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September 27, 2011

VIA E-MAIL AND FEDERAL EXPRESS

Filing Center
Oregon Public Utility Commission
550 Capitol St NE Ste 215
Salem, OR 97301-2551

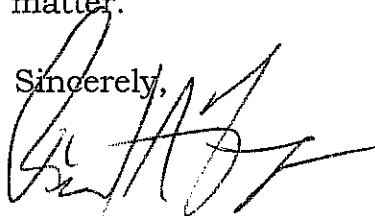
Re: UM 1017(3) – Reply Brief of the Oregon Exchange Carrier
Association on the Question of Whether the Proposal by the Oregon
Exchange Carrier Association is Consistent with ORS 759.425

Dear Sir/Madam:

Enclosed are the original and five copies of the Reply 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. Also
enclosed are the original and five copies of a Certificate of Service.

Thank you for your attention to this matter.

Sincerely,



RICHARD A. FINNIGAN

RAF/km
Enclosures

cc: Service List (via e-mail)
Client (via e-mail)

**BEFORE THE
OREGON PUBLIC UTILITY COMMISSION**

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON

UM 1017(3)

Investigation into Expansion of the Oregon
Universal Service Fund to Include the Service
Areas of Rural Telecommunications Carriers

**REPLY 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**

September 27, 2011

INTRODUCTION AND OVERVIEW

This Reply Brief is submitted by the Oregon Exchange Carrier Association (OECA) to reply to the responsive briefs filed in this docket. Responsive briefs were filed by the Staff of the Public Utility Commission (Staff), Citizens' Utility Board of Oregon (CUB), and Verizon. A response was also filed by the Oregon Cable Telecommunications Association (Cable).¹ A Joint Responsive Brief was filed by Comcast, TRACER and tw telecom (Joint Response). These five briefs opposed OECA's Proposal that was filed in this matter.² There was a responsive brief filed by AT&T Communications of the Pacific Northwest, Inc., TCG Joint Venture Holdings, Inc., d/b/a TCG Oregon and AT&T Mobility LLCC (AT&T). The AT&T response supports the concept, if not all of the details, of the OECA Proposal.

The approach in this Reply Brief will be to first address some general misconceptions about the purpose and effect of the OECA Proposal. Then OECA will address some common arguments made by the parties opposing the OECA Proposal. Finally, OECA will address specific additional issues raised in various of the response briefs.

OECA'S PROPOSAL IS DESIGNED TO ENSURE BASIC TELEPHONE SERVICE IS AVAILABLE AT A REASONABLE AND AFFORDABLE RATE

ORS 759.425(1) reads, in part, as follows: "The Public Utility Commission shall establish and implement a competitively neutral and nondiscriminatory universal service fund ... to ensure basic telephone service is available at a reasonable and affordable rate." That is the precise purpose of OECA's Proposal.

¹ Cable's Brief was not served on OECA electronically. Cable's Brief was found when the Commission issued a notice that it had received Cable's Brief.

² As described in OECA's Opening Brief, OECA has presented a detailed proposal which is referred to for ease of reference as the "OECA Proposal." That short hand reference will be used in this Reply Brief as well.

Unfortunately, several of the parties have misconstrued OECA's Proposal.³ For example, Commission Staff describes OECA's Proposal as one seeking OUSF support for intrastate switched access service or long distance service.⁴ That is not OECA's Proposal. Verizon argues that OECA's Proposal is to support switched access services.⁵ That is not OECA's Proposal. Similar mischaracterizations can be found in the CUB Brief and the Joint Response.⁶ All of these characterizations display a fundamental misunderstanding of the OECA Proposal.

What the OECA Proposal actually does is to seek universal service fund support to ensure that basic telephone service is available at a reasonable and affordable rate as directed by the Legislature. It does this by shifting support for the public switched telecommunications network (PSTN), which is the vehicle that provides basic telephone service, from access charges to universal service funds. In doing so, it stabilizes the support mechanism for basic telephone service and ensures that basic telephone service is available at a reasonable and affordable rate.

As explained in OECA's Opening Brief, support for the PSTN has been provided traditionally through revenues from local service, revenues from access charges and support from state and federal universal service funds. OECA's Proposal recognizes that support from access charge revenues is becoming increasingly unstable. Thus, OECA proposes that the support for basic telephone service be more heavily weighted to universal service support than other factors. It is not a subsidy of access charges. It is not a subsidy of long distance service.

³ Perhaps that is because we are at an early stage in the docket and the parties do not fully understand the OECA Proposal. That is one of the risks of trying to address this question before the record is completed.

⁴ Staff Brief at p. 5.

⁵ Verizon Brief at p. 7.

⁶ See, e.g., CUB Brief at p. 3 and Joint Response at p. 2-3.

**OECA'S PROPOSAL OFFERS THE BEST CONSTRUCTION OF
ORS 759.425 TO CARRY OUT LEGISLATIVE INTENT**

Arguments advanced by CUB, the Joint Response and others are to the effect that OECA's view of ORS 759.425 reads out of existence the provisions of ORS 759.425(3) and, thus, violates canons of statutory construction set out in the PGE⁷ case and ORS 174.010.⁸ Nothing could be further from fact.

The argument advanced by OECA in the Opening Brief gives full effect to both ORS 759.425(3) and ORS 759.425(1). This is something the responsive briefs do not do.

OECA has set out in its briefing that under ORS 759.425(3)(a), the Commission is to use the universal service fund to provide explicit support that is equal to the difference between the cost of providing basic telephone service and the Commission established benchmark, less any explicit compensation received from federal sources specifically targeted to recovery of loop costs and any explicit support received from a federal universal service program. OECA's Proposal gives full weight to that statutory provision in two ways.

The first is that the OECA Proposal is to continue using the OUSF calculations approved by the Commission in Order No. 03-082. Thus, the benchmark in the formula in ORS 759.425(3)(a) is part and parcel of the OECA Proposal.

The second way in which the benchmark is used is that it is an explicit offset against recovery under the OECA Proposal. There is a refinement from Order No. 03-082 to use the benchmark or a larger amount. This is a refinement that is clearly within the Commission's authority to adopt. The point is that the benchmark is used so that under the OECA Proposal the OUSF is funding the difference between the benchmark (as refined) together with the other

⁷ PGE v. Board of Labor and Industries, 317 Or. 606, 859 P.2d 1143 (1993)

⁸ See, e.g., Joint Response at p. 14-17; CUB Brief at p. 5.

statutorily required deductions and the cost of providing basic telephone service, where the cost of providing basic telephone service includes access to long distance services.

Thus, in addition to the statutory directive in ORS 759.425(3)(a), OECA points out that there is another statutory directive contained in ORS 759.425(1). That statutory directive is to use the universal service fund to ensure basic telephone service is available at a reasonable and affordable rate. This is precisely what OECA's Proposal does.

In essence, what the parties that are arguing that OECA's Proposal is contrary to statute really mean is that ORS 759.425(3)(a) is an explicit constraint on the Commission's authority under ORS 759.425(1). That is the only way in which the opposing arguments can prevail.

What this means is that rather than reading the effect of ORS 759.425(3)(a) out of existence as the opposing parties argue, OECA recognizes that statutory directive and the Commission's additional statutory directive in ORS 759.425(1). The opposing parties do not give effect to the second legislative directive of ORS 759.425(1).

As OECA pointed out in the Opening Brief, where the Legislature wanted to limit the Commission's authority under ORS 759.425(1), it did so. The specific example is Chapter 885, Oregon Laws 2009 which added a proviso that made the use of the OUSF for ensuring basic telephone service is available at a reasonable and affordable rate subject to Subsection 6 of the statute. Subsection 6 of the statute authorized the use of OUSF funds for broadband mapping purposes.⁹ No equivalent language exists for Subsection (3). If the Commission determines that ORS 759.425(1) is constrained by ORS 759.425(3)(a), it must somehow find the legislative intent to do so from language that is not there.

⁹ Some parties argue that the reference to Subsection 6 is not a limitation on the Commission's authority. See, e.g., CUB Brief at p. 6. Such a distinction is meaningless. The Legislature put a caveat on the Commission's use of OUSF by directing the funds be used for broadband purposes under certain circumstances. Whether that is construed as a limitation or expansion of authority does not change the analysis.

In considering this argument, the question before the Commission is simple: Is ORS 759.425(1) constrained by ORS 759.425(3)(a)? If it is not, then OECA's argument gives full effect to both provisions. This outcome is consistent with the direction from the PGE case to look at the text and context of the statute. This statutory interpretation does not engraft additional terms into ORS 759.425(1), contrary to the requirements of ORS 174.010, which is a necessary outcome for the parties arguing against OECA's construction of the statute. Further, OECA's construction of the statute gives full force and effect to the direction in ORS 759.425(3)(a) to also use OUSF to fund the difference in the cost of basic telephone service and the benchmark determined by the Commission.

**OECA'S PROPOSAL DOES NOT TREAT ACCESS CHARGES
AS PART OF THE DEFINITION OF BASIC TELEPHONE SERVICE**

Several arguments are advanced that: (1) OECA is trying to argue that access charge service is part of the definition of basic telephone service; (2) thus, OECA is seeking to have the OUSF support this wholesale service; and (3) therefore, because the Commission has defined basic telephone service as "retail telecommunications service," OECA's Proposal is contrary to statute.¹⁰ This syllogistic construction of OECA's Proposal is incorrect.

What OECA argued in its Opening Brief is that the Commission's definition of basic telephone service contained in OAR 860-032-0190(2) includes access to long distance service. That is exactly what the definition states. OECA explained in the Opening Brief that, traditionally, support for access to long distance service has been provided through access charges assessed to interexchange carriers. OECA's Proposal does no more than shift the reliance more to universal service support and less from access charges. The concept of access

¹⁰ Joint Response at p. 6-8.

to long distance service has been and still is a part of basic telephone service under the Commission's rule.

**IF ORS 759.425(1) IS CONSTRAINED BY ORS 759.425(3)(a),
OECA'S PROPOSAL IS STILL CONSISTENT WITH STATUTORY AUTHORITY**

The argument raised against OECA's Proposal is that if ORS 759.425(3)(a) is a constraint on the Commission's authority, the OECA Proposal does not comport with this statutory provision.¹¹ Those arguments are incorrect. Primarily those arguments are predicated on the concept discussed above that the parties opposing the OECA Proposal characterize it as supporting wholesale access services. That is not OECA's Proposal.

As noted in the previous section, the Commission's definition of basic telephone service under OAR 860-032-0190(2) includes access to long distance service. Traditionally, the cost of providing access to long distance service has been recovered through access charges to interexchange carriers. What OECA's Proposal does is to ask the Commission to recognize that those costs are part of the cost of providing basic telephone service and to shift some of the support for basic telephone service from access charges to the OUSF. In doing so, the Commission will continue to fulfill the statutory directive in ORS 759.425(3)(a) to use OUSF support to fund the difference between the benchmark and the cost of providing basic telephone service.

OECA recognizes that there are some variations between the OECA Proposal and the formula the Commission approved in Order No. 03-082. Those are discussed above. However, OECA asserts, and no party has really questioned, that the Commission has the authority to adopt those modifications and still be consistent with ORS 759.425(3)(a).

¹¹ See prior citations.

REPLIES TO OTHER ARGUMENTS

In this section of this Reply Brief, OECA will address various arguments raised in the responsive briefing.¹²

1. Staff Brief.

The primary arguments raised by Staff have been addressed as to the use of OUSF to support "wholesale" services versus "retail" services. There are two points in Staff's Brief that this portion of the Reply Brief will address.

The first of these is at Page 3, Lines 8-11 where the Staff argues that OECA may be arguing that the Commission does not have to follow ORS 759.425(3). That is not OECA's argument.

In part, this gets into the statutory construction analysis again. It is OECA's assertion that ORS 759.425(1) provides an additional means of addressing affordability of basic telephone service independent of ORS 759.425(3). OECA's secondary argument is that if somehow ORS 759.425(3) controls the Commission's actions under ORS 759.425(1), the OECA Proposal is still consistent with statute.

The second item in Staff's Brief concerns Staff's "benchmark" argument. The Staff's argument that the OECA Proposal is inconsistent with ORS 759.425(3) is predicated upon the assertion that the OECA Proposal does not include use of the benchmark.¹³ That is incorrect. As discussed above, the benchmark is incorporated in two ways in the OECA Proposal. The first is that the OECA Proposal is to continue using the OUSF calculations approved by the

¹² OECA will not address AT&T's Responsive Brief since it is in general agreement with OECA's position. OECA appreciates the fact that AT&T is able to understand the purpose of OECA's Proposal and does not mischaracterize the nature of the Proposal.

¹³ Staff Brief at p. 6.

Commission in Order No. 03-082. Thus, the use of the benchmark in the formula in ORS 759.425(3)(a) is in OECA's Proposal.

The second way in which the benchmark is used in the OECA Proposal is that the benchmark is an explicit offset against recovery. As noted, there is a refinement to use the benchmark or a larger amount. The benchmark is used in a manner so that the OUSF is funding the difference between the benchmark (and less some other statutorily required deductions) and the cost of providing basic telephone service. This is the logical conclusion that should be reached given the Commission's explicit definition to include access to long distance services within the definition of basic telephone service.

2. CUB.

With one exception, all of the arguments advanced by CUB have been addressed in the discussion above. That one additional argument is CUB's citation to ORS 759.410(4) that points out that there is a distinction between intrastate switched access and regulated retail telecommunications service on the one hand and basic telephone service on the other. CUB's argument is that the prior two items are subject to price floor and basic telephone service is not.¹⁴

OECA agrees that there is a distinction between basic telephone service and other services. However, the definition of basic telephone service includes access to long distance service.¹⁵ While traditionally the cost of that access to long distance service has been recovered primarily from interexchange carriers through access charges, that source of support for the PSTN to provide basic telephone service is in danger. Therefore, the OECA Proposal shifts the source of support so that it is weighted more heavily on the OUSF side.

¹⁴ CUB Brief at p. 4.

¹⁵ OAR 860-032-0190(2).

In addition, because ORS 759.410(4) distinguishes between intrastate switched access and regulated retail telecommunications service on the one hand versus basic telephone service on the other hand, there does not seem to be a lot of support for CUB's idea that OECA's Proposal somehow must be found to be in violation of statute. CUB's premise is that the OECA Proposal is meant to subsidize access charges. OECA's Proposal does not support or subsidize access charges. What it does support is the basic telephone service provided over the PSTN.

3. Verizon.

The crux of Verizon's legal arguments have been addressed in the discussions set out above. Verizon, however, spends approximately half of its Brief submitting facts that it asserts are contrary to OECA's position. It is unfortunate that this briefing is taking place at this stage of the docket. That is why OECA was reluctant in its support of proceeding along this path. Suffice it to say that weighing of the facts must wait until other phases of this docket are completed. OECA does believe that it is important to consider the OECA Proposal, not only in statutory context, but also how that statutory context is more fully developed through the facts.

4. Joint Response.

The major points raised by the Joint Response have been addressed above. Despite the Joint Response's argument to the contrary,¹⁶ OECA's Proposal is not using OUSF to fund a wholesale service.

The Joint Response puts a novel spin on this argument by stating that under ORS 759.400(1), basic telephone service is limited to "local exchange telecommunications service" which is defined in ORS 759.005 as "telecommunications service provided within the boundaries of exchange maps filed with and approved by the commission."¹⁷ Somehow the Joint Response

¹⁶ This is argued throughout the Joint Response, but, see, e.g., at p. 4.

¹⁷ Joint Response at p. 5.

asserts that this means OECA's Proposal is contrary to statute. The logic of this argument is very hard to discern. Where else but within the confines of the exchange is access to long distance service provided? For example, Stayton Cooperative does not provide access to long distance service for its members by doing so in Portland. It provides the access to long distance service within the boundaries of the Stayton exchange. Monroe Telephone Company does not provide access to long distance service for its customers in Eugene. It provides the access to long distance within the Monroe exchange. The Joint Response's argument on this point just does not make sense.

The Joint Response, like CUB, points to ORS 759.410(4). The argument is the same as raised by CUB and, thus, OECA's reply is the same. The reference to this statute provides very little help in discerning the legislative intent under ORS 759.425.

The linchpin to the arguments in the Joint Response is whether the Commission will accept the assertion that OECA is seeking OUSF support to subsidize intrastate switched access service. That is not the case. OECA's Proposal provides a means for ensuring that basic telephone service is available at a reasonable and affordable rate.

At Pages 8 and 9 of the Joint Response, an argument is raised that OECA's position would allow the Commission to fund anything that is offered, including ISDN, DSL, Caller ID and Frame Relay as services supported by the OUSF. This parade of horrors has no basis within the OECA Proposal. For example, under the OECA's Proposal, DSL services are excluded in the very first step since they are excluded from the starting number. The Joint Response should have recognized this since that was OECA's response to them in the data

requests propounded by the Joint Responders to OECA.¹⁸ Since there is no factual basis for the Joint Response's parade of horrors, it should be ignored.

5. Cable.

Cable asserts, without a shred of support, that OECA's Proposal is designed to provide OUSF revenues to subsidize competitive services.¹⁹ That unsupported assertion should be given no weight.

CONCLUSION

OECA respectfully requests that the Commission rule that the OECA Proposal is consistent with statute. OECA's Proposal is designed to ensure rates for basic telephone service are reasonable and affordable.

Respectfully submitted this 27th day of September, 2011.

By: 

Richard A. Finnigan, OSB No. 965357
Attorney for the Oregon Exchange
Carrier Association

¹⁸ See, Exhibit 1, OECA's response to TRACER/Comcast/tw telecom, DR 001.

¹⁹ Cable Brief at p. 2-3.

1 **EXHIBIT 1**

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5 **BEFORE THE PUBLIC UTILITY COMMISSION**
6 **OF OREGON**

7 **UM 1017(3)**

8 In the Matter of

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10 **PUBLIC UTILITY COMMISSION OF**
11 **OREGON**

DECLARATION OF RICHARD A. FINNIGAN

12 Investigation into Expansion of the Oregon
13 Universal Service Fund to Include the Service
Areas of Rural Telecommunications Carriers

14 I, Richard A. Finnigan, hereby declare under penalty of perjury under the laws of the state of
15 Oregon that the following statements are true and correct:

16 1. I am the Attorney for the Oregon Exchange Carrier Association and make this
17 Declaration in that capacity.

18 2. Attached is a true and correct copy of the Response to Data Request 001 of the Oregon
19 Exchange Carrier Association to TRACER's, Comcast Phone of Oregon, LLC's and tw telecom of
20 oregon llc's First Set of Data Requests.

21 Dated this 27th day of September, 2011.

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RICHARD A. FINNIGAN

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DATA REQUESTS

1
2 REQUEST 001:

3 For the legacy United Northwest, for each OECA member individually, and for all
4 OECA members collectively please provide the following information for each of the last five
(5) years:

- 5 (a) Total revenues (regulated and unregulated);
6 (b) Total revenues from local service;
7 (c) Total revenues from intrastate switched access service;
8 (d) Total revenues from DSL service;
9 (e) Total number of switched access lines;
10 (f) Total number of DSL lines.

11 RESPONSE:

12 OECA objects to Request 001(a). The information is not relevant to the issues in this
13 docket. As explained by Mr. Phillips at the August 16, 2011, workshop, the starting point for the
14 analysis begins with the Part 36 regulated revenue requirement. Information concerning the
15 expenses related to the provision of non-regulated activities have been removed before the starting
16 point is reached. Therefore, any comparison of information from Request 001(a) to the information
17 in Mr. Phillips' Exhibits OECA/201 and 202 would be misleading as an "apples to oranges"
18 comparison. In addition, the expenses associated with other activities that may be regulated, such
19 as the provision of interexchange service, have also been removed before the starting point is
20 reached. Thus, for those companies that provide toll services, it would be misleading to use the
21 revenues from those services without accounting for the expenses related to those services.

22 Without waiving the foregoing objections, please see the material that is attached on the
23 confidential attachment.

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26 RESPONSES TO DATA REQUEST NOS. 001
AND 006 OF THE OREGON EXCHANGE
CARRIER ASSOCIATION TO TRACER'S,
COMCAST PHONE OF OREGON, LLC'S, AND
TW TELECOM OF OREGON LLC'S FIRST SET
OF DATA REQUESTS - 2

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1 By way of further information, most companies in the OECA pool provide DSL service as
2 part of the NECA pool. This was an option provided to rural companies under the FCC's orders
3 related to DSL service. Others provide DSL service on a non-tariffed basis. However, in both
4 cases, the services are regulated. The costs related to DSL services are included in the information
5 on the interstate cost portion of Mr. Phillips' Exhibits OECA/201 and OECA/202, and are removed
6 as the subtraction from the total regulated revenue requirement before reaching the intrastate
7 revenue requirement. In other words, DSL is included as an interstate regulated service and
8 accounted for on the interstate side. It is not an additional revenue source as a non-regulated
9 service. Although neither CenturyTel of Oregon or United Telephone Company of the Northwest
10 provide DSL service as part of the NECA pool, information related to DSL is included in the
11 interstate cost portion of Mr. Phillips' Exhibits OECA/201 and OECA/202, and is removed as the
12 subtraction from the total regulated revenue requirement before reaching the intrastate revenue
13 requirement. This is also the case for Frontier.
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17 Response prepared by: Richard A. Finnigan
18 Title: Attorney
19 Date: September 1, 2011
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**CERTIFICATE OF SERVICE
UM 1017(3)**

I certify that I have this day sent the attached Reply 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 by electronic mail and Federal Express to the following:

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I further certify that I have this day sent the attached Reply 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 by electronic mail to the following parties or attorneys of parties:

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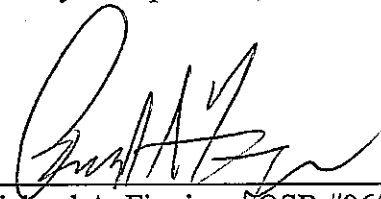
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