

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

**OREGON CABLE
TELECOMMUNICATIONS
ASSOCIATION'S RESPONSE IN
OPPOSITION TO MOTION FOR
RECONSIDERATION AND STAY OF
ORDER NO. 10-496**

I. INTRODUCTION

Pursuant to OAR 860-001-0720(4), the Oregon Cable Telecommunications Association (“OCTA”) submits this response in opposition to the Motion for Reconsideration and Stay of Order No. 10-496 (“Motion”) filed by Qwest Corporation (“Qwest”) and Frontier Communications Northwest, Inc. (“Frontier”) on February 22, 2011.

Qwest and Frontier argue that the Commission’s Order No. 10-496 (“the Order”) changes the purpose of the Oregon Universal Service Fund (“OUSF”), conflicts with its previous Order No. 00-312, and is defective for lack of notice and evidentiary support with respect to the additional reporting requirements imposed on Qwest and Frontier. The fundamental flaw in Qwest and Frontier’s argument is a misunderstanding of the OUSF’s purpose. While Qwest and Frontier assert that the purpose is in essence to provide a dollar-for-dollar offset for incumbent Local Exchange Company (“ILEC”) rate decreases, in effect guaranteeing ILEC profit-margins, the actual purpose is to make basic telephone service universally available at affordable rates, including in high-cost areas. Qwest and Frontier’s arguments on lack of notice and evidence rely on, and fall with, their mistaken assertions as to the OUSF’s purpose. Because there was no change to the purpose, no notice or evidence concerning that (non-existent) change was needed.

In any case, the broad scope of the docket set forth in the original Staff Report, the appearance of numerous accountability issues on the Consolidated Issues List, and Administrative Law Judge Pines' oral and written statements to the parties that the Commission was interested in such issues, all put Qwest and Frontier on notice that the Commission might address transparency, including reporting requirements. Similarly, the Commission did not require additional fact-finding to support the Order. The relevant "fact" is simply that Qwest and Frontier do not report their use of OUSF funds to the Commission. There is no factual dispute in this regard and no evidentiary fact-finding needed.

II. PROCEDURAL BACKGROUND

On April 26, 2010, the Commission opened this docket to investigate the Oregon Universal Service Fund (OUSF). The parties developed a wide-ranging list of issues to be addressed by the docket through a series of workshops conducted from June 7, 2010 to August 12, 2010. Following these workshops, and after allowing parties additional time to add issues, Staff filed the Consolidated Issues List on September 8, 2010, containing seventy-eight issues. Parties submitted initial comments on October 25, 2010. Following a telephone conference with Administrative Law Judge Pines in which she informed the parties of the Commission's particular interest in issues five through thirteen, the parties submitted a second round of comments on November 23, 2010.

On December 28, 2010, the Commission issued the Order that Qwest and Frontier now challenge. The Order deferred ruling on the majority of issues, but made several determinations with respect to transparency and accountability. The Commission found that "rural companies that primarily serve high-cost areas document and report the use of OUSF distributions through their annual access charge filings," but that "interim measures should be adopted for non-rural

companies to further promote OUSF transparency and accountability.”¹ Specifically, the Commission clarified that (a) “non-rural companies may only use OUSF distributions for investment and infrastructure or maintenance,” and that (b) “non-rural companies must, beginning March 1, 2011, submit semiannual reports to show that the funds were used in areas with demonstrably higher installation and maintenance costs”²

Qwest and Frontier filed their Motion on February 22, 2011. On February 28, 2011, Chief Administrative Law Judge Michael Grant issued Order No. 11-070, staying the March 1, 2011 deadline for filing semiannual reports established in the Order, pending resolution of the Motion.

III. ARGUMENT

A. The Commission did not alter the OUSF’s purpose or amend its prior order.

Qwest and Frontier state that the “principal basis” for reconsideration is that the UM 1481 “was not noticed as a docket in which changes to the purpose of the [OUSF] would be considered, and there was no evidentiary basis for any such changes.”³ The flaw in this argument is that Order No. 10-496 did not change the OUSF’s purpose or otherwise amend its prior Order. Qwest and Frontier’s insistence to the contrary is based on a misunderstanding of OUSF’s long-standing purpose and a misreading of the Commission’s order in docket UM 731.

ORS 759.425 sets forth the goal of the Oregon Universal Service Fund (“OUSF”):

The Public Utility Commission shall establish and implement a competitively neutral and nondiscriminatory universal service fund. Subject to subsection (6) of this section, the commission shall use the universal service fund to ensure basic telephone service is available at a reasonable and affordable rate.⁴

¹ Order No. 10-496, at 3.

² *Id.*

³ Qwest’s Motion for Reconsideration and Stay of Order No. 10-496.

⁴ ORS 759.425 (emphasis added).

Order No. 10-496 did not change the purpose established by statute. The Order did two things. First, it clarified that OUSF money must be invested in infrastructure and maintenance. Investing in, and maintaining infrastructure is consistent with the goal of ensuring the ongoing availability of basic telephone service. Second, the Order required that non-rural companies, like their rural counterparts, submit reports to show that OUSF funds are used in areas with demonstrably higher installation and maintenance costs. This too is consistent with the goal of ensuring the availability of basic telephone service, since investing in higher-cost areas may result in greater availability and more affordable rates.

Qwest and Frontier insist, however, that the purpose of the OUSF is far narrower than is set forth above. They contend that the Commission's Order No. 00-312 in Docket UM 731 "stated that *the* purpose of the OUSF is the transfer of implicit support to explicit support."⁵ As support for this statement, Qwest and Frontier cite language from Order No. 00-312 that required telecommunications utilities to file a revenue-neutral tariff as an additional condition of receiving OUSF funds:

We agree that a revenue-neutral filing by telecommunications utilities is necessary *when they start receiving OUS support*. It would be unconscionable to allow them to receive explicit universal support while continuing the same level of implicit support.⁶

Qwest and Frontier argue, citing the language above, that UM 731 transformed the OUSF into a fund whose main purpose was in essence to create a dollar-for-dollar offset for telecommunications utility rate reductions, and not to improve or maintain telephone service. Only if the one accepts that mistaken premise can one make sense of Qwest and Frontier's

⁵ Qwest's Motion for Reconsideration and Stay of Order No. 10-496, at 2 (emphasis added).

⁶ *Id.* at 2 (emphasis added).

argument that requiring it to report whether it spends OUSF funds on higher-cost wire centers would “change” the purpose of the OUSF.

Qwest and Frontier’s argument is unsound. The goal of the OUSF is and has always been to ensure universal service, not to support ILEC revenues. Contrary to Qwest and Frontier’s contention, Order No. 00-312 did not change the OUSF into a means to protect incumbent Local Exchange Company (“ILEC”) revenues.

Similarly, Qwest and Frontier’s reliance on Staff testimony in docket UM 731 is misleading. The testimony of Staff witness Turner in that docket shows only that he opposed a proposal by US West (now Qwest) that would have provided OUSF funds for “additional infrastructure investment” *without reductions in rates to customers*. Mr. Turner’s rejection of that proposal did not mean that Staff believed the OUSF’s sole purpose was to maintain ILEC revenue levels, or that the Commission adopted such a view.

In sum, the Commission has never abandoned the statutory purpose of the OUSF, and indeed, has no power to do so. It certainly did not do so in UM 731. The purpose of the fund was then, and remains today, “ensur[ing] basic telephone service is available at a reasonable and affordable rate.” The challenged reporting provisions in the Order are consistent with that purpose.

B. No notice of amendment was required, and Qwest and Frontier had ample notice that the Commission could address OUSF accountability.

ORS 756.568 provides in full:

The Public Utility Commission may at any time, upon notice to the public utility or telecommunications utility and after opportunity to be heard as provided in ORS 756.500 to 756.610, rescind, suspend or amend any order made by the commission. Copies of the same shall be served and take effect as provided in ORS 756.558 for original orders.

Because Order No. 10-496 did not amend Order No. 00-312, Qwest and Frontier's argument that the Commission failed to provide the required notice has neither relevance nor merit, and the Commission need not consider it further.

In any event, Qwest and Frontier had ample notice that the Commission might alter the existing OUSF requirements in this docket. In fact, the April 14, 2010 Staff Report prepared for and presented at the Commission's April 26, 2010 Public Meeting set forth the very broad scope of this docket, stating on page 4:

Issues to be investigated:

The basic issues that were identified in Phase I of Docket UM 731 should be revisited in this investigation, along with three new ones. The issues that should be investigated are the following:

1. Should there continue to be an Oregon USF?
2. What services should the Oregon USF support?
3. How should the Oregon USF be designed for contribution purposes?
4. How should the Oregon USF be designed for distribution purposes?
5. What should the requirements to qualify for Oregon USF support?
6. How should end-user contributions be assessed?
7. What changes, if any, should be made to intercarrier compensation, and is rate rebalancing required in order to implement the changes to Oregon USF?

The reporting requirements imposed by the Order easily fall within this broad description of the issues to be addressed in this docket. This also provides ample notice that the Commission might amend earlier Orders relating to the existing OUSF.

Furthermore, the Commission also provided adequate notice of potential Commission action on accountability and transparency measures, such as the interim reporting requirements imposed under the Order. As explained below, more than ten accountability issues appeared on the issues list for this docket, and Administrative Law Judge Pines *twice* expressly informed the parties that the Commission was interested in several of those issues.

On November 8, 2010, Staff filed the Issues List, which included more than ten issues concerning accountability and transparency. In fact, the Issues List contained an entire section entitled “Future Accountability,” including the following issues:

35. How should the Commission ensure that the OUSF money provided to the companies is spent for the intended purpose?

36. What type of accountability measures should be in place to ensure that money paid out of the fund is used for the purposes for which the fund is established, including that the OUSF receipts are spent in Oregon?⁷

The appearance of these issues alone would have provided sufficient notice to Qwest and Frontier that the Commission would address accountability. But additional notice was provided.

In a conference call on November 1, 2010, Judge Pines informed all parties that the Commission was particularly interested in questions five through thirteen on the list. Several of those issues also centered on accountability and transparency:

5. Has the current OUSF met the statutory goal found in ORS 759.425 of ensuring basic telephone service is available at a reasonable and affordable rate?

* * *

11. Is the OUSF money currently provided to companies spent for the intended purpose of the fund?

12. How does the Commission insure that the OUSF money provided to the companies is spent for the intended purpose? Is documentation required? Is a report required? Is an attestation required? Is documentation currently subject to an audit and, in fact, audited?

13. Can the Commission verify today that the OUSF money provided to companies has historically been spent for the intended purpose?⁸

⁷ Staff’s Consolidated Issues List at 4.

⁸ *Id.* at 1-2.

Judge Pines reiterated the Commission's interest in the above questions in a written Telephone Conference Report filed November 3, 2010. The existence of these issues on the Consolidated Issues List, coupled with Judge Pines' verbal and written statements that the Commission was particularly interested in briefing on these issues, not only provided Qwest and Frontier with notice that the Commission might address accountability and transparency, but literally invited them to be heard on the issue. There is simply no support for the claim that notice was lacking, that due process was denied, or that ORS 756.568 was violated.

In sum, no notice was required under ORS 756.568 because no order was amended, but in any case the Staff Report, the Consolidated Issues List, and Judge Pines' oral and written statements regarding the Commission's interest in accountability and transparency, all provided the parties with the sufficient notice.

C. No additional "evidentiary" basis is necessary for the Order.

In their motion, Qwest and Frontier assert that there is "*no evidentiary basis*" for the interim reporting requirements set forth in the Order. These evidentiary objections appear to be based on their mistaken view that the Commission's actions amend a previous order and changed the OUSF's purpose. Since the Commission did considerably less than that, Qwest and Frontier's evidentiary objections presumably do not apply. Moreover, Qwest and Frontier cite no rule or regulation that *requires* that an interim reporting requirement like that the Commission imposed through the order requires the "full evidentiary record" it decries as lacking.⁹ Similarly, the Oregon Telecommunications Association ("OTA") vaguely complains that the "proceedings in this docket have not been evidentiary in nature," but identifies no rule of law requiring evidentiary proceedings to support the Commission's interim reporting requirement.

⁹ Qwest's Motion for Reconsideration, at 6-7.

The Commission does not require additional fact-finding to support the interim reporting requirements. The relevant “fact” is simply that Qwest and Frontier do not report their use of OUSF funds to the Commission. This is not a factual issue at all. As a practical matter, the Commission is aware that it does not currently receive such reports from Qwest or Frontier. Staff’s opening comments stated that the large ILECs did not provide such reporting and effectively invited Qwest and Frontier to rebut that assertion:

For the two large companies the Commission currently has no effective way to determine how the money has been spent. Staff will review the parties’ opening comments and reserves the right to supplement this response in the next round of comments.¹⁰

Neither Frontier nor Qwest has ever disputed this assertion. Nor could they.

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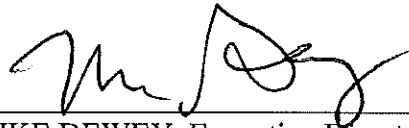
¹⁰ Staff’s Comments, ¶ 12.

IV. CONCLUSION

For the foregoing reasons, OCTA respectfully urges the Commission to deny Qwest and Frontier's Motion for Reconsideration, and to lift the stay on those reporting requirements.

Dated: March 9, 2010

OREGON CABLE TELECOMMUNICATIONS ASSN.



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CERTIFICATE OF SERVICE
UM 1481

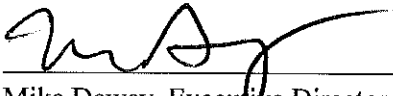
I hereby certify that the attached Response to Motion for Reconsideration and Stay of Order No. 10-496 from the Oregon Cable Telecommunications Association (OCTA) was served on March 9, 2011, by U.S. Mail and electronic email, unless otherwise specified, to the following parties:

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DATED this 9th day of March, 2011

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