

Agenda Date: April 8, 2021  
Item Number: A2\_

**Docket:** UT-201008

Company Name: Frontier Communications Northwest, LLC, d/b/a “Zipty Fiber”

Staff: Tim Zawislak, Senior Telecommunications Regulatory Analyst  
Jennifer Cameron-Rulkowski, Assistant Attorney General  
Jing Roth, Assistant Director – Telecommunications

### **Recommendation**

Enter an order:

- a. Denying the motion for protective order;
- b. Directing Zipty Fiber to file public and confidential versions of the FCC “Long Form” application, and associated attachments, pertaining to its Washington ETC petition in Docket UT-201008 under the provisions of the commission’s rule on confidential information, WAC 480-07-160, as soon as possible and no later than April 15, 2021; and
- c. Directing Zipty Fiber to redact from both versions any confidential information that pertains only to other states.

### **Background**

On December 30, 2020, Frontier Communications of the Northwest, LLC d/b/a “Zipty Fiber” filed a petition to be designated as an eligible telecommunications carrier (ETC) in the areas where it was a winning bidder (yet not already an ETC) in the FCC’s rural digital opportunity fund auction 904 (RDOF - Phase I Auction 904).

To meet the FCC deadline for ETC designation of auction winners, the Commission will need to issue an order on the ETC petitions of the Washington RDOF auction winners, including Zipty Fiber, before the end of May 2021. Commission staff (staff) is in the process of reviewing the petitions and plans to present them to the commission for decision through the open meeting process on May 20, 2021.

On February 12, 2021, commission staff requested the following information by March 5, 2021, as part of its review of Zipty Fiber’s petition:

*An electronic copy of the FCC RDOF Long Form information (including engineering diagrams and detailed technology and system design description) and other supporting information for Zipty Fiber’s RDOF winning bid(s) in Washington.*

The FCC “Long Form” information contains attachments that staff uses to validate the required contents pursuant to WAC 480-123-030(1)(b), (c), and (d); especially substantive plans of the

investments to be made during the first two years when initial federal support will be distributed. Staff needs Ziplly's Long Form application and associated attachments<sup>1</sup> for its analysis and to make a recommendation on the ETC petition at the May open meeting, which is less than two months from now.

On March 15, 2021, Ziplly Fiber filed a Motion for Protective Order ("Motion") seeking a protective order before it will provide the Long Form for staff's review. Staff has encouraged the company to provide confidential information under WAC 480-07-160 as is customary in non-adjudicative cases (and as other RDOF ETC petitioners have already done).<sup>2</sup>

### **Legal and Policy Discussion**

Staff does not believe that there is a dispute with the company about the parts of the Long Form that staff needs to evaluate the ETC petition. Specifically, staff does not require information that pertains only to other states, as staff does not believe this will be relevant to its analysis of this particular petition, and staff has discussed this with Ziplly Fiber. The issue presented by the Motion is whether the commission should take the unusual step of entering a protective order in a non-adjudicative proceeding such as an open meeting.

The commission and its staff routinely receive confidential information from companies in non-adjudicative matters through formal filings, through informal discovery, and otherwise, under the protections of WAC 480-07-160.

The commission's rules provide for protection of confidential information on two tracks: (1) pursuant to a protective order in the context of an adjudicative proceeding, and (2) pursuant to WAC 480-07-160 in all other contexts. WAC 480-07-160 provides, "WAC 480-07-420 governs access to, and exchange of, restricted information by parties in commission adjudicative proceedings." WAC 480-07-420, the commission's rule on protective orders, is located in Part III of the commission's administrative rules. The scope of Part III is as follows:

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<sup>1</sup> The "Project Funding Description," attachment is an example of the type of information contained in the long form and is described in paragraph 312 of the FCC's [Auction 904 Procedures Public Notice](#) (June 11, 2020). This includes a description of how the required construction will be funded in each state.

<sup>2</sup> There are eight other ETC petitions from eight other companies on the same deadline (most of which have already filed both confidential and public versions of their Long Forms in their respective ETC dockets under the provisions of WAC 480-07-160).

**Scope.** *The rules in this subpart apply to all adjudicative proceedings described in this chapter, except to the extent of any conflict with special rules that govern general rate proceedings (subpart B of this chapter) or abbreviated adjudicative proceedings (subpart C of this chapter). An adjudicative proceeding for purposes of this chapter is a proceeding in which an opportunity for hearing is required by statute or constitutional right or is a proceeding the commission voluntarily commences as an adjudication as defined and described in chapter 34.05 RCW.*

WAC 480-07-300(1).

There is no statute or rule administered by the commission that would require a hearing or an opportunity for a hearing before the commission enters an order resolving Zply Fiber's pending ETC petition, which means that this matter is not inherently an adjudicative proceeding.

A protective order allows the parties to an adjudication to provide confidential information to one another after participants have signed an agreement to protect and not further disclose information that a party has designated as confidential. A provision for highly confidential information in a protective order also serves a specific purpose: it expressly limits the exchange of certain confidential information among the parties to certain categories of participants from each party. The commission's rule governing protective orders reflects these functions:

*The commission may enter a standard form of protective order designed to promote the free exchange of information and development of the factual record in a proceeding when the commission finds that parties reasonably anticipate that discovery or evidentiary filings will require information designated as confidential as defined in WAC 480-07-160 to be disclosed to other parties in the adjudication.*

WAC 480-07-420(1).

Given the purpose of protective orders, which is to facilitate the exchange of confidential information among formal participants in a proceeding, it is not surprising that neither the commission's procedural rules nor the Administrative Procedure Act provides for the issuance of protective orders outside the context of adjudicative proceedings. Given that this ETC matter is not an adjudicative proceeding and that there are no other parties, Zply Fiber's Motion is not appropriate. Confidential information does not need to be shared beyond the commission, so there is no need for a protective order. WAC 480-08-160 provides the protection that Zply Fiber seeks, which is the protection of confidential information from disclosure.

Staff is further concerned that granting this Motion could create a slippery slope. The commission traditionally enters protective orders only in adjudicative proceedings. Granting this Motion could encourage further requests for protective orders in other matters that proceed through the open meeting process. Entering protective orders in non-adjudicative proceedings would add unnecessary process to matters involving confidential information, especially when,

as here, the circumstances do not squarely fit the purposes for which protective orders are designed.

**Conclusion**

Staff recommends that the commission deny the Motion and direct Ziplly Fiber to file public and confidential versions of the Long Form application and associated attachments under the provisions of WAC 480-07-160 in Docket UT-201008, as soon as possible and no later than April 15, 2021. Staff further recommends that the commission direct Ziplly Fiber to redact from both versions any confidential information that pertains only to other states.