah Rural Telecom Association (URTA) filed a joinder to the E Fiber petition. Frontier Communications (Frontier) filed a response to E Fiber’s petition on January 29, 2021 and the Office

of Consumer Services (OCS) filed a response to the E Fiber petition on February 1, 2021.

On February 10, 2021 the PSC issued a notice that it intends to modify the December 16, 2021 order, and requested the Division of Public Utilities (“DPU”) and the OCS address “at least” the following issues.

- “Can E-Fiber become a carrier of last resort (“COLR”) to fewer than all of the current customer of Citizens Telecommunications Company of Utah d/b/a Frontier Communications (Frontier) in the subject service territory? If so, is it in the public interest?”
- “Can the PSC divide potential future UUSF funding between E-Fiber and Frontier, assuming Frontier qualifies for UUSF funds? If so, how would the PSC divide the funding between the two carriers? If not, and assuming E-Fiber does not become a COLR to all of the current customers of Frontier in the subject service territory, how would the PSC decide which COLR should receive the UUSF funding, assuming again Frontier qualifies for UUSF funding?”

In accordance with the PSC’s Notice, the OCS submits these comments and recommendations.

DISCUSSION

The OCS will address each of the PSC’s questions in order.

Can E Fiber become COLR to fewer than all current customers in the Exchanges? If so, is it in the public interest?

In its August 25, 2020 Memorandum in Opposition to Citizens Telecommunications Company of Utah d/b/a Frontier Communications’ Motion for Partial Summary Judgement (“Memorandum in Opposition”) the OCS argued that Utah Code §54-8b-2.1(4) and §54-8b-15(1)(b)(ii) provide that more than one COLR may operate in the same exchange.¹ The same statutes state that a COLR has the obligation to provide public telecommunications service to any customer or class of customers that request service within the local exchange. Therefore, if E Fiber’s applications are granted they must become COLRs in the Exchanges with the obligation to serve all customers who

¹ Docket No. 20-2618-01 OCS Memorandum in Opposition to Frontier Communication's Rule 56(a) Motion for Partial Summary Judgement, August 25, 2020, pages 12-14.

request service. However, the OCS notes that this right and obligation must be contingent on approval and agreement with the White Mesa community, which is part of the Ute Mountain Tribe Reservation (“Tribe”) and part of the Blanding exchange, for any service on Tribal land. Further, it is the OCS’s understanding that E Fiber seeks to serve all current customers in the Exchanges with the exception of those subject to Tribal approval, which has not yet been granted. Additionally, as stated in testimony, §54-8b-1.1 declares the Utah Legislature’s policy to “enhance the general welfare and encourage the growth of the economy of the state through increased competition in the telecommunications industry.” The OCS believes this policy supports more than one COLR operating in the same service territory as being in the public interest.²

Can the PSC divide potential UUSF funding between two carriers in the same exchange? If so, how would the PSC divide the funding between the two carriers?

In the Memorandum in Opposition, the OCS demonstrated that when two COLRs provide telecommunication service within the same exchange, each is qualified to receive UUSF support, but only to recover expenses reasonably incurred and it is *per se* unreasonable to build duplicate infrastructure.³ The OCS notes that the current UUSF review process evaluates the entire service territory (i.e. all exchanges throughout the state) in determining appropriate levels of UUSF support. Thus some process changes are likely necessary to review the UUSF for different portions of a carrier’s Utah service territory separately.

How does the PSC decide which COLR should receive UUSF funding when more than one COLR serves in an exchange?

The OCS recommends that the PSC give guidance as part of its order on the parameters to be used in determining reasonableness of future investments in Exchanges with two approved COLRs. Specifically, the PSC should make it clear that the building of duplicative telecom plant would not be found to be reasonable. The OCS further recommends that the PSC follow up this docket with rulemaking⁴ to create and codify the tests for UUSF recovery in cases where two COLRs are eligible for investment in the same exchange.

² Docket No. 20-2618-01 OCS Direct Testimony of Alyson Anderson, lines 99-114.

³ Docket No. 20-2618-01 OCS Memorandum in Opposition to Frontier Communication's Rule 56(a) Motion for Partial Summary Judgement, August 25, 2020, pages 11-17.

⁴ This is consistent with Utah Code § 63G-3-201(6) and could also address additional issues relevant to the topic but not explicitly raised in the E Fiber applications.

In this case, the OCS agrees with E Fiber that deploying state of the art fiber facilities is a substantial upgrade and will provide more reliable service to the Exchanges. Therefore, it will not be duplicative of Frontier's current infrastructure and eligible for recovery from the UUSF.⁵ However, it would be duplicative if Frontier later asked for UUSF support to also deploy fiber facilities in the Exchanges. With the ever changing technology and telecommunications landscape, all scenarios are difficult to predict with regards to determining which COLR receives UUSF support in exchanges with more than one COLR. To some extent, it is likely that future review will need to be done on a case by case basis, but the PSC can and should provide some high level guidance in this docket and more specific process and review requirements in subsequent rules.

In testimony, the OCS outlined three factors the PSC should consider in evaluating whether investments are reasonable.⁶

- Is the proposed infrastructure redundant of the current telecom infrastructure in the service territory?
- What is the current service quality in the service territory?
- What is the commitment level of the competitor and incumbent in the service territory?

Given the delay between construction of telecom plant and actually receiving UUSF support for that investment, the approval process could involve both a pre-construction and post construction review components. For example, the PSC could require a potential new rate of return regulated COLR to file a detailed three to five-year buildout plan and the PSC could initially rule on the reasonableness of its proposed plan and then, after construction, the PSC would evaluate the implementation of the plan and the actual investment at the time of the yearly request for UUSF. The incumbent COLR could intervene to challenge the competitive entry COLR. Challenges at the time the plan is filed could be based upon why the service territory infrastructure does not need to be upgraded, or the incumbent telecom's own build out plans for the area, thus showing the proposed build out plan to be duplicative. Challenges after construction at the time of the request for UUSF disbursement could be limited to issues surrounding proper implementation of the plan and whether costs stayed within projections and were fully justified.

⁵ Docket No. 20-2618-01 OCS Direct Testimony of Alyson Anderson, lines 178-184.

⁶ Docket No. 20-2618-01 OCS Direct Testimony of Alyson Anderson, lines 169-176

Accordingly, the ruling making should address the following topics:

- What information must be provided with an application for competitive entry into an incumbent's telecom exchange, designation as a COLR and request for eligibility for the UUSF.
- What factors the PSC will consider in determining if it should allow competitive entry into an incumbent's exchange.
- What factors the PSC will consider in determining if a proposed/actual buildout is a reasonable expenditure.
- The fact that the buildout of duplicative infrastructure is *per se* unreasonable.
- What factors the PSC will consider in determining if a proposed /actual buildout is duplicative.
- The timing and procedures for the PSC to make the determination that a proposed/actual buildout is a reasonable expenditure.
- Reporting requirements for any proposed/actual buildout.
- Process and timing for final review to ensure the buildout plan was implemented prudently.

Finally, The PSC could consider releasing the incumbent of its COLR obligations in exchanges with another COLR serving, if requested pursuant to Utah Code § 54-8b-3, depending on the specific facts and circumstances of the request.

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