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2022 Annual Report of E Fiber San Juan, LLC	<u>DOCKET NO. 23-2619-01</u> <u>ORDER APPROVING 2024 DISTRIBUTION</u>
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ISSUED: December 6, 2023

**PROCEDURAL BACKGROUND**

On April 24, 2023, E Fiber San Juan, LLC (“E Fiber San Juan”) filed its Annual Report for Calendar Year 2022 (“Report”) with the Public Service Commission (PSC).

On September 1, 2023, the Division of Public Utilities (DPU) filed its recommendation for the 2024 Utah Universal Public Telecommunications Support Fund (“UUSF”) calendar year distribution (“Initial Comments”).

On September 6, 2023, the PSC issued a Notice of Filing and Comment Period, seeking comments on DPU’s recommendation on or before October 6, 2023.

On September 29, 2023, the PSC requested additional analysis of Utah Admin. Code R746-349-10 that generally prohibits the reimbursement of duplicate capital expenditures for Carriers of Last Resort (COLR) operating in overlapping service areas, such as E Fiber San Juan.<sup>1</sup>

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<sup>1</sup> See *Application of 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. 20-2619-01 (the “CPCN Docket”). The PSC granted E Fiber San Juan a CPCN in part of the service territory of Citizens Telecommunications Company of Utah d/b/a Frontier Communications of Utah (“Frontier”). That CPCN thus resulted in overlapping service territories of both E Fiber San Juan and Frontier. This overlap implicated Utah Admin. Code R746-349-10, to which both E Fiber San Juan and Frontier are subject, and which may disqualify the reimbursement of UUSF funds for duplicate capital expenditures.

On October 6, 2023, DPU submitted supplemental comments (“DPU’s Supplemental Comments”).

On November 1, 2023, DPU filed its final comments which included final recommended UUSF annual disbursements, consistent with Utah Admin. Code R746-8-401(10)(e) (“DPU’s Final Recommendation”).

The PSC received no comments or challenges to DPU’s final recommendation by the November 15, 2023, deadline under Utah Admin. Code R746-8-401(10)(f).

### **DPU COMMENTS**

#### 1. Initial Comments.

The Initial Comments recommended a 2024 UUSF calendar year distribution for E Fiber San Juan of \$1,145,821.00 to be distributed in twelve monthly payments of \$95,485.08. In its analysis, DPU restated the PSC’s conclusion in granting E Fiber San Juan’s certificate of public convenience and necessity (“CPCN”),<sup>2</sup> that “as a COLR, [E Fiber San Juan] would not be prohibited from seeking disbursements from the ... [UUSF], solely because of an overlapping exchange area with the established regulated COLR.”<sup>3</sup> DPU indicated that “both established COLRs are eligible to seek UUSF support pursuant to Utah Admin. Code R746-8-401, subject to any future amendments.”<sup>4</sup> As support for its recommended UUSF disbursement, DPU reviewed

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<sup>2</sup> See Initial Comments, at 1-2.

<sup>3</sup> *Id.*, at 1.

<sup>4</sup> *Id.*, at 2.

(1) E Fiber San Juan's Report; (2) its responses to informal data requests; (3) the build-out plan filed by E Fiber San Juan in the CPCN Docket; (4) Federal Program Funding and Grants; (5) E Fiber San Juan's rate of return of 9.75 percent; (6) allocation adjustments to account for shared equipment, reclassifying materials and supplies between regulated and non-regulated companies and operations; and (7) Federal Communications Commission (FCC) excluded costs.<sup>5</sup>

2. Supplemental Comments.

The PSC requested additional analysis to ensure no reimbursement of duplicate capital expenditures for COLRs operating in overlapping service areas occurs since both E Fiber San Juan and Frontier are seeking 2024 UUSF reimbursements. DPU's Supplemental Comments state that E Fiber San Juan is a competing COLR consistent with its PSC-granted CPCN.<sup>6</sup> DPU restates that UUSF support is not prohibited solely based on overlapping COLR service area and "[i]n the absence of the necessary data, the [DPU] applied the standard method of calculating UUSF recovery while continuing to pursue the missing information."<sup>7</sup> DPU explains that it did not yet have all the information requested from Frontier to fully verify that E Fiber San Juan's capital expenditures for new equipment or network installations were not duplicative. DPU explains that it therefore "relied on the standard pro forma process to calculate a

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<sup>5</sup> DPU listed expenses that are disallowed from Federal USF and UUSF reimbursement under the Code of Federal Regulations Part 54.7 and Utah Code Ann. § 54-8b-15(3). *See id.*, at 3.

<sup>6</sup> *See* Supplemental Comments, at 2-3.

<sup>7</sup> *Id.*, at 2.

revenue requirement, trusting the [PSC's] subsequent processes would either help illuminate these issues or, failing that, leave the record insufficient to grant support.”<sup>8</sup>

DPU subsequently received additional information from Frontier to determine that E Fiber San Juan's capital expenditures did not duplicate any capital expenditures for which Frontier was also seeking reimbursement.<sup>9</sup> DPU's Final Recommendation did not change from the recommendation in its Initial Comments, thus resulting in a recommendation of 2024 UUSF reimbursement for E Fiber San Juan of \$1,145,821.<sup>10</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Utah Admin. Code R746-8-401 requires DPU to make annual recommendations to the PSC for adjustments to the monthly UUSF distribution to each provider based on an established FCC rate of return and the provider's most recent financial information reflected in its annual report filed with the PSC. In addition, Utah Admin. Code R746-349-10 generally prohibits reimbursement of duplicate capital expenditures for COLRs operating in overlapping service areas, such as E Fiber San Juan.

In calculating E Fiber San Juan's eligibility for the UUSF distribution, DPU's review included several rounds of comments, a review of E Fiber San Juan's rate of return, its state and federal income taxes, depreciation, federal USF excluded costs,

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<sup>8</sup> *Id.*, at 4-5.

<sup>9</sup> See Comments from the Division of Public Utilities, Docket No. 23-041-01, filed November 1, 2023, and Comments from the Division of Public Utilities, Docket No. 23-999-03, filed November 1, 2023.

<sup>10</sup> Comments from the Division of Public Utilities, Docket No. 23-999-03, filed November 1, 2023.

UUSF eligibility, accumulated deferred income taxes, and federal USF assistance. DPU also reviewed E Fiber San Juan's build-out plan and additional information filed in the parallel Frontier docket in which Frontier (the original COLR) also seeks UUSF reimbursement. DPU's analysis and review included a comparison of E Fiber San Juan's build-out plan with Frontier's upgrades and capital expenditures to ensure E Fiber San Juan is not seeking reimbursement of duplicate capital expenditures.

Through several rounds of review and analysis, DPU's Final Recommendation for the 2024 UUSF calendar year distribution to E Fiber San Juan is \$1,145,821.00, to be distributed in twelve monthly payments of \$95,485.08. In totality, and as illustrated in Exhibit A, the 2024 UUSF distribution to E Fiber San Juan comprises 8.06% of the increased funding, and 3.24% of the total 2024 UUSF funding for all eligible carriers. In addition, the cumulative effect of the increase in funding for all UUSF necessitated DPU's recommendation to substantially increase the UUSF surcharge from \$0.36 to \$0.71,<sup>11</sup> beginning January 2024.<sup>12</sup>

The PSC appreciates the DPU's analysis in this docket, as it was more involved than has historically been required. This is the first year that two COLRs with overlapping service territory seek reimbursement for capital expenditures which

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<sup>11</sup> See *Miscellaneous Correspondence and Reports Regarding Telecommunications Utility Services; 2023*, Docket No. 23-999-03, DPU Action Request Response filed September 12, 2023. The DPU initially recommended an increase in the surcharge to \$0.74 but modified its recommendation to \$0.71. Accordingly, the PSC has published a rule amendment in the Utah State Bulletin to increase the surcharge to \$0.71.

<sup>12</sup> Consequently, the PSC requests all eligible carriers to closely monitor capital expenditures to ensure they are consistent with the UUSF rules and regulations.

required a careful and thorough analysis of Utah Admin. Code R746-349-10. The PSC finds sufficient evidence exists in the record to conclude that E Fiber San Juan complies with Utah Admin. Code R746-349-10. Based on the Report, DPU's several rounds of comments and uncontested Final Recommendation, and there being no opposition comments or reply comments filed, we find and conclude that E Fiber San Juan is therefore eligible to receive DPU's recommended 2024 UUSF calendar year distribution in the amount of \$1,145,821.00, pursuant to Utah Code Ann. § 54-8b-15.

**ORDER**

The PSC approves a 2024 UUSF calendar year distribution of \$1,145,821.00 for E Fiber San Juan, to be disbursed in twelve equal monthly payments in the amount of \$95,485.08.

DATED at Salt Lake City, Utah, December 6, 2023.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

**CONCURRING STATEMENT OF COMMISSIONER JOHN S. HARVEY, Ph.D.**

I concur with the outcome of this docket (for reasons explained below), but not with the finding regarding the reasonableness of the costs incurred by E Fiber San Juan. Utah Code Ann. § 54-8b-15(4)(a)(ii)<sup>1</sup> requires a finding by the PSC that the

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<sup>1</sup> (ii) the rate-of-return regulated carrier of last resort's reasonable costs, as determined by the [PSC], to provide public telecommunications service and wholesale broadband Internet access service are greater than the sum of:

(A) the rate-of-return regulated carrier of last resort's revenue from basic residential service

claimed incurred costs are reasonable before authorizing reimbursement of those costs. For me, there is insufficient evidence in the record to support that finding. Accordingly, I cannot affix my name to an order that makes such a finding.

However, I recognize that predictability in regulatory practice is an important consideration and, therefore, in recognition that the DPU and E Fiber San Juan acted in accordance with recent practice, I do not desire to penalize E Fiber San Juan by denying some, or all, of the disbursement approved by this order. But on a going-forward basis I want to be clear that the current practices have not produced a record I consider sufficient to reach the finding of reasonableness.

In reading Utah Code Ann. § 54-8b-15, it is clear the public policy goals are both to (1) significantly subsidize the expansion of broadband with funds collected from the general populace of Utah, while simultaneously (2) prohibiting the PSC from any type of rate setting for the broadband services provided by the rate-of-return utility (or its affiliate) in order to avoid the burden of frequent rate case proceedings. However, the statute as written is not a blank check with respect to the reimbursement of costs incurred; it includes the requirement that the PSC find the utility's costs are reasonable.

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considered affordable by the [PSC];  
(B) the rate-of-return regulated carrier of last resort's regulated revenue derived from providing other public telecommunications service;  
(C) the rate-of-return regulated carrier of last resort's revenue from rates approved by the Federal Communications Commission for wholesale broadband Internet access service; and  
(D) the amount the rate-of-return regulated carrier of last resort receives from federal universal service funds. (emphasis added).

I wish to be clear in this concurrence that I am not asking for annual rate cases or for the type of full-fledged accounting of all revenues and costs such an approach requires. I acknowledge statutory law prescribes the inputs into the decision-making process and that those inputs are limited as compared to a rate-case type of approach. I simply desire to establish a process that, in future cases, will allow the DPU to provide the PSC with a set of record evidence that makes a sufficient showing that the claimed incurred costs by the utility in question are reasonable. In my mind that process requires the utility/DPU to demonstrate that:

1) The utility has applied for (using its best efforts) available federal programs that could be used to offset some, or all, of the costs associated with meeting the public policy objective of providing its customers with broadband services;

2) The utility demonstrates that any incremental level of service (above the federal minimum for broadband service) it has chosen to provision broadband throughout its service territory has been done without incurring additional costs above what would be required to provide the federal minimum level of broadband service, or that such extra costs are either insignificant (compared to the total costs of the project), or that the extra costs can be justified by other public policy considerations. (Note: Fiber to the premise/door/NID provides a faster level of broadband service than is required by the federal standards and provides a faster service than many of the people who are paying most of the subsidies – the



population on the Wasatch Front and other large urban areas of the state – are currently receiving.);

3) The utility has conducted a process that demonstrates the design of the network is the least cost design;

4) The utility has chosen the lessor cost option of self-construction versus contracted construction; and,

5) The rate approved by the Federal Communications Commission for wholesale broadband Internet access service which is used for reference pricing is for a comparable level (e.g., speed) of service capability.

**CONCLUSION**

I find the record is insufficient to reach a finding of reasonableness with respect to the costs incurred by E Fiber San Juan. However, I find that the utility and DPU acted according to the agreed-upon practices in place at the time the DPU recommendation was made and so I decline to advocate for a denial of the recommended disbursement. I request that the PSC schedule a technical conference (or series of technical conferences) very early in 2024 so that parties may discuss the development of procedures that will result in a sufficient record to support a reasonableness finding, before the DPU begins its work on next year's UUSF recommendations.

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/s/ John S. Harvey, Ph.D., Commissioner

Attest:

/s/ Gary L. Widerburg  
PSC Secretary  
DW#331141

Exhibit A  
Summary of 2024 UUSF Disbursements

	Disbursement 2023	Recommended Disbursement 2024	Increase/ (Decrease)	Individual Change	% of Total Increase <sup>1</sup>	% of 2024 Allocation
All West Communications, Inc.	\$2,080,193.00	\$3,445,674.00	\$1,365,481.00	65.64%	9.61%	9.76%
Bear Lake Communications d/b/a CentraCom	-	-	-	-	-	-
Beehive Telephone Company, Inc. d/b/a Beehive Broadband	\$1,865,082.00	\$2,398,770.00	\$533,688.00	28.61%	3.76%	6.79%
Carbon/Emery Telcom, Inc.	\$1,752,591.00	\$2,262,786.00	\$510,195.00	29.11%	3.59%	6.41%
Central Utah Telephone d/b/a CentraCom	-	\$42,836.00	\$42,836.00	-	0.30%	0.12%
Citizens Telecommunications Company of Utah	-	\$3,084,978.00	\$3,084,978.00		21.71%	8.74%
Direct Communications Cedar Valley, LLC	\$3,094,626.00	\$2,604,685.00	(\$489,941.00)	-15.83%	-	7.38%
E Fiber Moab, LLC	-	\$1,114,971.00	\$1,114,971.00	-	7.85%	3.16%
E Fiber San Juan, LLC	-	\$1,145,821.00	\$1,145,821.00	-	8.06%	3.24%
Emery Telephone d/b/a Emery Telcom	\$1,700,041.00	\$2,392,909.00	\$692,868.00	40.76%	4.88%	6.78%
Gunnison Telephone Company	\$457,054.00	\$454,946.00	(\$2,108.00)	-0.46%	-	1.29%
Hanksville Telcom, Inc.	\$55,417.00	\$51,194.00	(\$4,223.00)	-7.62%	-	0.14%
Manti Telephone Company, Inc.	\$734,580.00	\$919,431.00	\$184,851.00	25.16%	1.30%	2.60%
Navajo Communications Company, Inc. (Utah) d/b/a Frontier Navajo Communications Company	-	\$749,326.00	\$749,326.00		5.27%	2.12%
Skyline Telecom d/b/a CentraCom	-	-	-	-	-	-
South Central Utah Telephone Association, Inc. d/b/a South Central Communications	\$6,139,926.00	\$8,598,237.00	\$2,458,311.00	40.04%	17.30%	24.35%
UBTA-UBET Communications, Inc. d/b/a STRATA Networks	\$3,720,571.00	\$6,049,028.00	\$2,328,457.00	62.58%	16.38%	17.13%
Union Telephone Company	-	-	-			-
Total	\$21,600,081.00	\$35,315,592.00	\$13,715,511.00	63.50%		

<sup>1</sup> These values are normalized to sum to 100%. Without normalizing the data, the sum of the percent of total increase in UUSF disbursement equals 103.62%.

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this written order by filing a request for review or rehearing with the PSC within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the PSC fails to grant a request for review or rehearing within 30 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on December 6, 2023, a true and correct copy of the foregoing was served upon the following as indicated below:

By Email:

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Administrative Assistant