BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DOCKET NO. UM 1017

In the Matter of The Investigation Into Expansion of the Oregon Universal Service Fund to Include the Service Areas of Rural Telecommunications Carriers.	JOINT RESPONSE OF COMCAST, TRACER, AND TW TELECOM TO THE BRIEF OF THE OREGON EXCHANGE CARRIER ASSOCIATION CONCERNING WHETHER OECA'S PROPOSAL IS OUTSIDE THE PUBLIC UTILITY COMMISSION'S AUTHORITY

INTRODUCTION

Comcast Phone of Oregon, LLC ("Comcast"), TRACER, and **tw telecom of oregon llc** ("tw") (collectively, "Joint Respondents") submit this brief in response to the brief of the Oregon Exchange Carrier Association ("OECA") concerning whether there is statutory authority for OECA's proposed changes to the Oregon Universal Service Fund ("OUSF"). OECA's proposal has been described in its petition to reopen this Docket, in written testimony, and in two workshops held by the Oregon Public Utility Commission ("Commission") to review the proposal. Following the second workshop, Joint Respondents, OECA and the Citizens' Utility Board ("CUB") filed a motion to modify the schedule to brief the threshold issue of statutory authority. Administrative Law Judge Arlow granted the motion on August 29, 2011. OECA filed its brief on September 8, 2011, arguing that ORS 759.425 provides authority for the Commission to adopt OECA's proposal.

In the Joint Respondents' view, OECA has proposed a reinvention of the OUSF that is outside the statutory authority of the Commission. OECA's proposal, including its proposed new calculation for OUSF, would create a second OUSF funding mechanism in which support would

be based upon wholesale intrastate access charge reductions by rural incumbent Local Exchange Carriers ("RLECs").[1] As explained herein, regardless of whether OECA's proposal would be good or bad policy, ORS 759.425 provides no authority to enact it. The proposal cannot be reconciled with ORS 759.425(1)'s requirement that the OUSF be based to ensure "basic telephone service," as defined by ORS Chapter 759 and the Commission's rules. The proposed new calculation contravenes ORS 759.425(3), which provides a mandatory formula for how OUSF support must be calculated. OECA's arguments misapply Oregon's statutory construction rules, misinterpret ORS Chapter 759 and the Commission's rules, and impermissibly read the statutory formula for calculating OUSF funding in ORS 759.425(3) right out of the statute. OECA's unlawful proposal must be rejected.

DISCUSSION

A. OECA's proposal creates a second OUSF funding mechanism, calculating additional funding based on reductions in wholesale intrastate access charges.

In essence, OECA proposes a second OUSF with new purpose and funding calculation. Although the OECA Proposal would change the current OUSF in a number of ways,[2] the central change is a new funding requirement based on aggregate common-line and switched access revenue requirements. This is in addition to the current OUSF, which is calculated based on the difference between monthly per line costs of basic telephone service and a $21.00 per line benchmark rate.[3] As Mr. Phillips described it in his prepared testimony:

> In essence, there would be a two step process. The existing OUSF requirement would be calculated based on the existing mechanism. The remaining support is calculated as I have just described [in pages 6 through 11].[4]

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[1] See Opening Testimony of Craig J. Phillips on Behalf of the Oregon Exchange Carrier Association ("Phillips Testimony"), Exhibit OECA/100 at Phillips/6-11; Brief of the Oregon Exchange Carrier Association on the Question of Whether the Proposal by the Oregon Exchange Carrier Association is Consistent with ORS 759.425 ("OECA's Brief"), at 8.

[2] For example OECA suggests refining the benchmark to reflect actual local and Extended Area Service revenue if higher than $21.00. OECA's Brief, at 9. The instant brief does not address every suggested change individually, as they all appear to be part of a unified proposal that, as argued herein, lacks a statutory basis.

[3] ORS 759.425(3); *see also* OECA's Brief, at 8 (discussing current OUSF calculation).

[4] Phillips Testimony, at 11, lines 14-18.

OECA's brief similarly describes the new OUSF mechanism as a "second level," atop the current OUSF mechanism,[5] one that provides a separate calculation of support:

> The Proposal … takes into account existing OUSF support using the methodology established in Order No. 03-082 . . . . * * * The Proposal then calculates an additional amount of support that is available to the RLEC to support affordable local rates.[6]

Under the new calculation in this second "step" or "level," certain carriers that receive no OUSF funding under the current formula set forth in ORS 759.425(3), including Oregon Telephone Corporation, would receive OUSF funds under OECA's proposed new calculation for determining funding.[7] In essence, the level of funding for this new commitment would be determined by a new calculation that tracks the difference between wholesale intrastate access charge revenues at current levels and the reduced revenues from lowering those wholesale charges to interstate levels. This new calculation would apply even if those interstate levels are reduced further, *e.g.*, if the Federal Communications Commission (FCC) reduces wholesale interstate access charges to the $.0007 level. Future reductions in wholesale interstate access charges would cause further expansion of the new OUSF mechanism, resulting in greater outlays and increased OUSF fees to customers.[8]

B. OECA's proposal is outside the authority of the Commission under ORS 759.425.

OECA's proposal to create a new OUSF mechanism based on wholesale rate reductions, including the new calculation that would determine the additional amount of funding, is outside the statutory authority granted to the Commission under ORS 759.425. The proposal violates the ORS 759.425(1) requirement that the basis of OUSF be ensuring "basic telephone service," and is inconsistent with the statutory calculation for sizing the OUSF set forth in ORS 759.425(3).

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[5] OECA's Brief, at 9.

[6] OECA's Brief, at 10.

[7] During the Second Workshop, Mr. Phillips and/or Mr. Finnigan noted that Oregon Telephone Corporation and possibly other carriers would being receive OUSF under the OECA Proposal, despite currently receiving no OUSF support.

[8] *See* Phillips Testimony, at 6-11.

OECA's arguments to the contrary rely on clear misapplication of the Oregon Supreme Court's methodology for statutory interpretation.

1. Under ORS 759.425, the basis for OUSF funding must be support for basic telephone service, not support for reducing wholesale intrastate access charges.

The first statutory obstacle to OECA's proposal is that the only allowable basis for OUSF funding, under ORS 759.425(1), is ensuring "basic telephone service."[9] Basing funding on reductions in wholesale intrastate access rates violates ORS 759.425(1).[10] ORS Chapter 759.400(1) requires that "basic telephone service" be within the local exchange and ORS 759.410 makes clear that such service excludes intrastate switched access. Moreover, in OAR 860-032-0190(2) the Commission has further limited "basic telephone service," to certain *retail* services, excluding long distance.[11] Neither Chapter 759 nor OAR 860-032-0190 provides support for OECA's argument that anything that supports the Publicly Switched Telephone Network (PSTN) is basic telephone service, which amounts to the absurd position that the OUSF can be used to support practically any service.

The statutory basis for the Oregon Universal Service Fund is ORS 759.425. Section ORS 759.425(1) requires that the OUSF is used to ensure the availability of "basic telephone service":

> 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**.[12]

The definition of "basic telephone service" is split between ORS Chapter 759 and OAR 860-032-0190. First "basic telephone service" is partially defined in ORS 759.400(1) as follows:

> As used in ORS 759.400 to 759.455:

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[9] In addition, ORS 759.425(6) allows broadband to be a basis of funding in certain circumstances.
[10] In contrast, merely allowing ILEC rate reductions to offset OUSF funds that are based on the statutory formula, as the Commission did earlier in UM 1017 to avoid windfall profits for ILECs, does not conflict with the statute.
[11] OAR 860-032-0190(2).
[12] ORS 759.425(1) (emphasis added).

> (1) "Basic telephone service" means local exchange telecommunications service defined as basic by rule of the Public Utility Commission.[13]

Chapter 759 places two important limits on the definition of "basic telephone services," while leaving the Commission room to refine the definition.

First, the plain text of ORS 759.400(1)'s definition makes clear that the scope of "basic telephone service" is limited to "local exchange telecommunications service," which ORS 759.005 in turn defines as "telecommunications service provided within the boundaries of exchange maps filed with and approved by the commission."[14]

Second, the use of the phrase "basic telephone service" in ORS 759.410 unambiguously distinguishes "basic telephone service," from the intrastate switched access that OECA's proposal would support through new OUSF funding based on reductions in wholesale intrastate access charges. In particular, ORS 759.410(4) provides:

> (4) A telecommunications carrier that elects to be subject to this section and ORS 759.405 may adjust the price for ***intrastate switched access or a regulated retail telecommunications service*** between the maximum price established under this section and a price floor equal to the sum of the total service long run incremental cost of providing the service for the nonessential functions of the service and the price that is charged to other telecommunications carriers for the essential functions. ***Basic telephone service*** shall not be subject to a price floor.[15]

ORS 759.410(4) demonstrates that "intrastate switched access" is something other than "basic telephone service," because "basic telephone service" is not subject to a price floor, while intrastate switched access is subject to a price floor. Because the "[u]se of the same term throughout a statute indicates that the term has the same meaning throughout the statute,"[16] this limitation bears on the meaning of "basic telephone service" in ORS 759.425(1). Because "basic telephone service" is distinct from intrastate switched access, the statutory framework is at odds

[13] ORS 759.400(1).
[14] ORS 759.005(3).
[15] ORS 759.410 (emphasis added).
[16] *PGE*, 317 Or at 611, 859 P2d at 1146.

with OECA's contention that supporting reductions in wholesale intrastate access charges supports "basic telephone service."

OECA's brief suggests that ORS 759.400(1) left the definition of "basic telephone service" entirely to the Commission.[17] But as shown above, the statute itself established limitations that basic telephone service (1) must be local exchange service, and (2) does not include intrastate access.

After the Legislature adopted the partial definition of "basic telephone service" in ORS 759.400(1), the Commission refined the definition by in rulemaking Docket No. AR 368, by establishing OAR 860-032-0190(2).[18] The rule must be read along with the statutory provisions to determine full definition of "basic telephone service."[19] OECA fails to attend to the limitations on the phrase "basic telephone service" established in Chapter 759, focusing on the Commission's refinement of the statutory meaning of that phrase in OAR 860-032-0190(2).

There, the Commission fulfilled its statutory mandate to refine the definition by enacting OAR 860-032-190(2), under which only certain retail services are deemed "basic":

> (2) "Basic telephone service" means ***retail telecommunications service*** that is single party, has voice grade or equivalent transmission parameters and tone dialing capability, provides local exchange calling, and ***gives customers access to but does not include***:
>
> (a) Extended area service (EAS);
>
> (b) ***Long distance services***;
>
> * * *[20]

The Commission's rule – operating within the space allowed by the statute – narrows the statutory definition by determining that only retail telecommunications services are basic. Under OAR 860-032-0012, "retail telecommunications service" expressly excludes "service provided

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[17] See OECA's Brief, at 17 ("Under ORS 759.400(1), the Commission has authority to define basic telephone service."

[18] See Docket No. AR 368, Order No. 00-265, following passage of SB 622 in September of 1999.

[19] *See generally, Portland Gen. Elec. v. Bureau of Labor and Industries* ("*PGE*"), 317 Or 606, 610-12 (1993).

[20] OAR 860-032-0190(2) (emphasis added).

by a competitive telecommunications provider to another competitive telecommunications provider or telecommunications utility, unless the competitive telecommunications provider or telecommunications utility receiving the service is the end user of the service."[21] Moreover, OAR 860-032-0190 makes clear that not all retail services are "basic." Certain retail services, such as DSL, call waiting, and caller ID are expressly excluded by OAR 860-032-190(4).[22] Other retail services are expressly included by OAR 860-032-0190(3).[23]

In sum, the definition of "basic telephone service" in ORS 759.400(1), the use of that phrase in ORS 759.410, ORS 759.425(1), and ORS 759.425(3), plus the Commission's definition in OAR 860-032-0190 yield a coherent meaning establishing that basic telephone service (1) must be local exchange service, (2) does not include intrastate access, (3) must be retail, not wholesale, and (4) includes only certain retail services. Thus, the complete definition of "basic telephone service," based on Chapter 759 and the Commission's rules, does not allow OUSF funding to be based on wholesale long distance charges, such as the intrastate access charges that OECA proposes to subsidize. In fact, the OECA proposal violates all four limitations discussed above.

First, intrastate switched access service could not be "basic telephone service" under ORS 759.400(1), which limits "basic" service to that provided within the local exchange area. Second, supporting reductions in wholesale intrastate access charges plainly support intrastate switched access, which ORS 759.410(4) expressly distinguishes from "basic telephone service." Third, *wholesale* intrastate access charges are plainly wholesale – charged by one carrier to another – rather than retail. Under OAR 860-032-0190, that alone disqualifies the wholesale charges as a possible basis for OUSF funding. Fourth, wholesale intrastate access charges are charges to interexchange carriers for the origination and termination of long distance calls. "Long distance" is expressly excluded from "basic telephone service" by the Commission's

[21] OAR 860-032-0012(1)(l).
[22] OAR 860-032-0190(4).
[23] OAR 860-032-0190(3).

rules.[24] Because switched access charges relate to calls originating outside the local exchange but terminating within it, or vice versa, such services plainly involve more than merely providing "access to" long distance.

OECA's position appears to be that any use of the OUSF that supports the PSTN qualifies as support for retail "basic telephone service."[25] But even as OECA makes this argument, it implicitly reveals the fundamental flaw in it -- that the PSTN is used for many more services than could reasonably be considered "basic" under the express terms of the statute and the Commission's rules. OECA states that "[i]t is the PSTN that delivers basic telephone service, as defined by the Commission, and *other communications services* to customers,"[26] and OECA further argues that, at least when one sets aside separate trunk groups outside of RLEC territory, "the PSTN in each RLEC service territory is one network. There is not one set of facilities for local communications and a second set of facilities for communication with the outside world."[27]

OECA mistakenly equates support for "basic telephone service" and support for PSTN. The problem with that position is that, if accepted, it would open the door for OUSF funding for almost every service, which was obviously not the intent of either the Legislature or the Commission in defining "basic telephone service." If one accepts OECA's position that the ORS 759.425 authorizes OUSF support for any service that relies on the PSTN as "basic telephone service," then virtually *any* service would qualify as "basic." These would include services such as EAS and long-distance services, which make use of both the PSTN and non-local trunks, despite the Legislature's definition of "basic telephone service" as service within the local

[24] While acknowledging that long distance is not "basic" under OAR 860-032-0190(2), OECA attempts to create an ambiguity where none exists by arguing that the Commission's failure to include long distance on an additional list of services that are "not considered basic telephone service" in OAR 860-032-0190(4). OECA's Brief, at 17-18. The obvious explanation for this is that it wasn't necessary to exclude long distance twice. Moreover, OECA tries to blur the line between the basic local exchange service that provide "access to" long instance and the costs of long distance service itself. The result is impenetrable locutions such as OECA's statement that OAR 860-032-0190 "can be read as including services to interexchange carriers that allow the local customers to place and receive long distance service." OECA's Brief, at 18.

[25] *See* OECA's Brief, at 5-6, 15.

[26] OECA's Brief, at 3 (emphasis added)

[27] OECA's Brief, at 3-4.

exchanges. The list would also include ISDN, DSL, caller ID, and frame relay, despite the Commission express exclusion of those services from "basic telephone service" in OAR 860-032-0190. If OECA's position were correct, then the Commission erroneously excluded such services from the definition of "basic telephone service," which would be a dramatic constriction of the broad authority OECA finds in ORS 759.425, and one that the Legislature surely would have corrected in the more than twelve years since OAR 860-032-0190 was adopted.

Indeed, if OECA's broad interpretation of ORS 759.400(1) were right, then virtually everything would be "basic telephone service." But neither common sense, nor the actions of the Commission or Legislature are consistent with that conclusion. Therefore, one must abandon the premise that leads to the absurd conclusion, namely OECA's equating of support for "basic telephone service" and support for the PSTN.

There is no sound authority for OECA's attempt to conflate support for basic telephone service and support for the PSTN. Switched access service provided to interexchange carriers for the origination and termination of intrastate long distance calls is not "basic telephone service" as that term is defined and used in ORS Chapter 759 and in the Commission's rules. Therefore, reduction in the charges for that service is not a statutorily allowed basis for a new OUSF mechanism as proposed by OECA.

2. OECA's proposal violates the statutory formula for calculating OUSF funding that is mandated by ORS 759.425(3).

The second major problem with OECA's proposal is that OECA's proposed method of calculating the fund is inconsistent with the statutory formula for calculating OUSF in ORS 759.425(3). That formula is the sole method by which the amount of OUSF funding must be calculated, leaving no room for the second formula that OECA proposes. OECA's proposed calculation departs drastically from the ORS 759.425(3) calculation. This is demonstrated by OECA's own lengthy description of the calculation in Mr. Phillips' testimony, and by OECA's acknowledgement that certain carriers that receive no OUSF would receive OUSF funds based on OECA's proposal. OECA's suggestion that the Commission rejected the 759.425(3)

constraints when it approved a stipulation earlier in UM 1017 misconstrues the Commission's action, and OECA's argument that 759.425(3) is simply an "additional authorization" on top of broad authority granted by 759.425(1) is an unreasonable interpretation of the statute that violates the methodology of statutory interpretation that OECA purports to apply.

In keeping with requirement that the OUSF ensure only "basic telephone service," ORS 759.425(3) sets forth a specific calculation to ensure that the amount of support be based upon the cost of providing that "basic telephone service." Specifically, ORS 759.425(3) requires the Commission to establish a benchmark for basic telephone service, and sets forth a very specific formula for calculating OUSF funding. The difference between a carrier's cost of providing basic telephone service is compared against a Commission-established benchmark reflecting average revenues per line for such service:

> The universal service fund shall provide explicit support to an eligible telecommunications carrier that is equal to ***the difference between the cost of providing basic telephone service and the benchmark***, less any explicit compensation received by the carrier from federal sources specifically targeted to recovery of local loop costs and less any explicit support received by the carrier from a federal universal service program.[28]

The amount by which the cost exceeds the benchmark represents the maximum possible OUSF funding available for that service. That amount is further reduced, however, by any explicit federal compensation targeted to local loop costs, and is further reduced by any explicit federal USF support. The ORS 759.425 is inherently line-based. The benchmark established by the Commission is $21.00 per month per line, and the cost of providing basic telephone service is a monthly per-line cost. The statute provides *no other mechanism* by which OUSF support may be calculated. Rather, the basis for all OUSF support is the difference between the cost of delivering basic telephone service and the benchmark.

Refusing to be constrained by these statutory requirements, OECA's proposal presents a novel way to calculate its additional new OUSF funding that is foreign to ORS 759.425. While

[28] ORS 759.425(3)(a) (emphasis added).

the calculation for the existing OUSF remains basically unchanged,[29] the new OUSF funds that OECA envisions are based on a calculation that reflects the difference between current wholesale intrastate access charges and future wholesale interstate access charges, not the difference between the cost of service and the benchmark set forth in ORS 759.425(3). Moreover, OECA abandons the per line basis of support implied in the statutory formula. OECA's proposal quite simply has no viable basis in the statute, and the method of calculation proposed for the new OUSF funding mechanism is incompatible with ORS 759.425(3). Given the statutory formula in ORS 759.425(3), the Commission has no authority to adopt OECA's proposal.

a. The Commission adhered to the ORS 759.425(3) formula in UM 1017.

At two points in its brief, OECA implies that the Commission already departed from the ORS 759.425(3) statutory formula in Order 03-082 in the earlier phase of UM 1017, or based OUSF funding on support for wholesale service.[30] OECA's argument misapprehends what the Commission did in Order 03-082. There, the Commission merely accepted a stipulation among the parties under which rural carriers receiving OUSF support payments for the first time would reduce access charges to avoid windfall profits from the OUSF funding. The Commission did not adopt a framework in which reductions in access charges entitled carriers to OUSF. The amount of OUSF was determined under the statutory formula, not calculated based on the amount of desired access charge reductions, as it would be under OECA's Proposal.

Understanding what the Commission did – and did not – do in UM 1017 requires an explanation of what it did back in UM 731. In Phase IV of UM 731, which established the OUSF, the Commission required non-rural ILECs to rebalance rates to avoid a windfall from the OUSF revenues. The Commission explained that "[r]ate rebalancing is necessary to offset

[29] See Phillips Testimony, at 11.

[30] See OECA Brief, at 9, n 14 & 18-19. In footnote 14, OECA contends that "[t]o the extent that opponents of the Proposal describe using OUSF funds to reduce intrastate access charges as subsidizing wholesale service, they must be arguing that the Commission erred in 2003 and has been in continuous violation of ORS 759.425 ever since." Not so. As explained herein, the Commission's approval of the UM 1017 stipulation did not effect a significant change in the method of determining how much OUSF would be available for each carrier, which continued to be the statutory formula.

additional revenues some companies will receive from the Universal Service Fund."[31] In UM 731, the Commission determined that business line rates would be reduced to avoid the windfall. But the statutory formula, not business line rate reductions, determined the amount of OUSF funding. The Commission could presumably have selected a different rate to reduce by the amount of OUSF. The driving concern was to avoid windfall profits for the LECs at ratepayer expense. Reduction in business line rates was a side effect of OUSF funding, not the basis of OUSF funding.

Just as the Commission required rate reductions for non-rural ILECs receiving OUSF funding in UM 731, it required rate reductions for rural ILECs that began receiving OUSF dollars through UM 1017. The Commission might as easily have approved a stipulation that would have reduced charges other than intrastate access charges, with the same revenue-neutral effect (like the business rates in UM 731). But that was not the stipulation the parties presented. Instead, the parties had agreed to prioritize intrastate access reductions. Because those reductions achieved revenue neutrality, avoiding windfall, the Commission approved the stipulation. But as in UM 731, the statutory formula, not the amount of intrastate access charges reductions, determined the amount of OUSF funding. Like non-rural business line rates, rural access charges simply happened to be the item that was reduced to avoid windfall profits.

Indeed, the Commission observed that the 03-0382 stipulation extended the OUSF to rural carriers through "a straightforward addition of rural carrier operations to the *existing* OUSF for non-rural carriers."[32] OUSF support levels for rural carriers were based – as ORS 759.425 requires – on the difference between carriers' costs in providing service and the benchmark cost established by the Commission. It was based on the statutory calculation that the rural carriers were entitled to the amount of OUSF funds that were provided under the stipulation and the Commission's Order. The only difference in the application of the statutory formula was in how costs were calculated. For non-rural incumbent Local Exchange Carriers (ILECs) such as Qwest

[31] Order 00-312, UM 731, at 4.
[32] *Id.* at 1 (emphasis added).

and Verizon, costs had been calculated by a complicated econometric model that projected future costs. With RLECs, the Commission noted that "[t]he information and expertise required to determine costs by a forward-looking econometric model are not now available in usable form,"[33] so reporting on embedded costs, based on the previous year, were used instead.[34] But the stipulation was consistent with the statutory formula wherein the amount of OUSF is equal to costs, less explicit federal support, minus the benchmark. Order 03-082 stated:

> Commission Staff calculated the embedded costs of basic telephone service for 31 rural ILECs. * * * Calculating the amount of support for individual carriers depends, in general terms, on the cost of basic telephone service, less federal loop compensation and USF amounts, less the Commission-established benchmark. The Commission's current benchmark is $21.00 per month per line, and the Stipulation would adopt that amount. *That formula produces support payments between $0.00 per month and $34.71 per month*.[35]

Properly understood, then, UM 1017's reductions in access rates were neither the basis for providing OUSF funding, nor the measure of how much funding to provide. Similarly, UM 731's reductions in business rates were neither the basis for providing OUSF funding to non-rural ILECs nor used to determine the amount of OUSF funding. Just as the Commission ordered reduced business rates in UM 731 so that OUSF funds would not simply provide windfall profits for non-rural ILECs, in UM 1017 the RLECs agreed to reduce access rates so that extending the existing OUSF would not result in windfall profits.[36] Put another way, while rates were reduced, the calculation of the OUSF drove the amount of the tariff reductions, not the other way around. Tariff reductions were not the *basis* of OUSF funding, but were instead a *result* of OUSF funding that was based on the statutory formula. So Order 03-0382 did not change, could not change, and did not purport to change the structure of the OUSF. OECA's proposal is based on the fundamental misconception that it did, and that reductions in intrastate

[33] *Id.* at 1.
[34] *Id.* at 3.
[35] *Id.* at 4 (emphasis added).
[36] *Id*. at 4-5.

access charges could provide a basis for OUSF funding. That has never been the case, and is prohibited by ORS 759.425(1) and (3).

b. OECA's argument that ORS 759.425(3) is no constraint on the OUSF violates the Oregon Supreme Court's *PGE* statutory interpretation methodology by ignoring context and mandatory canons of construction.

Under the methodology of *Portland General Electric v. BOLI* ("*PGE*")[37], as slightly modified by *State v. Gaines*,[38] the first level of inquiry is an examination of the text *and* context of the statute.[39] OECA's analysis presents the text alone as if that were the first level, with context as the second level of inquiry.[40] As a result, OECA's analysis impermissibly rests on misinterpreted passages in isolation from the context of the statutory scheme.[41] For example, OECA argues that ORS 759.425(1) provides all the authority that it needs for its proposal, making the startling claim that ORS 759.425(3) is not a limitation on the OUSF at all, but instead an additional grant of authority,[42] a "second authorization for OUSF found in 759.425(3)."[43] This apparently results from an over-granular focus on ORS 759.425(1) apart from even obvious context. To illustrate, OECA argues that "there is no limiting language *in ORS 759.425(1)* that makes it subject to subsection (3). Therefore, the language cannot be inserted by construction of the statute."[44]

PGE provides no basis for reading (1) and (3) in isolation as OECA does, when OECA itself acknowledges that a statute's context "includes other provisions of the same statute and other statutes on the same subject."[45] OECA ignores that section (3) is part of the context of

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[37] *PGE*, 317 Or at 610-12.
[38] *State v. Gaines*, 346 Or 160 (2009) (holding that the court shall consider legislative history offered by parties).
[39] *PGE*, 317 Or at 610-11 (emphasis added).
[40] See OECA's Brief, at 15, stating without citation that context is considered only if legislative intent is not clear from the text.
[41] *Lane Co. v. Land Conservation*, 325 Or 569, 578 (1997) ("[W]e do not look at one subsection of a statute in a vacuum; rather, we construe each part together with other parts in an attempt to produce a harmonious whole.").
[42] OECA's Brief, at 14.
[43] OECA's Brief, at 2.
[44] OECA's Brief, at 14 (emphasis added).
[45] OECA's Brief, at 16, citing *Ecumenical Ministries of Oregon v. State Lottery Comm'n*, 318 Or 551, 560 (1994) and *Boone v. Wright*, 314 OR 135, 138 (1992).

section (1), which was enacted at the same time.[46] The resulting reading of the two sections of the same statute, ORS 759.425(1) and ORS 759.425(3) as providing two separate grants of authority is unreasonable. OECA can offer no plausible explanation for why the Legislature would provide one broad grant of authority in ORS 759.425(1), and then a second, narrower "grant" in ORS 759.425(3) that only authorizes the Commission to do that which, according to OECA, the Commission could do under ORS 759.425(1).

OECA's reading contravenes the *PGE* framework in other ways as well. The first level of analysis, under *PGE*, includes those canons of construction mandated by statute,[47] including the requirement of ORS 174.010 to give effect to all provisions of a statute.[48] Yet OECA would essentially read section (3) out of ORS 759.425. Ironically, OECA attempts to justify its reading on ORS 174.010 itself. Yet OECA offers no explanation whatsoever of how section (3) would be given effect since, under OECA's reading, it adds no authority beyond that in (1) and imposes no limitations either.[49] That is not consistent with *PGE*, and it simply makes no sense.

A proper application of *PGE*, examining text and context together with the statutorily mandated canons of construction in ORS 174.010, corrects OECA's misreading. Additional limiting language does not need to be inserted into (1), because it is already in (3), which is part of the *very same statute*, ORS 759.425. When read together, as context for each other, it is clear that both section (1) and section (3) of ORS 759.425 limit the OUSF, with (1) restricting the services that are potential bases for OUSF funding, while (3) defines the formula for calculating the amount of OUSF funding. Even if section (1) were the unconstrained general grant of authority that OECA imagines it to be, under mandatory principles of statutory construction, the

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[46] SB 622 (1999).

[47] *PGE*, 317 Or at 611 ("Some of those rules are mandated by statute, including, for example, the principles that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.").

[48] ORS 174.110 provides, in relevant part, that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." *See also State v. Stamper*, 197 Or App 413, 418, 106 P3d 172 (2005) ("As a general rule, we assume that the legislature did not intend any portion of its enactments to be meaningless surplusage.").

[49] OECA argues that (3) is not created as an "express" limitation on (1). In the narrowest, technical sense, that may be true because paragraph (3) does not expressly mention (1). But in all other senses, the claim is wholly unsubstantiated.

more particular statutory formula specified in section (3) would limit the calculation of the OUSF.[50]

Finally, OECA's argument that "when the Legislature wanted to limit the Commission's authority in ORS 759.425(1), it knew how to do so," only shows that its reading of (6) is as flawed as its reading of (1). Section (6), enacted in 2009, was not a limit on the authority otherwise established in (1), but granted the Commission authority not previously established in ORS 759.425, namely, authority to use the OUSF to facilitate broadband availability.[51] Thus, the language OECA points to as proof that the Legislature knew how to create a limitation, namely the phrase "[s]ubject to subsection (6) of this section," did not in fact reduce the Commission's authority, but expanded it by providing an exception to the otherwise restrictive requirement to use the OUSF for basic telephone service. Thus, OECA's statement that this "demonstrated that [the Legislature] could condition the grant of authority under ORS 759.425(1) when it believed it appropriate to do so," simply misreads both (1) and (6).[52] In any case, the 2009 revisions that added (6) are irrelevant to discerning the intent behind the requirement that the OUSF be used to ensure "basic telephone service" enacted in 1999, as

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[50] See ORS 174.020 ("When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."); *see also PGE*, 317 Or at 611.

[51] ORS 759.425(6), as enacted in 2009, currently provides that:

> (6) In addition to the purpose specified in subsection (1) of this section, moneys in the universal service fund may be used by the Public Utility Commission to facilitate the availability of broadband at fair and reasonable rates throughout this state.

ORS 759.425(6) (2011); Laws 2009, c. 885, § 16, eff. Aug. 4, 2009. Subsequently, the 2011 Legislature narrowed that authority so that effective January 1, 2012 ORS 759.425(6) will provide that:

> (6) In addition to the purpose specified in subsection (1) of this section, moneys in the universal service fund may be used by the Public Utility Commission to survey or map the state to determine where adequate broadband services are available.

HB 2192 (effective January 1, 2012).

[52] OECA's Brief, at 12.

Section 28 of SB 622. It is a well-established principle of Oregon law that statements of a later legislature concerning a provision are irrelevant to the intent of the enacting legislature.[53]

C. OECA's policy arguments are irrelevant to the threshold question of the legality.

OECA devotes a substantial portion of its brief to what are essentially policy arguments, claiming that the Proposal would relieve pressure on rural ILECs from a host of ills including falling intrastate access minutes, and suspicions of misreported Percent Interstate Usage, over-reported VoIP traffic, and disguised traffic.[54] But OECA's policy arguments, like its dire predictions concerning RLEC revenues, are premature. Before such arguments can be considered – and subjected to appropriate scrutiny – the Commission would first have to decide the threshold question of whether the statute gives it the authority to adopt OECA's proposal. If, as argued above, OECA's proposal does not comport with ORS 759.425, then the question of whether the proposal is otherwise good or bad policy is moot.

CONCLUSION

For the reasons explained above, there is no statutory authority for the additional OUSF mechanism OECA proposes. Basing OUSF funding on reductions on wholesale intrastate access charges violates ORS 759.425(1)'s requirement that the fund be used to ensure "basic telephone service." The calculations OECA proposes to determine the amount of "second level" OUSF funding contravenes the statutory formula for determining OUSF funding levels—a formula the Commission adhered to earlier in UM 1017. OECA's interpretation of ORS 759.425(1) would read ORS 759.425(3) right out of the statute, and is incompatible with the Oregon Supreme Court's *PGE* statutory interpretation methodology. OECA's policy arguments are misplaced, because the Commission has no authority to take the action OECA seeks.

Dated: September 22, 2011

[53] *Cf. State v. Clum*, 216 Or App 1, 14, 171 P3d 980 n 7 (2007) (statements made by a subsequent legislature are irrelevant in determining the intent of the legislature that enacted a given law).
[54] See OECA Brief, at 3-8, 21-22.

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CERTIFICATE OF SERVICE
UM 1017

I hereby certify that, on September 22, 2011, JOINT RESPONSE OF COMCAST, TRACER, AND TW TELECOM TO THE BRIEF OF THE OREGON EXCHANGE CARRIER ASSOCIATION CONCERNING WHETHER OECA'S PROPOSAL IS OUTSIDE THE PUBLIC UTILITY COMMISSION'S AUTHORITY was served on the following persons by email to all parties and by U.S. Mail to parties who have not waived paper service:

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