

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 MOTION TO COMPEL
OREGON TELECOMMUNICATIONS
ASSOCIATION AND MOTION TO
EXTEND TIME FOR OPENING
TESTIMONY**

**EXPEDITED CONSIDERATION
REQUESTED**

MOTION

Pursuant to OAR 860-014-0070(3), the Oregon Cable Telecommunications Association (OCTA) respectfully moves to compel Oregon Telecommunications Association and its members ("OTA"), to produce information concerning broadband services responsive to OCTA's First Set of Data Requests, specifically requests 1, 3, 4 and 8 to each OTA entity,¹ and moves to change the date for initial testimony to December 10, 2012, and requests expedited consideration of this motion.

**CERTIFICATION OF GOOD FAITH EFFORT
TO RESOLVE DISCOVERY DISPUTE**

OCTA made a good-faith effort to resolve these matters informally by conferring in a series of telephone calls and email correspondence with counsel for OTA that began on

¹ OCTA's First Set of Data Requests was served upon each of OTA's members, with separate numbering for each, in the form where DR 1 is designated OCTA-XXXX-1, DR 2 is designated OCTA-XXXX-2, and for each OTA entity XXXX is replaced by a carrier-specific identifier (PINE for Pine Telephone System, Inc., for example).

November 2, 2012, but the parties were unable to resolve the dispute that is the subject of this motion. On November 13, OTA's counsel communicated a final decision to exclude broadband services from the information provided in response to the data requests.

BACKGROUND FACTS

At issue in this motion are OCTA's First Set of Data Requests, Nos. 1, 3, 4 and 8.² These requests sought annual reports filed with the Oregon Public Utility Commission (the Commission), line-counts (including broadband lines), and revenues (again, including broadband revenues). Generally, OTA declined to provide responsive material relating to its broadband services.

Specifically, DR 1 to each OTA entity provides as follows:

Provide the confidential version of each Annual Report Form O submitted by the Company to the Oregon PUC, for each of the three years 2009, 2010, and 2011.

Each OTA member's response was substantially identical. Although information was produced, each response stated that "[t]his data request is objected to on the grounds of relevancy and is outside the scope of the docket," and noted that "broadband data is redacted per objections stated in response to DR 4."

OCTA's DR 3 to each OTA entity provides as follows:

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;

² See note above regarding numbering of requests to OTA member companies.

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

In each OTA response, the RLEC objected to portions C and D, referring to its objections to DR 4, discussed below. Finally, OCTA's DR 4 to each entity provides as follows:

As of December 31, 2011, provide the company average revenue per line for the following line types and 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.

In each OTA response, the RLEC referred back to information provided on Form O for portions A and B, but objected as follows to C and D:

As to subparts C and D, this portion of the data request is object to as seeking information not relevant to the matters within this proceeding. In addition, it is seeking information beyond the scope of this proceeding. In the Ruling issued August 29, 2012, the Administrative Law Judge stated as follows: "Issue 1 will not be included in these proceedings, as the purpose of the OUSF has been established – and may only be revised – by an act of the legislature. The purpose of the OUSF is to assure the availability of basic telephone service at a reasonable and affordable rate.

OCTA's DR 8 to each OTA entity asked:

Has the Company received any USDA Rural Development (formerly known as Rural Utilities Service, RUS) grants (i.e., financial assistance other than loans) during the past five years (i.e. period 2007-2012)? If the answer is yes, provide:

- A. The total dollar amount and type of grant provided (e.g., Recovery Act Broadband Initiatives Program).

- B. A brief description of the terms and conditions of that assistance, including but not limited to how the funds are to be used.

OTA's response to this request, in its entirety, was "Objection. Beyond the scope of this proceeding."

OCTA's opening testimony is currently due on November 26, 2012.

ARGUMENT

A. The Scope of Permissible Discovery Is Broad

The scope of discovery in this proceeding is the broad one established by the Oregon Rules of Civil Procedure (ORCP). OAR 860-001-0540 provides that "[a] party may submit data requests to any other party, subject to the discovery rules in the ORCP."³ The ORCP, specifically allows discovery of "any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party...."⁴ "Relevant evidence" is in turn defined to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁵ The ORCP expressly provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."⁶ For decades, Oregon law has shifted towards requiring disclosure even where relevancy is contested. *See Oregon Orchards v. Ins. Co. of N.A.*, 239 Or 192, 198, 397 P2d 74 (1964) (noting the trend to require production of documents in order to determine relevancy,

³ See also OAR 860-001-0000 (providing that the "The Oregon Rules of Civil Procedure (ORCP) also apply in contested case and declaratory ruling proceedings unless inconsistent with these rules, a Commission order, or an Administrative Law Judge (ALJ) ruling.").

⁴ ORCP 36 B(1).

⁵ ORS 40.150.

⁶ ORCP 36 B(1).

rather than denying as irrelevant before disclosing the documents). The Commission’s rules emphasize that the standard protective order “allows the broadest possible discovery consistent with the need to protect confidential information.”⁷

B. Broadband Information Is Well Within the Broad Scope Of Permissible Discovery

The subject of OCTA’s Data Requests—including the information on OTA’s broadband services—easily meets the liberal standard for discovery. All the Data Requests are reasonably calculated to lead to the discovery of admissible evidence. A central issue in this docket is “[w]hat changes should be made to the existing OUSF related to the calculation, the collection, and the distribution of funds.”⁸ Calculation of OUSF support must take into consideration whether a carrier actually *needs* support. Carrier revenues that can be used to offset the cost of providing service are relevant to that analysis.

Moreover, the relevance of broadband revenues to the future of the OUSF calculations and distributions is clear from the history of this docket. Staff’s comments in response to the issues list in the earlier phase of UM 1481 explained that “DSL revenues or revenues derived from providing internet services,” should be used to reduce support if OUSF support remains directed at carriers.⁹ Staff also commented that “as a principle, a company’s total communications earnings should be consider when determining if a company needs support for serving a particular geographic area.”¹⁰ The relevance of broadband revenues, such as DSL revenues, to the OUSF was also made clear by the Commission in its first triennial review of rural Local Exchange Carriers’ OUSF funding in 2006, where it approved a Memorandum of

⁷ OAR 860-001-0080.

⁸ *Issues List Ruling*, at 2.

⁹ *In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Staff investigation of the Oregon Universal Service Fund*, Staff’s Comments, UM 1481, at Issue 29 (October 25, 2010).

¹⁰ *Id.*, at Issue 38.

Understanding, which set forth options for calculating future OUSF funding including “[i]mput[ing] DSL revenues as an additional OUSF offset”; and, “[a]djust[ing] the line counts to include DSL capable lines in the denominator to calculate cost per line.”¹¹

OTA’s objections appear to be based on the false assumption that if the OUSF will not be repurposed to directly support broadband, then broadband metrics and revenues are irrelevant to OTA’s need for further support. That is simply not the case. If rural LECs’ broadband revenue is significant, then the Commission must be free to consider whether OUSF funding calculations and distributions should reflect that.

OCTA, in order to meaningfully comment on how the OUSF should be calculated and distributed, must have access to the data OTA is refusing to provide. 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 how the size of the OUSF might be impacted by such changes to the calculation of support.

Information on any RUS grants in RLEC areas, requested by Data Request 8, is similarly needed to understand what funding already exists, which will inform testimony on how to best calculate and distribute OUSF funding. If there are no RUS grants in OTA members’ RLEC areas, then OTA should say so. If there are, then the amount of funding and conditions of such funding should be disclosed.

In sum, there is no legitimate basis for OTA, including its membership, to continue to withhold the requested information.

¹¹ *In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Staff investigation of the Oregon Universal Service Fund*, Order 06-297, UM 1017, Appendix A, at 7 (June 14, 2006).

C. Expedited Consideration and Extended Time for Opening Testimony Are Merited

Finally, in order to allow consideration of this motion, and to allow OCTA to review, analyze and incorporate material OTA is ultimately compelled to produce, currently due on November 26 (just after the Thanksgiving holiday), OCTA requests expedited consideration for this motion, and further requests that the time for opening testimony be extended two-weeks, to December 10, 2012.

CONCLUSION

For the foregoing reasons, OCTA respectfully requests that its motion to compel discovery be granted on an expedited basis, and that the time for opening testimony should be extended to December 10, 2012.

DATED this 14th day of November, 2012.

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**CERTIFICATE OF SERVICE
UM 1481**

I hereby certify that on November 14, 2012, the foregoing **OCTA'S MOTION TO COMPEL OREGON TELECOMMUNICATIONS ASSOCIATION AND MOTION TO EXTEND TIME FOR OPENING TESTIMONY -EXPEDITED CONSIDERATION REQUESTED** was sent by UPS Overnight Mail to the Oregon Public Utilities Commission, 550 Capitol Street NE, #215, Salem OR 97310 and email to puc.filingcenter@state.or.us, and was served on the following persons by email:

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Dated this 14th day of November 2012 at
Portland, Oregon.

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