

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of

PUBLIC UTILITY COMMISSION OF  
OREGON

Staff investigation of the Oregon Universal  
Service Fund.

Docket No. UM 1481

**OCTA’S MOTION TO COMPEL  
FRONTIER AND MOTION TO  
EXTEND TIME FOR OPENING  
TESTIMONY**

**EXPEDITED CONSIDERATION  
REQUESTED**

**MOTION**

Pursuant to OAR 860-014-0070(3), the Oregon Cable Telecommunications Association (OCTA)<sup>1</sup> respectfully moves to compel Frontier Communications Northwest, Inc. (“Frontier”) to produce information concerning broadband services responsive to OCTA’s First Set of Data Request, Nos. OCTA-FT-3, and OCTA-FT-4, moves to change the date for initial testimony to December 10, 2012, and requests expedited consideration of this motion.

**CERTIFICATION OF GOOD FAITH EFFORT**

**TO RESOLVE DISCOVERY DISPUTE**

OCTA made a good-faith effort to resolve these matters informally by conferring in a series of telephone calls and email correspondence with counsel for Frontier that began on November 8, 2012, but the parties were unable to resolve the dispute that is the subject of this

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<sup>1</sup> Both OCTA and OCTA member Comcast are parties to this docket.

motion. On November 13, Frontier communicated a final decision to exclude broadband services from the information provided in response to the data requests.

### **BACKGROUND FACTS**

At issue in this motion is OCTA's First Set of Data Requests, specifically requests OCTA-FT-3, and OCTA-FT-4. These requests sought annual reports filed with the Oregon Public Utility Commission (the Commission), line-counts (including broadband lines), and revenues (again, including broadband revenues). Generally, Frontier declined to provide responsive material relating to its broadband services. OCTA-FT-3 provides as follows:

For 2011, provide Frontier's year-end line counts for the following services by wire center and study area (to the extent these data are not available at the wire center level, please provide the data at the lowest level of granularity available, such as rate center):

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

While Frontier provided some information, it did not provide the granular data requested, and it objected as follows:

Frontier specifically objects to the requests for residential and business broadband data as beyond the scope of this proceeding, not subject to the jurisdiction of the Oregon Public Utility Commission, unduly burdensome and unlikely to lead to the discovery of admissible evidence.

Finally, OCTA-FT-4 provides as follows:

For 2011, provide Frontier's average revenue per line for the following line types and by wire center and ILEC study area (to the extent these data are not available at the wire center level, please

provide the data at the lowest level of granularity available, such as rate center):

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

While Frontier provided some information, it did not provide the granular data requested, and it objected as follows:

In addition to and without limitation to its general objections, Frontier specifically objects to the requests for residential and business broadband data as beyond the scope of this proceeding, not subject to the jurisdiction of the Oregon Public Utility Commission, unduly burdensome and unlikely to lead to the discovery of admissible evidence.

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

## **ARGUMENT**

### **A. The Scope of Permissible Discovery Is Broad**

The scope of discovery in this proceeding is the broad one established by the Oregon Rules of Civil Procedure (ORCP). OAR 860-001-0540 provides that “[a] party may submit data requests to any other party, subject to the discovery rules in the ORCP.”<sup>2</sup> The ORCP, specifically allows discovery of “any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party....”<sup>3</sup> “Relevant evidence” is in turn defined to mean “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

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<sup>2</sup> See also OAR 860-001-0000 (providing that the “The Oregon Rules of Civil Procedure (ORCP) also apply in contested case and declaratory ruling proceedings unless inconsistent with these rules, a Commission order, or an Administrative Law Judge (ALJ) ruling.”).

<sup>3</sup> ORCP 36 B(1).

less probable than it would be without the evidence.”<sup>4</sup> The ORCP expressly provides that “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>5</sup> For decades, Oregon law has shifted towards requiring disclosure even where relevancy is contested. *See Oregon Orchards v. Ins. Co. of N.A.*, 239 Or 192, 198, 397 P2d 74 (1964) (noting the trend to require production of documents in order to determine relevancy, rather than denying as irrelevant before disclosing the documents). The Commission’s rules emphasize that the standard protective order “allows the broadest possible discovery consistent with the need to protect confidential information.”<sup>6</sup>

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

The subject of OCTA’s Data Requests—including the information on Frontier’s broadband services—easily meets the liberal standard for discovery. All the Data Requests are reasonably calculated to lead to the discovery of admissible evidence. A central issue in this docket is “[w]hat changes should be made to the existing OUSF related to the calculation, the collection, and the distribution of funds.”<sup>7</sup> Calculation of OUSF support must take into consideration whether a carrier actually *needs* support. Carrier revenues that can be used to offset the cost of providing service are relevant to that analysis.

Moreover, the relevance of broadband revenues to the future of the OUSF calculations and distributions is clear from the history of this docket. Staff’s comments in response to the issues list in the earlier phase of UM 1481 explained that “DSL revenues or revenues derived

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<sup>4</sup> ORS 40.150.

<sup>5</sup> ORCP 36 B(1).

<sup>6</sup> OAR 860-001-0080.

<sup>7</sup> *Issues List Ruling*, at 2.

from providing internet services,” should be used to reduce support if OUSF support remains directed at carriers.<sup>8</sup> Staff also commented that “as a principle, a company’s total communications earnings should be consider when determining if a company needs support for serving a particular geographic area.”<sup>9</sup> The relevance of broadband revenues, such as DSL revenues, to the OUSF was also made clear by the Commission in its first triennial review of rural Local Exchange Carriers’ OUSF funding in 2006, where it approved a Memorandum of Understanding, which set forth options for calculating future OUSF funding including “[i]nput[ing] DSL revenues as an additional OUSF offset”; and, “[a]djust[ing] the line counts to include DSL capable lines in the denominator to calculate cost per line.”<sup>10</sup>

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

OCTA, in order to meaningfully comment on how the OUSF should be calculated and distributed, must have access to the data Frontier is refusing to provide. Specifically, information on broadband services requested by Data Requests OCTA-FT-3 and OCTA-FT-4 is needed for OCTA to evaluate options for calculating and distributing future OUSF funds, and potentially present testimony to the Commission, including projections as to how the size of the OUSF might be impacted by such changes to the calculation of support.

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<sup>8</sup> *In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Staff investigation of the Oregon Universal Service Fund*, Staff’s Comments, UM 1481, at Issue 29 (October 25, 2010).

<sup>9</sup> *Id.*, at Issue 38.

<sup>10</sup> *In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Staff investigation of the Oregon Universal Service Fund*, Order 06-297, UM 1017, Appendix A, at 7 (June 14, 2006).

In sum, there is no legitimate basis for Frontier to withhold the requested information.

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

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

**CONCLUSION**

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

DATED this 14<sup>th</sup> day of November, 2012.

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**CERTIFICATE OF SERVICE  
UM 1481**

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

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Dated this 14th day of November 2012 at  
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