

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON

Staff investigation of the Oregon Universal
Service Fund.

Docket No. UM 1481

**OCTA’S COMBINED REPLY IN
SUPPORT OF MOTIONS TO COMPEL
OREGON TELECOMMUNICATIONS
ASSOCIATION, CENTURY LINK, AND
FRONTIER**

**EXPEDITED CONSIDERATION
REQUESTED**

INTRODUCTION

CenturyLink, Frontier and Oregon Telecommunications Association (“OTA”) (collectively, the “ILECs”) raise nearly identical arguments in response to OCTA’s motions to compel production of broadband line count and revenue data sought by OCTA’s data requests. Accordingly, OCTA has combined its reply to these arguments below. As shown herein, the arguments raised by the ILECs all fail.¹

First, the ILECs’ argument that ORS 759.218 bars discovery of broadband revenues here fails, because a statute that limits revenue attribution in ratemaking cases does not apply here, and certainly does not prohibit discovery in investigating how to best calculate and distribute the Oregon Universal Service Fund (“OUSF”).

¹ Today, OTA provided a supplemental response to DR 8 that resolves the dispute over that data request. OCTA hereby withdraws its motion to compel with respect to DR 8 promulgated on OTA members.

Second, the ILECs' argument that broadband revenues are outside the scope of this docket because the OUSF will not directly support broadband fails, because the revenue data sought nonetheless is an indicator of whether and where further carrier subsidies may be needed, and, therefore, is directly relevant to the issue of how to calculate and distribute the OUSF.

Third, the ILECs' argument that compelling discovery of broadband data falls outside the jurisdiction of the Commission is a red-herring that conflates the ability to directly regulate activities with the ability to obtain information about revenues from such activities and would lead to absurd results in other contexts.

Fourth, the ILECs' objections based on undue burden are without merit because OCTA's requests expressly allow flexibility in the format of the responsive data, negating the concerns the ILECs raise.

A. The ILECs fail to address the general relevance of ILEC revenues to the OUSF.

All ILEC revenues derived from the supported networks are relevant to the issues in this docket. OCTA's motion explained why, stating:

“A central issue in the docket is ‘[w]hat changes should be made to the existing OUSF related to the calculation, the collection, and the distribution of funds. Calculation of OUSF support must take into consideration whether a carrier actually needs support.’”²

That general principle establishes the relevance of the data sought by OCTA. OCTA separately stated this general principle another way:

“Specifically, information on broadband services requested by Data Requests 1, 3 and 4 is needed for OCTA to evaluate options for calculating and distributing future OUSF funds, and potentially present testimony to the Commission, including projections as to

² See Motion to Compel to OTA, at 5, Motion to Compel to CenturyLink at 3-4, Motion to Compel to Frontier, at 4.

how the size of the OUSF might be impacted by such changes to the calculation of support.”³

In short, the Commission should be able to consider whether support is actually needed, by looking all sources of revenue – whether from broadband, RUS grants, or elsewhere. The general relevance of the information does not depend on use of broadband revenues as off-sets in any form (a misconception underpinning the arguments based on ORS 759.218).

With respect to broadband, OTA’s general objections to relevance are based on the exclusion of proposed Issue #1 from this phase of the docket. But those objections, in turn, are based on a misconception that broadband could only be relevant if the Commission is considering repurposing the fund *to support* broadband. That’s simply a false assumption. In considering how to calculate and distribute OUSF to achieve its current purpose – the availability of basic telephone service – the Commission is free to consider whether the amount of broadband revenues that ILECs earn off of the supported networks might affect the appropriate amount of any future support. Discovery of those revenues is, therefore, reasonably calculated to lead to admissible evidence.⁴

The ILECs’ response offers nothing to rebut the proposition that calculations must take into account carriers’ *need* for support, to which broadband revenues are obviously relevant. Accordingly, no further demonstration by OCTA of the information’s relevance is necessary. The foregoing, standing alone, is sufficient to grant discovery of the broadband data sought by OCTA.

³ Motion to Compel to OTA, at 6, Motion to Compel to CenturyLink at 6, Motion to Compel to Frontier, at 5.

⁴ See ORCP 36.

B. The ILECs’ focus on a single sentence of OCTA’s motions fails to rebut OCTA’s general argument regarding the relevance of the requested data, and is based on a misreading of ORS 759.218.

The ILECs focus much of their briefing on OCTA’s additional statement that “Carrier revenues that can be used to off-set the cost of providing service are relevant to that analysis.”⁵ The ILECs essentially pounce on this sentence, contending that such cost off-sets would violate ORS 759.218, and contending that discovery of broadband revenues is thus prohibited.

The ILECs are incorrect. ORS 759.218 is concerned with ratemaking, and prohibits only attribution of non-regulated revenues to regulated services in that context. It has no bearing on the Oregon Universal Service Fund, nor on the proper scope of discovery generally, and certainly does not prohibit the discovery sought here.

ORS 759.218 regulates ratemaking proceedings. Paragraph (3) expressly references ratemaking proceedings, stating:

“(3) The commission *may approve a telecommunications utility rate proposal* for basic local service rates that utilizes revenues from other regulated services to partially cover the costs of providing basic local service.”⁶

Paragraphs (1) and (2), read in context with paragraph (3), plainly constrain the accounting of revenues for ratemaking purposes, when the Commission determines how much carriers may charge:

“(1) A telecommunications utility may not use revenues earned from, or allocate expenses to, that portion of the utility’s business that is regulated under this chapter in order to subsidize activities that are not regulated by this chapter.”⁷

⁵ Oregon Telecommunications Association’s Response to OCTA’s Motion to Compel (“OTA Response”), at 2-3; Joint Response of Frontier and CenturyTel to OCTA’s Motion to Compel (“Joint Response”), at 3-4.

⁶ ORS 759.218(3).

⁷ ORS 759.218(1).

“(2) The Public Utility Commission may not require revenues or expenses from an activity that is not regulated under this chapter to be attributed to the regulated activities of a telecommunications utility.”⁸

Paragraph (1) plainly does not apply here because it restricts ILECs, not the Commission.

Paragraph (2) also plainly does not preclude the discovery sought here. OCTA’s motion does not ask the PUC to require that revenues be attributed to any regulated activities for purposes of ratemaking, which is all that ORS 759.218 forbids.

First, this is not a ratemaking proceeding. OCTA is not asking the Commission to set, or change, CenturyLink’s, Frontier’s, or OTA’s members’ rates. Extending ORS 759.218 to this context would make no sense. The issues before the Commission, as reflected in the issues list, are fundamentally different than the distinct issues in a ratemaking proceeding. The fundamental issue here is not carrier’s rates, but the future of a distinct subsidy mechanism – the OUSF.

Second, even assuming *arguendo* that ORS 759.218 did apply, it does not prohibit compelling ILECs to provide information on revenues. The only Commission action barred by ORS 759.218 is “requir[ing] revenues or expenses from an activity that is not regulated under this chapter to be attributed to the regulated activities of a telecommunications utility.”⁹ Through its discovery requests, OCTA does not seek not to have the Commission attribute non-regulated broadband revenues to regulated activities for ratemaking purposes; OCTA simply wants to know what the broadband revenues are and to ask the Commission take them into consideration in determining the level of a carrier’s need for OUSF support. Granting OCTA’s motion to

⁸ ORS 759.218(2).

⁹ *Id.*

compel does not require any attribution of ILEC revenues or expenses, and is therefore not prohibited by the statute.

Finally, the relevance of broadband revenues to this proceeding does not depend on any such attribution of non-regulated revenues to regulated activities. The arguments presented by OTA, Frontier, and CenturyLink attempt to create the impression that broadband revenues are only relevant if the Commission attributes broadband revenues to regulated basic telephone service. To paint this picture, OTA goes so far as to assert that OCTA must have used “service” as defined by ORS 759.425.¹⁰ But this picture is false, and it misses the broader point about the relevance of all ILEC revenues derived from the supported networks to this proceeding.

The broader point is that in determining how to calculate and distribute OUSF the Commission should be allowed to look at the overall revenues and expenses of the ILECs. It is that simple. More specifically, the Commission should be able to pose a common sense question: “Do the companies that currently receive \$43 million dollars in annual OUSF support¹¹ actually need it?” The revenue information sought is relevant to that question.

The single sentence to which the ILECs object merely illustrates one specific way that revenues could be used in calculations. There are many ways that revenue data could factor into OUSF calculations and distributions as part of an effort to limit excessive OUSF subsidies. Another mechanism that the Commission could consider would be using broadband revenues to do basic allocation on the cost side of the OUSF calculation. For example, if an ILEC’s revenue

¹⁰ OTA Response, at 3.

¹¹ See *In the Matter of the PUBLIC UTILITY COMMISSION OF OREGON Investigation Into Expansion of the Oregon Universal Service Fund to Include the Service Areas of Rural Telecommunications Carriers*, Order 12-206, Docket UM 1017 (June 5, 2012), at Appendix A, page 4 (noting increase of total OUSF disbursements from \$35 million to \$43 million.”).

data shows that 50% of the revenues for a given local loop come from broadband services, then the Commission might decide to limit what percentage of the costs of the loop should be allocated to basic telephone service for purposes of establishing OUSF support. Broadband revenues could also be used in adjusting the “benchmark” used in the calculation of OUSF. None of those mechanisms would violate ORS 759.218, because none require attributing broadband revenues to regulated services.

Even if some types of revenue are ultimately excluded from the OUSF calculations, such data is useful to the Commission and parties in determining what the proper calculation should be. The utility of the revenue data does not depend on the Commission’s ultimate decision as to the calculation and distribution of OUSF. The scope of discovery cannot depend on the outcome of the proceeding; rather, the purpose of the discovery sought is to allow the parties in the proceeding to help inform the Commission’s ultimate decision. The scope of discovery, expressly including even material that is not itself admissible, is deliberately broad enough to include such background information.¹² And there is no conceivable way that using revenue data as background when discussing future OUSF calculation mechanisms could violate ORS 759.218. It simply has no effect here.

C. The argument that the Commission lacks jurisdiction to compel discovery of broadband revenues is a specious red-herring with absurd consequences.

CenturyLink and Frontier argue that the Commission lacks jurisdiction to regulate broadband, and that therefore the Commission has no jurisdiction to compel production of any information concerning broadband, including revenue numbers. This argument has absurd

¹² See ORCP 36.

consequences, and is based on a fundamental misconception of the relationship between direct power to regulate an activity and the power to obtain information stemming from that activity.

Even if one accepted the premise that broadband is interstate in nature, and the implication that broadband must be regulated by the FCC rather than the Commission, the conclusion that the Commission lacks jurisdiction to *compel production of information* about such services does not follow.

OCTA's requests do not concern the aspects of broadband that are in the exclusive jurisdiction of the federal government, but simply concern the revenues from broadband and other services. The *existence* and *amount* of those revenues is not the exclusive province of the FCC. This is shown by recent Commission practice, and by the absurd consequences of the OTA/CenturyLink/Frontier position.

First, information about services regulated by the FCC is relevant to inform Commission decision-making in many contexts, as Frontier and CenturyLink have recognized in this and other proceedings. For instance, the OPUC cannot regulate interstate long distance rates, but the FCC's plan to transition interstate access charges to the 0.0001 level is obviously relevant in this Commission's regulation of ILEC intrastate access rates and other ILEC rates. The ILECs have never suggested that the Commission ignore changes to ILEC interstate revenues when determining how to regulate intrastate rates. In fact, the ILECs have suggested in presentations made to this Commission at Public Meetings that intercarrier compensation reforms adopted by the FCC should be considered by the Commission in establishing OUSF levels. Furthermore, this Commission requires ILECs to provide broadband data in annual Form O and Form I reports filed with the Commission. Taken to its logical conclusion, the ILECs' jurisdictional argument would prohibit the Commission from collecting such data from the ILECs.

Second, OTA, CenturyLink and Frontier’s position carries absurd consequences. For instance, federal law states that “[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.”¹³ But if the Oregon Department of Revenue were to sue in state court for unpaid taxes on revenues arising from patented products (e.g., iPhones) or copyrighted material (e.g., book sales), it would be absurd to argue the amounts of revenues are immune from discovery simply because patent and copyright fall within exclusive federal jurisdiction. Oregon may not be able to impose its own patent and copyright laws, but it can find out how much revenue Powell’s Books earns from books, or how much the Apple Store in Portland sold in iPhones. Yet, this is exactly the type of limitation on discovery the ILECs are contending for here.

D. OTA’s objections as to burden reveal a misreading of OCTA’s requests, and are without merit.

OCTA’s DR 3 to each OTA entity requests the following:

For 2011, provide the company year-end line counts for the following services by wire center and study area (*to the extent these data are not available at the wire center level, please provide the data at the lowest level of granularity available, such as rate center*):

- A. Residential local voice service;
- B. Business local voice service;
- C. Residential broadband service provided by the company or its affiliates;
- D. Business broadband service provided by the company or its affiliates.

OCTA’s DR 4 to each OTA entity requests the following:

As of December 31, 2011, provide the company average revenue per line for the following line types and by wire center and study

¹³ 28 USC § 1338.

area (to the extent these data are not available at the wire center level, please provide the data at the lowest level of granularity available, such as rate center):

- A. Residential local voice service;
- B. Business local voice service;
- C. Residential broadband service provided by the company or its affiliates;
- D. Business broadband service provided by the company or its affiliates.

Despite the italicized language above, Frontier and CenturyLink object that they do not normally maintain data by wire center, and that given the number of wire centers they each have, compliance with the request would be burdensome.¹⁴ OTA similarly objects that OCTA’s data requests seek data by customer class that, at least for “most” members, would require a special study that would be burdensome to conduct.¹⁵ But the original data requests provide the alternative – to provide the data at the lowest level of granularity that is already “available.” If CenturyLink and Frontier maintain this data in a less granular form, then they should simply provide it in that form. Since OTA’s objections imply that at least some of its members record data by customer class, that data should be provided in whatever form it is available. Other OTA members should provide the data in the format they collect it, even if it is not broken down by customer class.

//

//

//

//

¹⁴ Joint Response, at 5.

¹⁵ OTA Response, at 7.

CONCLUSION

For the foregoing reasons, OCTA respectfully requests that its motion to compel discovery be granted.

DATED this 21st day of November, 2012.

DAVIS WRIGHT TREMAINE LLP

By: _____
MARK TRINCHERO, OSB #883221
Email: marktrinchero@dwt.com
ALAN GALLOWAY, OSB #083290
Email: alangalloway@dwt.com
Telephone: (503) 241-2300
Facsimile: (503) 778-5299
Of Attorneys for OCTA

**CERTIFICATE OF SERVICE
UM 1481**

I hereby certify that on November 21, 2012, the foregoing **OCTA'S COMBINED REPLY IN SUPPORT OF MOTIONS TO COMPEL OREGON TELECOMMUNICATIONS ASSOCIATION, CENTURY LINK, AND FRONTIER - EXPEDITED CONSIDERATION REQUESTED** was sent by UPS Overnight Mail to the Oregon Public Utilities Commission, 550 Capitol Street NE, #215, Salem OR 97308-2148 and emailed to puc.filingcenter@state.or.us, and was served on the following persons by email:

<p>Citizens' Utility Board of Oregon OPUC Dockets 610 SW Broadway, Ste. 400 Portland, OR 97205 Dockets@oregoncub.org</p>	<p>Charles L. Best 1631 NE Broadway #538 Portland, OR 97232-1425 Chuck@charleslbest.com</p>
<p>Ater Wynne LLP Arthur A. Butler 601 Union Street, Ste 1501 Seattle, WA 98101-3981 Aab@aterwynne.com</p>	<p>Qwest Corporation Carla Butler 310 SE Park Ave 11th Flr Portland, OR 97205-3715 Carla.butler@centurylink.com</p>
<p>AT&T Communications of the Pacific Northwest Inc. David Collier 645 E Plumb Lane/PO Box 11010 Reno, NV 89502 David.collier@att.com</p>	<p>Comcast Business Communications LLC Doug Cooley 1710 Salem industrial Drive NE Salem, OR 97303 Doug_cooley@cable.comcast.com</p>
<p>Integra Telecom of Oregon Inc Douglas K Denney 1201 NE Lloyd Blvd, Ste 500 Portland, OR 97232 Dkdenney@integratelecom.com</p>	<p>OCTA Michael Dewey 1249 Commercial St SE Salem, OR 97302 Mdewey@oregoncable.com</p>
<p>Verizon Communications NW, Inc. Milt H. Doumit 410 – 11th Ave. SE, Ste 103 Olympia WA 98501 milt.h.doumit@verizon.com</p>	<p>Citizens' Utility Board of Oregon Gordon Feighner 610 SW Broadway, Ste 400 Portland, OR 97205 Gordon@oregoncub.org</p>
<p>Law Office of Richard A Finnigan Richard A Finnigan 2112 Black Lake Blvd SW Olympia, WA 98512 Rickfinn@localaccess.com</p>	<p>WSTC Adam Haas 10425 SW Hawthorne Ln Portland, OR 97225 Adam.haas@warmspringstelecom.com</p>

<p>CenturyLink, Inc. William E Hendricks 902 Wasco St a0412 Hood River, OR 97031 Tre.hendricks@centurylink.com</p>	<p>PUC Staff--Department of Justice Jason W Jones Business Activities Section 1162 Court St NE Salem, OR 97301-4096 Jason.w.jones@state.or.us</p>
<p>GVNW Consulting Inc. Carsten Koldsbaek PO Box 2330 Tualatin, OR 97062 Ckoldsbaek@gvnw.com</p>	<p>Mcdowell Rackner & Gibson PC Adam Lowney 419 SW 11th Ave, Ste. 400 Portland, OR 97205 Adam@mcd-law.com</p>
<p>AT&T Cynthia Manheim PO Box 97061 Redmond, WA 98052 Cindy.manheim@att.com</p>	<p>Public Utility Commission of Oregon Kay Marinos PO Box 2148 Salem, OR 97308-2148 kay.marinos@state.or.us</p>
<p>Citizens' Utility Board of Oregon G. Catriona McCracken 610 SW Broadway, Ste. 400 Portland, OR 97205 Catriona@oregoncub.org</p>	<p>AT&T Services, Inc. Sharon L. Mullin 400 W 15th St, Ste. 930 Austin, TX 78701 Smullin@att.com</p>
<p>Integra Telecom of Oregon Inc. J Jeffery Oxley 6160 Golden Hills Dr. Golden Valley, MN 55416-1020 Jjoxley@integratelecom.com</p>	<p>Oregon Exchange Carrier Association Craig Phillips 1104 Main St., #300 Vancouver, WA 98660 Cphillips@oecca.com</p>
<p>Mcdowell Rackner & Gibson PC Lisa F Rackner 419 SW 11th Ave., Suite 400 Portland, OR 97205 Dockets@mcd-law.com</p>	<p>GVNW Consulting Inc. Jim Rennard PO Box 2330 Tualatin, OR 97062 Jrennard@gvnw.com</p>
<p>Verizon Corporate Counsel Rudolph M Reyes 201 Spear Street, 7th floor San Francisco, CA 94105 Rudy.reyes@verizon.com</p>	<p>Frontier Communications of America Inc Kevin L Saville 2378 Wilshire Blvd Mound, MN 55364 kevin.saville@ftr.com</p>
<p>Verizon Richard B Severy 2775 Mitchell Dr, Bldg. 8-2 Walnut Creek, CA 94598 Richard.b.severy@verizon.com</p>	<p>GVNW Consulting Inc Jeffrey H Smith PO Box 2330 Tualatin, OR 97062 Jsmith@gvnw.com</p>

Comspan Communications Inc. Tim Spanring 278 NW Garden Valley Blvd Roseburg, OR 97470 Tims@comspancomm.com	Warm Springs Telecommunications Marsha Spellman 10425 SW Hawthorne Ln Portland, OR 97225 Marsha.spellman@warmspringtelecom.com
CenturyLink, Inc. Ron L Trullinger 310 SW Park Ave 11th Flr Portland, OR 97205 Ron.trullinger@centurylink.com	Public Utility Commission of Oregon Roger White PO Box 2148 Salem, OR 97308 Roger.white@state.or.us
Frontier Communications Northwest Inc. Renee Willer 20575 NW von Neumann Dr. Beaverton, OR 97006-6982 Renee.willer@ftr.com	Oregon Telecommunications Association Brant Wolf 777 13th St SE – Ste. 120 Salem, OR 97301-4038 Bwolf@ota-telecom.org
Embarq Communications Inc. Barbara Young 902 Wasco St - orhdra0412 Hood River, OR 97031-3105 Barbara.c.young@centurylink.com	tw telecom of oregon llc Lyndall Nipps 9665 Granite Ridge Dr - Ste 500 San Digeo CA 92123 lyndall.nipps@twtelecom.com
Ater Wynne LLP Joel Paisner 601 Union Street SE Ste 1501 Seattle WA 98101-2327 jrp@aterwynne.com	

Dated this 21st day of November 2012 at Portland,
Oregon.

Marleah Dolson
Davis Wright Tremaine, LLP
1300 SW 5th Avenue, Suite 2400
Portland, OR 97201-5630