



1201 Court Street NE, Suite 200 • Salem, Oregon 97301
(503) 588-6550 • (800) 452-0338 • Fax: (503) 399-4863
www.orcities.org

June 13, 2014

PUC Filing Center
PO BOX 1088
Salem, OR 97308-1088

RE: UM 1677 Frontier Petition for Price Plan

Dear Filing Center,

Enclosed for filing in the above mentioned docket, please find a copy of the League of Oregon Cities Reply to the Joint Parties Response Reply to the League of Oregon Cities Objection as to why the waiver of OAR 860-022-0042 is improper.

Please contact me at (503) 540-6550 if you have any questions.

Sincerely,

Sean E. O'Day
General Counsel
League of Oregon Cities
soday@orcities.org
cc: Service List

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **UM 1677**
4

In the Matter of the Petition of Frontier
Communications Northwest Inc.
For Approval of Price Plan Pursuant to
ORS 759.255

LEAGUE OF OREGON CITIES REPLY

5 **INTRODUCTION**

6 On April 30, 2014, Frontier Communications (“Frontier”), the Public Utility Commission
7 of Oregon Staff, the Citizens’ Utilities Board of Oregon, Integra Telecom of Oregon, and its
8 affiliates, and PriorityOne Telecommunications, Inc. (collectively the “Joint Parties”) filed a
9 Stipulation and Price Plan with the Public Utility Commission of Oregon (“Commission”). In
10 that filing the Joint Parties sought an order from the Commission approving the Price Plan,
11 which included a waiver of OAR 860-022-0042. On May 15, 2014, the League of Oregon Cities
12 (League) filed an Objection to the Joint Parties motion setting forth arguments as to why the
13 waiver of OAR 860-022-0042 is improper.

14 Pursuant to a schedule established by Judge Traci A. G. Kirkpatrick, the Joint Parties
15 (excluding Integra Telecom of Oregon, and its affiliates, and PriorityOne Telecommunications,
16 Inc.) filed a Reply on June 6, 2014. Pursuant to the same schedule, the League hereby files this
17 Reply to the Joint Parties Response.

18 **POINTS AND AUTHORITIES**

19 After reviewing the Joint Parties’ Response, the League maintains its position that a
20 waiver of OAR 860-022-0042 is improper for the reasons set forth in its Objection, which stand
21 on their own merits and need not be repeated here. However, because the Joint Parties’

1 Response misdirects attention from the salient issues presented by Frontier’s request for a waiver
2 of OAR 860-022-0042, the League submits this brief Reply to refocus the discussion and to aid
3 the Commission in properly framing and deciding the issues presented in this matter.

4 **I. The League does not assert that it has been denied due process in this proceeding;**
5 **however, a waiver of OAR 860-022-0042 in this case would violate administrative law, state**
6 **statute and general notions of due process.**

7 Of the several reasons why a waiver of OAR 860-022-0042 is improper in this
8 proceeding, the League points out in its Objection that it would violate both state statute and
9 notions of due process to waive an administrative rule in a contested case proceeding.
10 Specifically, the League notes that under ORS 183.335(5) and as fundamental principle of
11 administrative law and due process that absent express authority elsewhere, an executive agency
12 cannot avoid the application of its administrative rules without going through a rule amendment
13 or repeal process. In response to those arguments, the Joint Parties assert that the League
14 misunderstands ORS 183.335(5) and in addition they assert that the League has been afforded
15 and indeed made full use of its due process rights by being an active participant in this
16 proceeding.

17 With respect to the meaning of ORS 183.335(5), the Commission has now been offered
18 alternative interpretations of how that statute affects the Commission’s ability to waive a rule,
19 specifically of OAR 860-022-0042, where neither state statute nor the rule itself provide for a
20 waiver. The League has put forth two cases that are consistent with its view that an
21 administrative agency may not abandon, ignore, nor waive the application of a rule without
22 going through the proper procedures to repeal the rule. The Joint Parties offer no legal authority
23 to support their contrary position. Rather, the Joint Parties attempt to factually distinguish this
24 proceeding from the cases cited by the League. Those distinctions are without a difference;
25 however, for the reasons set forth in the League’s Objection, as a fundamental principle of

1 administrative law, absent express statutory authority that allows an administrative agency the
2 ability to waive its rules (and even then, unless the rule itself provides for a procedure and
3 standards by which it may be waived) an administrative agency may not ignore the application of
4 that rule in a contested case proceeding. Here, neither ORS 759.219 (the statutory basis for OAR
5 860-022-0042), ORS 759.255 (the statutory basis for this proceeding and that expressly provides
6 for a waiver of certain traditional ratemaking principles, of which neither ORS 759.219 nor OAR
7 860-022-0042 is one of them), nor OAR 860-022-0042 itself provide for a waiver of it
8 application. Therefore the Commission should decline to waive that rule in this proceeding.

9 With respect to the League's due process arguments, the Joint Parties Response misses
10 the point. Whether the League has been afforded due process of law in this proceeding is not the
11 issue. Rather the issue is whether it is legal and proper for the Commission to waive a statutorily
12 mandated rule without going through the same inquiry and administrative process as that which
13 established the rule. Under the common law doctrine known as the act of equal dignity, a
14 doctrine rooted in notions of due process, a rulemaking body may not alter the terms or
15 applications of a rule without going through the same process by which that rule was adopted.
16 Put simply, the doctrine would forbid a waiver of an administrative rule in a contested case
17 proceeding where the rule did not otherwise allow for a waiver of its provisions. Instead, the
18 doctrine would require either (1) a repeal of the rule using the same procedure by which the rule
19 was adopted, or (2) an amendment of the rule to expressly provide for a process and standards by
20 which the rule can be waived. Because the Joint Parties would have the Commission abandon an
21 administrative rule absent either of those prerequisites, the League maintains it would be
22 improper for the Commission to do so. Consequently, the Commission should decline the Joint
23 Parties' request for a waiver of OAR 860-022-0042 in this proceeding, and should the

1 Commission desire to undertake changes in OAR 860-022-0042, to do so in the context of a
2 rulemaking docket.

3 **II. The general wavier provisions in OAR 860-022-0000 are not applicable to OAR 860-**
4 **022-0042, because the latter rule is based upon specific statutory direction.**

5 The Joint Parties argue that OAR 860-022-0000 provides authority and that good cause
6 exists under that rule to waive OAR 860-022-0042. Given the inequitable and disproportionate
7 burden that will be placed on urban ratepayers, the League disagrees that good cause exists under
8 OAR 860-022-0000 for the Commission to waive OAR 860-022-0042, which would allow a
9 telecommunications carrier to pass through 100% of a particular operating cost onto a subset of
10 the utility's customers. Nonetheless, OAR 860-022-0000 is not applicable here.

11 OAR 860-022-0000 in general terms allows the Commission to waive Division 22 rules
12 where good cause is shown. As a general matter of statutory construction and administrative
13 law, the specific will govern the general and an administrative rule cannot conflict with state
14 statute, respectively. See e.g., Accident Prevention Div. v. Gorsage, Inc., 97 Or App 504, 776
15 P2d 589 (1989) (The rule of statutory construction that a specific rule controls over a general rule
16 applies in a situation where there is a conflict or inconsistency between two administrative rules);
17 Employment Div. v. Ring, 104 Or App 713, 718, 803 P2d 766 (1990) (rule was invalid because
18 it conflicted with statute).

19 As noted in the League's Objection, ORS 759.255 provides the basis for the Commission
20 to approve price plans that fall outside of traditional rate base regulation. ORS 759.255(5)
21 clearly states what can be waived under the statute; ORS 759.219, the statute upon which OAR
22 860-022-0042 is predicated, is not one of them. Therefore, the general application of OAR 860-
23 022-0000 is overridden by the specific provisions of ORS 759.219. Moreover, because ORS

1 759.219 is a state statute, the Commission cannot apply OAR 860-022-0000 as the Joint Parties
2 request, because doing so would conflict with state statute.

3 **III. The changes in the Telecommunications Industry do not justify a disproportionate**
4 **burden to be placed on urban ratepayers.**

5 In response to the League’s Objection, the Joint Parties state that the League “incorrectly
6 implies that nothing has changed with respect to the Telecommunication’s Industry since the
7 Commission’s order in Docket AR 218.” The Joint Parties go on to note that manifold changes
8 have occurred in the telecommunication’s industry, most notably de-regulation, which has led to
9 a need to equal the playing field among competing telecommunications providers, which they
10 argue, provides a basis for the waiver of OAR 860-022-0042. The Joint Parties misconstrue the
11 League’s position and again, miss the mark.

12 The League recognizes that there have been changes in the telecommunications industry
13 that raise significant policy issues for the Commission, as well as the Legislative Assembly.
14 However those changes are irrelevant to the inquiry with regard to whether OAR 860-022-0042
15 should be waived. As noted in the League’s objection and above, OAR 860-022-0042 is the
16 product of ORS 759.219. ORS 759.219 does not concern itself with equity among utilities.
17 Rather, the statute is concerned with equity among ratepayers. Specifically, under ORS 759.219
18 a franchise fee is to be charged pro rata among the users of the telecommunications utility within
19 the jurisdiction collecting the franchise fee, unless the Commission determines “on a statewide
20 basis that such charges would be inequitable, in whole or in part, to city ratepayers or should
21 otherwise be borne as a statewide operating expense by the telecommunications utility.”
22 (Emphasis added.)

23 Thus the issue in whether to waive OAR 860-022-0042 does not turn on whether there is
24 a need to level the playing field among utilities. The issue is whether urban ratepayers should

1 bear the burden of an operating expense of an incumbent local exchange for which all customers
2 of that utility benefit. The Commission determined in 1990, the answer to that question was no.

3 The League submits that even with manifold changes in the telecommunications industry,
4 the answer to that question remains, no. Moreover, even if such an issue was to be debated, for
5 the reasons set forth in both the League's Objection as well as this Reply, any further inquiry into
6 the apportionment of a utilities' franchise fee is more appropriately addressed in a statewide
7 rulemaking proceeding conducted in accordance with the statutory mandate of ORS 759.219.

8 CONCLUSION

9 In conclusion, the issue before the Commission, simply stated, is whether the
10 Commission has the authority to abandon an administrative rule that equitably apportions a
11 telecommunications utilities operating costs across both urban as well as non-urban ratepayers.
12 The Joint Parties' response provides neither a persuasive policy nor legal basis for the
13 Commission to do so. In contrast, it has been and remains League's position that the
14 Commission lacks the legal authority to waive the application of OAR 860-022-0042 in this
15 proceeding, and that even if the Commission had such authority, it would be bad policy to do so;
16 placing an unequitable burden on city ratepayers. Therefore, for the reasons stated in the
17 League's Objection and this Reply, the League respectfully reiterates its request that the
18 Commission deny the motion for an order adopting the Stipulation and Price Plan in so far as
19 those contain a waiver of OAR 860-022-0042.

20 Respectfully submitted,

21 THE LEAGUE OF OREGON CITIES

22 /s/ Sean E. O'Day

23 Sean E. O'Day

24 General Counsel

25 League of Oregon Cities

CERTIFICATE OF SERVICE

UM 1677

I certify that I have, this day, caused to be served the foregoing document upon all parties of record in this proceeding by electronic mail, pursuant to OAR 860-001-0180, to the following parties or attorneys of parties.

Dated this 13th day of Friday, 2014 at Salem, Oregon.

/s/ Sean E. O'Day

Sean E. O'Day

General Counsel, League of Oregon Cities

PO Box 928, Salem, OR 97308

(503) 588-6550

SERVICE LIST (PARTIES)

Citizens' Utility Board of Oregon OPUC Dockets Robert Jenks G. Catronia McCracken	610 SW Broadway, Suite 400 Portland, OR 97205 dockets@oregoncub.org bob@oregoncub.org catronia@oregoncub.org
Frontier Communications Northwest Inc. George Baker Thomson Renee Willer	1800 41 st Street Everett, WA 98201 George.thomson@ftr.com 20575 NW Von Neumann Dr., Suite 150 Beaverton, OR 97006 Renee.willer@ftr.com
Integra Telecom of Oregon Inc Douglas K Denney	1201 NE Lloyd Blvd, Suite 500 Portland, OR 97232 dkdenney@integratelecom.com
PriorityOne Telecommunications Inc PJ Koller Kelly Mutch	3420 SE Camano Drive Camano Island, WA 98282 pjkoller@p1tel.com PO Box 758 La Grande, OR 97850 kmutch@p1tel.com
Public Utility Commission of Oregon Bruce Hellebuyck Mitch Moore	PO Box 1088 Salem, OR 97308 bruce.hellebuyck@state.or.us mitch.morre@state.or.us
PUC Staff – Oregon Department of Justice Jason W. Jones	Business Activities Section 1162 Court Street NE Salem, OR 97301 Jason.w.jones@state.or.us