BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1017(3)

In the Matter of	)
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PUBLIC UTILITY COMMISSION OF OREGON	)
	)
Investigation into Expansion of the Oregon Universal Service Fund to Include the Service Areas of Rural Telecommunications Carriers.	)

BRIEF OF THE

CITIZENS' UTILITY BOARD OF OREGON:

ON THE QUESTION WHETHER THE PROPOSAL OF THE OECA IS WITHIN THE COMMISSION'S AUTHORITY UNDER ORS 759.425

September 21, 2011

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INTRODUCTION

CUB hereby submits its responsive briefing on the issue of whether the OECA proposal to reduce intrastate rates and then make up the difference by increasing payouts from the OUSF, is within the Commission's authority under ORS 759.425. ALJ Arlow ordered the parties to brief this issue. OECA has submitted its brief arguing that the Commission has authority under ORS 759.425 to adopt and implement its proposal. CUB's position is that the proposal is not within the Commission's statutory authority.

The Oregon Exchange Carriers Association is an organization whose purpose is "to oversee the operation of access pools in Oregon and to make the annual access charge rate filing on behalf of its members." OECA/100 Long page 3. OECA has made a proposal for changes to the Oregon Universal Service Fund (OUSF). In a Workshop to review the proposal, parties to this docket questioned whether the proposal is within the Commission's authority under ORS 759.425, the statutory authority for the OUSF.

Although the OUSF proposal contains many technical details, its essence is relatively simple. The OUSF proposal requires the Commission to reduce intrastate access rates close to the level of interstate access rates and to increase OUSF support to make up the difference. (Exhibit OECA/100 at Long/5-7 and 11; OUSF Opening Brief at 8.) In other words, OECA asks the Commission to create an additional revenue loss to Rural ILECs by reducing intrastate rates and then to increase OUSF support to Rural ILECs to make up the difference and more. This results in an overall increase in OUSF funding of 12.2 million dollars. OECA/200 Phillips 12. CUB cannot see how taking additional money from all customers to support a loss to the Rural ILECs (created by the Commission at their request) is support for basic service or is in the public interest.

Not content with the methodology which the legislature provided for calculating OUSF support, OECA, through its proposal, seeks to graft additional cost accounting provisions on to that which is provided in ORS 759.425(3) in an attempt to use OUSF money to offset losses in interexchange support. OECA Opening Brief at 4. OECA pursues this proposal under the belief that it is the victim of sustained and systematic arbitrage perpetrated by interexchange carriers. *Id*.

In effect, rather than seeking to repair what it perceives as a broken leg of its funding stool, OECA is seeking to strengthen another leg to make up for the lost support. Setting aside the wisdom of this approach from a policy perspective, CUB focuses on whether, as presented, the proposal exceeds the scope of "Basic Telephone Service" as it is defined in the Oregon statutes and administrative rules. In addition, CUB addresses whether the Proposal must satisfy the requirements of ORS 759.425(3) and, if so, whether it satisfies those requirements.

ARGUMENT

A. OECA's Proposal Is Outside the Scope and Definition of "Basic Telephone Service"

ORS 759.425 requires that the Commission use the OUSF to ensure "basic telephone service.", ORS 759.400 defines " basic telephone service:"

> "As used in ORS 759.400 to 759.455:
>
> "(1) 'Basic Telephone Service' means local exchange telecommunications service defined as basic by rule of the Public Utility Commission."

The Commission, as instructed, provided a more detailed definition for "basic telephone service" in OAR 860-032-0190(2), which states:

> "'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 service;
>
> (c) Relay service for the hearing and speech impaired;
>
> (d) Operator service such as call completion assistance, special billing arrangements, service and trouble assistance, and billing inquiry;
>
> (e) Directory assistance; and
>
> (f) Emergency 9-1-1 service, including E-9-1-1 where available."

These two definitions must be read in harmony, and to be within the Commission's authority, the OECA proposal must work to ensure basic telephone service as defined. As detailed below, the proposal fails to stay within these basic parameters by relying on accounting of intrastate access charges to offset what OECA sees as high costs for wholesale long distance service rates. The definitions provided for 'basic telephone service' make clear that its scope is limited to telephone service that includes local calling but not long distance calling and to retail, rather than wholesale, service. Retail telephone service is further limited to that which is provided to private customers, with service between telecommunications companies specifically excluded.[1] However, as noted above, the OECA proposal seeks to supplement perceived losses in intrastate access support.[2] Such support is carrier-to-carrier in nature. Therefore application of the proposal would represent the use of OUSF funds in furtherance of charges that clearly fall outside of the definition of 'basic telephone service'.

OECA seeks to allow OUSF monies to support intrastate access charges; however, CUB finds nothing in the statutes or administrative rules indicating that such charges fall within the definition of 'basic telephone service'. To the contrary, ORS 759.410(4) appears to distinguish between intrastate switched access and basic telephone service in allowing application of certain price restrictions to the former, while specifically exempting the latter from such restrictions. Accordingly, to the extent that intrastate access charges are outside of the scope of 'basic telephone service', the Commission cannot rely upon current proposal without exceeding its statutory authority.

For the foregoing reasons, CUB believes that the OECA proposal does not work to ensure 'basic telephone service'. As such, CUB believes that the proposal is not within the Commission's authority under ORS 759.425, the statutory authority for the OUSF.

B. The Commission's Authority under ORS 759.425(1) is limited by ORS 759.425(3)

Even if the proposal is found to work to ensure basic telephone service, it is not consistent with the requirements of the statute. Apparently recognizing that its proposal may be

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[1] ORS 759.400(2) defines retail telephone service as: "(2) 'Retail telecommunications service' means a telecommunications service provided for a fee to customers. "Retail telecommunications service" does not include a service provided by one telecommunications carrier to another telecommunications carrier, unless the carrier receiving the service is the end user of the service."

[2] See also Opening Testimony of Gail Long (OECA/100/Long) at 6.

inconsistent with subsection 3 of the statute (the subsection that explains how the Commission is to establish a benchmark and how that benchmark is to be used to calculate the amount of OUSF support a company receives) OECA argues that the Commission has authority to implement the proposal solely under subsection 1. (OECA Opening Brief at 12.) The effect of OECA's approach is to render subsection 3 a nullity and to give the Commission authority to implement the OUSF in any way it chooses, so long as it furthers basic telephone service.

OECA contends:

> "There is nothing in ORS 759.425 that creates ORS 759.425(3) as an express limitation on the Commission's authority under ORS 759.425(1)." OECA Opening Brief at 12.

As OECA notes, "In interpreting a statute, the court's task is to discern the intent of the legislature. To do that, the court examines both the text and the context of the statute." OECA Opening Brief at 13, citing *PGE v. Board of Labor and Industries*, 317 OR. 606, 859 P.2d 1143 (1993). Nevertheless, OECA then focuses narrowly on the text and effectively ignores the context in arguing that the Commission need not even consider subsection 3 of the statute (OECA Opening Brief at 18) despite having noted that it is "relevant to the present inquiry." OECA Opening Brief at 12. In fact, it is the context that makes it clear that subsections 1 and 6 define the purposes for which the OUSF may be used and the balance of the statute defines and limits how the Commission is to attempt to ensure that those purposes are achieved.

OECA argues that "when the Legislature wanted to limit the Commission's authority in ORS 759.425(1) it knew how to do so." (Id.) It referred to subsection 6 as a limitation recently imposed by the legislature. The text OECA is focusing on states:

> "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." ORS 759.425(1).

The problem with this OECA's argument is that it represents a fundamental misunderstanding of the statute. The essence of subsection 1 is that the commission must establish a universal fund (i.e. OUSF) and that the fund is to be used to ensure basic telephone service at a reasonable rate. In context, the language "subject to subsection 6 of this section" means that the Commission may also use the OUSF to facilitate broadband in addition to basic telephone service. Subsection 6, by its own terms, is not a limitation on subsection 1, but an addition to the purpose it allows for the OUSF. It states:

> "In addition to the purpose specified in subsection (1) of this section…the universal service fund may be used by the Public Utility Commission to facilitate the availability of broadband at fair and reasonable rates throughout the state." ORS 759.425(6)

Thus, subsection 6 is an additional grant of authority to the Commission allowing it to use the OUSF for an additional purpose. It is not a limitation on subsection 1.

The balance of the statute, including subsection 3, acts as a limitation on how the Commission may administer and implement the OUSF. For example, subsection 3 states that **"[t]he universal service fund shall provide explicit support** …that is equal to the difference between the cost of providing basic telephone service and the benchmark." (Emphasis added.) Thus, by the explicit terms of the statute, the fund created in subsection 1 for the purposes stated in subsection 1 and 6 must be used to provide support that is calculated in a specific way as the difference between cost of basic service and the benchmark., To argue that so long as the Commission attempts to further the legislatively established purposes of the OUSF, it is free to act any way it chooses, is to ignore the balance of the statute. The Legislature has specifically told the Commission in the entire statute how to ensure basic telephone service.

OECA's interpretation of the statute, as noted, effectively nullifies subsection 3 (and most of the rest of the statute except subsections 1 and 6). Under *PGE*, along with text and context, the first level of analysis includes those canons of construction mandated by statute. *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.") The requirement to give effect to all provisions of a statute is articulated in ORS 174.010.

Because the OECA interpretation ignores the intent of the legislature to limit the way the Commission implements the OUSF, and because it gives no effect to many critical provisions of the statute, it should be rejected. The interpretation of the statute that is consistent with the text, context and maxims of construction is that subsections 1 and 6 define the acceptable purposes of the OUSF and that the balance of the statute tells the Commission how to implement the OUSF to achieve those purposes.

C. The OECA Proposal Is Impermissible under ORS 759.425(3)

ORS 759.425(3) describes how the Commission is to establish a benchmark for basic telephone service and how the OUSF is to use the benchmark to provide support to eligible telecommunications carriers. It states:

> "(3)(a) The Public Utility Commission shall establish a benchmark for basic telephone 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.
>
> "(b) The commission in its discretion shall periodically review the benchmark and adjust it as necessary to reflect:
>
> > "(A) Changes in competition in the telecommunications industry;
> >
> > "(B) Changes in federal universal service support; and
> >
> > "(C) Other relevant factors as determined by the commission.

> "(c) Except for a telecommunications utility described in ORS 759.040, the commission shall seek to limit the difference between the price a telecommunications utility may charge for basic telephone service and the benchmark."

OECA contends:

> "[U]nder ORS 759.425(3), by approving the OECA proposal, the Commission is following the legislative directive of funding the difference between the benchmark and the embedded cost of providing service, including access to long distance service." OECA Opening Brief at 18.

The calculation for the additional OUSF funds that OECA seeks in this proposal is found nowhere in the statute. The proposal calls for the new funds to be calculated as the difference between current wholesale intrastate access charges and future wholesale interstate access charges. In contrast, the calculation in the statute is the difference between the cost of service and the benchmark required in ORS 759.425(3). Finally, OECA abandons the per line basis support inherent in the statutory formula. OECA's proposal has no basis in ORS 759.425(3) and the method of calculation is incompatible ORS 759.425(3). Therefore, the Commission has no authority under ORS 759.425(3) to adopt OECA's proposal.

CONCLUSION

CUB urges the Commission to conclude that the OECA proposal is outside its authority under ORS 759.425.

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Respectfully submitted,
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UM 1017(3) – CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of September, 2011, I served the foregoing **BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON** in docket UM 1017(3) upon each party listed in the UM 1017(3) OPUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending one original and five copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

(W denotes waiver of paper service)

(C denotes service of Confidential material authorized)

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