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September 22, 2011

Carol Hulse
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: Responsive Brief regarding OPUC Authority – Docket No. UM 1017(3)

Dear Ms. Hulse:

Attached for filing is the Responsive Brief of AT&T Communications of the Pacific Northwest, Inc., TCG Joint Venture Holdings, Inc. d/b/a TCG Oregon and AT&T Mobility LLC and its subsidiaries operating in Oregon (collectively "AT&T") in regards to whether the Commission has legal authority to adopt the OECA proposal to expand the Oregon Universal Service Fund.

The Certificate of Service is also attached. If you need any information or have questions regarding this information, please let me know.

Sincerely,

/s/ Cynthia Manheim

Cynthia Manheim
General Attorney

Attachment

cc: Service list, plus original + 5 copies sent via overnight mail

**BEFORE THE
OREGON PUBLIC UTILITY COMMISSION**

In the Matter of)
)
PUBLIC UTILITY COMMISSION OF) UM 1017(3)
OREGON)
)
Investigation into Expansion of the)
Oregon Universal Service Fund to)
Include the Service Areas of Rural)
Telecommunications Carriers)
_____)

**RESPONSIVE BRIEF OF AT&T
ON WHETHER THE COMMISSION HAS LEGAL AUTHORITY
TO ADOPT OECA'S PROPOSED EXPANSION OF THE
OREGON UNIVERSAL SERVICE FUND**

Pursuant to the Administrative Law Judge (“ALJ”) Ruling on August 29, 2011, AT&T Communications of the Pacific Northwest, Inc., TCG Joint Venture Holdings, Inc d/b/a TCG Oregon and AT&T Mobility LLC and its subsidiaries operating in Oregon (collectively “AT&T”) file this brief on whether the Public Utility Commission of Oregon (“Commission”) has the legal authority to adopt the Oregon Exchange Carrier Association (“OECA”) proposal to expand the Oregon Universal Service Fund (“OUSF”).

At a very high level, AT&T understands that the OECA proposal would reduce the intrastate switched access rates that OECA carriers charge interexchange companies to each company’s interstate switched access rate and that most of the reduction in revenue would be offset by increased support from the OUSF.¹ Although AT&T does not support all aspects of the OECA proposal, the general concept of offsetting decreases

¹ See Opening Testimony of Gail Long and Craig Phillips on behalf of the Oregon Exchange Carrier Association, August 5, 2011.

to access rates, at least in part, by increased support from the OUSF is consistent with Oregon Revised Statute (“ORS”) 759.425, the definition of basic telephone service, and the legislative policy goals established in ORS 759.015.

Background:

To properly evaluate the legality of OECA’s proposal, the Commission must consider the background of access charges and the interrelationship of intercarrier compensation, including access charges, and universal service. Historically the public switched telecommunications network (“PSTN”) has been the infrastructure used to provide universal telecommunications service. Traditionally, implicit subsidies were used to promote universal service. For example, long-distance charges (and later, access charges) were set at artificially high, above-cost levels in order to generate implicit subsidies so that local service rates could be held at artificially low, below-cost levels.

The National Broadband Plan (“NBP”) describes the regime as follows:

. . . ICC [Intercarrier Compensation] was implemented...when there were separate local and long distance phone companies. Local companies incurred a traffic-sensitive cost to ‘switch’ or connect a call from the long distance company to the carrier’s customer. The per-minute rates charged to the long distance carrier were set above cost and provided an implicit subsidy for local carriers to keep residential rates low and promote universal telephone service.²

In the 1996 Telecommunications Act, Congress instructed the Federal Communications Commission (“FCC”), after consultation with the Federal-State Joint Board on Universal Service (“Joint Board”) to establish specific, predictable, and sufficient mechanisms to preserve and advance universal service. As stated by the FCC, “[o]ne of the primary purposes of universal service support is to allow LECs...to provide certain basic services to customers in high-cost areas without having to charge these

² Connecting America: The National Broadband Plan (*National Broadband Plan*), pg. 142.

customers unaffordable rates.”³ The FCC also recognized that universal service support has been both explicit and implicit.”⁴

With this background in mind as competition intensified, the FCC allowed the use of the federal universal service fund to reduce the implicit subsidies in interstate switched access charges to advance universal service. In the 2000 CALLS Order⁵ and the 2001 MAG Order⁶, the FCC permitted local carriers to offset the interstate switched access reductions through an increase in Subscriber Line Charges (“SLCs”) and created two new offsetting funding vehicles with the universal service fund, Interstate Access Support for price cap carriers and Interstate Common Line Support for rate-of-return carriers. This is similar to the approach that OECA proposes with respect to the OUSF.

ORS 759.425(1):

Some parties raised concern that the Commission does not have authority to enact OECA’s proposal. AT&T believes that the general concept of OECA’s proposal – use of the OUSF to offset, at least in part, revenue reductions from lowering intrastate switched access rates to interstate rates, is consistent with the purpose of the OUSF as set forth in ORS 759.425. Specifically, ORS 759.425(1) directs the Commission to use the OUSF to “ensure basic telephone service is available at a reasonable and affordable rate.” Further,

³ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users*, CC Docket No. 99-249, Report and Order, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, FCC 00-193, 15 FCC Rcd 12962 (2000) (“*CALLS Order*”), aff’d in part, rev’d in part, and remanded in part, *Texas Office of Public Util. Counsel et al. v. FCC*, 265 F.3d 313 (5th Cir. 2001)(subsequent history omitted), para. 21.

⁴ Id.

⁵ Id.

⁶ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, *Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket Nos. 96-45, 98-77, 98-166, 00-256, Second Report and Order and Further Notice of Proposed Rulemaking Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001) (“*MAG Order*”)

the statute provides that the Commission may adopt rules to conform the OUSF to “section 254 of the federal Telecommunications Act of 1996 (Public Law 104-104), and to related rules adopted by the Federal Communications Commission, to the extent that the Public Utility Commission determines is appropriate.”

Support for the PSTN in each RLEC service territory is accomplished through three main revenue sources: 1) revenue from end user services; 2) access charges, and 3) federal and state universal service funds. As described by OECA, “one leg of this three-legged stool of support for the PSTN has been under attack. That leg is the support received through access charges assessed to interexchange carriers.”⁷ AT&T agrees with OECA that access minutes are decreasing. As consumers shift their use from traditional landline long distance to email, social networking, wireless⁸ and IP-based alternatives, access charges as a source of revenues is being systematically undermined. In Oregon, access minutes are declining rapidly. In the last seven (7) years, access minutes for the OECA companies have declined by over fifty percent.⁹ The erosion of access revenues, and the implicit subsidies contained therein, threatens universal service at affordable rates in rural areas. It also threatens continued investment in rural Oregon.

The rapid decline of intrastate access minutes in Oregon has led to the increase in intrastate access rates charged by OECA carriers from \$0.05124 to \$0.09929 per minute over the last seven years.¹⁰ As the National Broadband Plan has noted, it is not sustainable in the long run to continue to increase intrastate access rates in the face of declining intrastate access minutes.

⁷ Brief of Oregon Exchange Carrier Association on the Question of Whether the Proposal by the Oregon Exchange Carrier Association is Consistent with ORS 759.425 (“OECA Brief”), page 4.

⁸ Pursuant to FCC rules, wireless carriers pay access charges on calls between Major Trading Areas (“MTAs”) but not for calls within an MTA.

⁹ OECA Brief, page 5.

¹⁰ Id.

Even rate-or-return carriers, who are permitted to increase per-minute rates so they have the opportunity to earn their authorized rate of return, acknowledge that the current system is ‘not sustainable’ and could lead to a ‘death spiral’ as higher rates to offset declining minutes exacerbate arbitrage and non-payment. As the small carriers recognize, revenues are also decreasing due to arbitrage and disputes over payment for VoIP traffic.¹¹

This “death spiral” of high access rates has the potential to undermine universal service at affordable rates. Further, not only is this model of increasing access rates unsustainable, it is also not beneficial for consumers. High switched access rates keep the price for in-state wireline long-distance service artificially inflated.

ORS 759.425(3)

From the workshop, it appears that some parties may argue that ORS 759.425(3) limits the use of OECA funds. This is an incorrect reading of the statute. ORS 759.425(3)(a) provides as follows:

The Public Utility Commission shall establish a benchmark for basic universal service as necessary for the administration and distribution of the universal service fund. 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. (Emphasis added.)

Although ORS 759(3)(a) specifically directs that the OUSF **shall** be used to provide support that is equal to the difference between the cost of providing basic telephone service and the benchmark, the statute does not state that the OUSF “**shall only**” be distributed in this manner. ORS 759.425(1) provides the purpose for which the Commission shall use the OUSF, which is “to ensure basic telephone service is available at a reasonable and affordable rate.” The legislature directed that one way that OUSF

¹¹ NBP, page 142.

shall be distributed for this purpose is through the manner described in ORS 759.425(3). The legislature, however, did not limit the distribution of the OUSF only to the mechanism described in 759.425(3). It is only when the OUSF is to be used for something other than “to ensure basic telephone service is available at a reasonable and affordable rate” that the legislature had to insert a specific exception in ORS 759.425(1) which it did for subsection (6) of the statute.¹²

Basic Service Definition:

As OECA set forth in its brief, it appears that another concern raised at the second workshop is that the definition of “basic telephone service” adopted by the Commission would somehow prevent the Commission from adopting OECA’s proposal because, it is alleged, the OUSF funding would be used to subsidize wholesale services as opposed to retail service. The definition of basic service adopted by the Oregon Commission does not prevent the Commission from adopting OECA’s proposal.

As an initial matter, it is improper to characterize OECA’s proposal as seeking to subsidize a wholesale service, namely intrastate switched access rates. Instead, as described in detail above and in OECA’s comments, the OECA carriers are seeking to support their basic telephone service in rural areas. Historically, in order to keep basic telephone service rates affordable, support for basic telephone service has come from the three-legged stool – below-cost subsidized local service rates and other end user services, subsidy-laden access charge revenues and, in more recent times, explicit universal service. However, as access minutes have precipitously declined, access charge revenues

¹² See ORS 759.425(1) which provides, “[s]ubject to subsection (6) of this section...” ORS 759.425(6) provides, “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...”

have become a less reliable and unsustainable source of revenue for rural carriers. As such there is a risk to universal service at affordable rates in rural areas.

There is no conflict between the Commission's definition of basic telephone service and using the OUSF to offset, at least in part, a reduction in intrastate switched access rates. The Commission defined "basic telephone service" as 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: ... (b) long distance service... (OAR 860-032-0190). This is similar to the federal definition of supported services which includes nine items, among them, access to interexchange service.¹³ The FCC previously found it consistent with the purpose of the fund to enact two components of the federal USF that were specifically designed to offset to reductions in interstate access charges.

Use of the OUSF to offset, at least in part, some of the revenue loss for rural companies to bring intrastate access rates to interstate access rates is consistent with the Commission's previous policies regarding universal service. In establishing the current OUSF, the Commission recognized that implicit subsidies should be reduced or eliminated and replaced with an explicit subsidy which would come from the OUSF.

"The universal service program is designed to reduce or eliminate implicit subsidies and

¹³ The services a carrier must provide in order to be eligible to receive universal service support include: single-party voice service; voice grade access to the public switched network; DTMF signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation services for qualifying low-income consumers. See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, (1997) (*Universal Service First Report and Order*), as corrected by Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming in relevant part the Commission's decisions regarding implementation of the high-cost universal service support mechanism).

instead use explicit subsidies for the services that need support.”¹⁴ For the rural carriers, intrastate switched access rates were reduced. The stipulation reached by the parties in the previous case provided that the “the tariff changes should work to reduce implicit subsidies that have been traditionally used to support the costs of basic telephone service.”¹⁵ OECA discussed the legislative history of ORS 759.425 and it is clear that nothing has changed since the Commission’s original order that would prohibit the use of the OUSF to offset, at least in part, reductions in revenue from intrastate access charges, in order to ensure that “basic telephone service is available at reasonable and affordable rate” in the OECA areas.

ORS 759.015

This statute sets forth the general policy goals for the Commission. Specifically, the statute provides, in relevant part, that “it is the goal of the State of Oregon to secure and maintain high-quality universal telecommunications service at just and reasonable rates for all classes of customers...” As explained above, ensuring a consistent source of funds for rural carriers is essential to ensuring affordable telecommunications service in rural areas and investment in these rural areas.

Conclusion:

Although AT&T does not support all aspects of the OECA proposal, the general concept of offsetting decreases in implicit subsidies in switched access rates, at least in part, by increased explicit support from the OUSF is consistent with Oregon Revised Statute (“ORS”) 759.425, the definition of basic telephone service, and the legislative policy goals established in ORS 759.015.

¹⁴ Order No. 03-082. UM-1017 (Feb. 3, 2003), page 1.

¹⁵ Id., pg 5.

Dated: September 22, 2011

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CERTIFICATE OF SERVICE
UM 1017(3)

I hereby certify that on the 22nd day of September, 2011, I served the foregoing Responsive Brief in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at the address shown below, or via email only if the service list indicates such persons waive paper service.

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DATED this 22nd day of September, 2011

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