BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DOCKET NO. AR 566

In the Matter of Amendments to OAR 860-032-0007 to Address Call Termination Issues	**Reply Comments of tw telecom of oregon llc, Level 3 Communications, LLC, and Sprint Communications Company, LP**

Pursuant to the modified schedule established in the Hearing Procedural Report, issued September 21, 2012, **tw telecom of oregon llc**, Level 3 Communications, LLC, and Sprint Communications Company, LP (collectively "Joint Commenters") respectfully submit the following reply comments in response to the initial comments filed in this docket by other parties.

Specifically, the reply comments below address: (1) how the comments of other parties underscore the fact no Oregon rule is needed; (2) why the NARUC letter referenced by the OTA actually reinforces the federal nature of call termination issues and the need for and efficacy of FCC enforcement efforts; (3) why the dramatic expansion of vicarious liability that OTA proposes in the form of "clarifications" to proposed rules 19 and 20 would be *ultra vires*, requiring authority far beyond that expressly delegated to the Commission by the Oregon Legislature; (4) why, if the Commission were to adopt any rule amendments in this docket, Joint Commenters' proposed revised version of rule 16 is the only rule that would directly and comprehensively address only call termination issues in Oregon; and (5) why the alternative to rule 17 proposed by CenturyLink, Frontier, and OTA ("ILEC Proposed rule 17") is, like the

original version of rule 17 set forth in the Notice of Proposed Rulemaking, both flawed and unnecessary.

A. Other parties recognize that no Oregon rule is needed.

At the outset, Joint Commenters observe that a majority of the parties who filed comments agree upon ***the*** threshold issue in this docket, namely, that there simply is no need for an Oregon-specific rule to address call termination issues in the State. CenturyLink, Frontier, AT&T, OCTA, Verizon and the Joint Commenters all filed comments highlighting that the problem of call termination is best addressed at the national level. The FCC's commitment to utilize its existing authority to curb prohibited practices, coupled with its commitment to address the root cause of the problem, eliminates the need for a State level rule. In fact, these commenting parties note that a State level rule could interfere with nation-wide industry solutions to call termination issues.

B. The NARUC letter referenced by OTA reinforces the federal nature of call termination issues and effectiveness of FCC engagement.

In support of its contention that a State level call termination rule is needed, OTA has attached to its initial comments in this docket a letter to the FCC from John Burke, the Chair of the NARUC Committee on Communication. However, a close reading of the letter and the data cited therein actually reinforces that call termination issues are national in nature, require national solutions, and that FCC action is already having a positive effect. First, it is striking that a letter from NARUC – the national association of *state* regulators – highlights the need not for state action, but instead asks for "the FCC to drop the hammer."[1] In fact, Mr. Burke's letter

[1] Letter from John Burke, Chair of the NARUC Committee on Communication, to FCC Chairman Julius Genachowski, September 12, 2012.

recognizes that the FCC's engagement on the issue is already alleviating the problem. In a footnote, Mr. Burke notes that "overall call termination and call quality problems did improve since NECA's previous test call project in September 2011."[2] Certainly, the NARUC letter is not a call for state-by-state rulemaking, as OTA suggests. Rather, it is an express recognition that what is needed is FCC action, not state-specific rules.

C. The expansion of vicarious liability urged by OTA in its recommended "clarification" to proposed rule 20 would be *ultra vires*.

ORS 756.060 contains a grant of rulemaking authority to the Commission. That grant is not unlimited in scope. Oregon courts have stated that the Commission's authority "is exercised within the bounds of both the state and federal constitutions," and in addition "the express delegation of power flowing from the legislature to the commissioner contains express limitations on the broad powers to regulate utilities."[3] ORS chapters 756 and 759 define not only the extent – but the limits – of the Commission's authority. The Commission has no authority to adopt rules in areas outside of the Legislature's express grant of powers.[4] There is no Oregon statute that authorizes the Commission to alter or expand the bedrock principles of vicarious liability developed under the common law of the State of Oregon. The legislature has not delegated authority to the Commission in that area, but has retained that authority for itself. Accordingly, the Commission simply cannot act to expand a certificate holders' liability to the acts or omissions of entities who are not agents or employees or with whom the certificate holder has no contractual privity. Thus, the Commission must reject OTA's proposed "clarification."

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[2] The May 2012 National Exchange Carrier Association (NECA) study to which Mr. Burke refers in this regard shows that, contrary to OTA's claims, FCC action has already begun to abate the problem.

[3] *Publisher's Paper Co. v. Davis*, 28 Or App 189, 193, 559 P 2d 891, 894 (1977); *Pacific N.W. Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, 534 P 2d 984, *rev den* (1975).

[4] *Sabin*, 21 Or App 213; *cf. GTE Northwest, Inc. v. Public Utility Comm'n of Oregon*, 321 Or 458, 466, 900 P2d 495, 499 (Or 1995) (attempt to exercise power of eminent domain was *ultra vires* absent express grant of authority).

The Commission should also reject the original proposed rule 20 as set forth in the Notice of Proposed rulemaking as it could be read to expand vicarious liability in a manner beyond the legislatively delegated authority of this Commission.[5]

D. If the Commission were to adopt *any* call termination rule, only Joint Commenters revised proposed rule 16, set forth below, focuses specifically on intrastate call termination issues.

In the event that the Commission determines that a State level call termination rule should be adopted, Joint Commenters reiterate the touchstone principle that any new language must focus directly on the problem and only on the problem. Rule 16, as revised by Joint Commenters and OCTA, is in fact the *only* proposal that directly and comprehensively addresses intrastate call termination issues. In revised form, Joint Commenters proposed rule 16 would read as follows:

> (16) Except as otherwise allowed under state or federal law, the certificate holder must not block, choke, reduce or restrict **intrastate** traffic to another certificate holder's service area in such a manner as to attempt to or to avoid paying terminating access charges. In determining whether there has been a violation of this standard, the Commission will consider the frequency with which the violations occur, the corrective action, if any, undertaken by the certificate holder and whether the certificate holder had knowledge of the violation. The Commission will not impose penalties in the event the certificate holder did not have knowledge of the violation **or has taken reasonable corrective action.** An aggrieved party is required to notify the certificate holder in writing of any issues and parties are encouraged to resolve any issues informally before seeking relief under this rule.[6]

As modified, revised Joint Commenters' proposed rule 16 focuses on and fully addresses the issue that this docket was created to address – intrastate call termination within Oregon. OCTA's proposed modification, precluding the imposition of penalties on carriers who are

[5] Proposed rule 19 is so vague as to be subject to the same overly broad and unlawful interpretation and should, therefore, also be rejected.

[6] The language in bold differs from the proposed rule 16 set forth in the Joint Commenters' Initial Comments.

taking reasonable corrective action is prudent because it maintains the focus of the rule on fixing call termination issues that may arise, rather than unduly penalizing cooperative certificate holders. The addition of the word "intrastate" further hones the focus of this rule on call termination issues in this State that fall within the Commission's jurisdiction.

If the Commission is to adopt any rule, then adoption of Joint Commenters' proposed revised rule 16 above should be the only rule adopted. It fully addresses Oregon call termination issue without venturing beyond the scope of the problem that this expedited docket was created to address. Furthermore, Joint Commenters support Verizon's proposal that if any rules are adopted in this proceeding, the Commission expressly subject such rules to a sunset provision.[7]

E. The proposed ILEC rule 17 is overbroad, unclear, and unnecessary.

OTA, CenturyLink and Frontier have indicated support for a revision to proposed rule 17.[8] The ILEC proposed rule 17 suffers from the same fatal flaws as the original proposed rule 17 set forth in the Notice of Proposed Rulemaking in this docket.[9] First, even if the Commission were to amend its rules, the Joint Commenters' proposed revised rule 16, set forth above, would prohibit all relevant blocking, choking, restricting or reducing of intrastate traffic, thereby comprehensively addressing all intrastate call termination issues in Oregon. There is no remaining problem to be solved by either the original rule 17 or the ILEC proposed rule 17. Second, the ILEC proposed rule 17, like the original rule 17 set forth in the Notice of Proposed Rulemaking, reaches far beyond call termination issues by imposing vague and ambiguous regulations on carrier routing practices. As the Joint Commenters noted in their Initial

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[7] *See* Verizon's Opening Comments In The Call Termination Docket, filed September 28, 2012, p. 18.
[8] *See* Comments of Frontier Communications, filed September 28, 2012, pp. 1-2.
[9] *See* Initial Comments of tw telecom of oregon llc, Level 3 Communications, LLC, and Sprint Communications Company, LP (noting problems with original rule 17).

Comments, the FCC has expressly avoided interfering in carrier routing practices, stating that "nothing in this Declaratory Ruling should be construed to dictate how carriers must route their traffic."[10] The FCC's reasoning on this point is sound, and the Commission should likewise decline the invitation to expand the scope of this docket by wading into carrier routing practices.

ILEC proposed rule 17 is also flawed because it retains the undefined term "lower quality service" that appears in the original proposed rule 17. ILEC proposed rule 17 also fails to offer an objective means of measuring the service quality levels that would lead to a finding of a violation. If a certificate holder has no means of knowing whether it may be violating the rule, the rule will have little to no impact on the certificate holder's behavior, rendering the rule completely ineffective.

In sum, like the original proposed rule 17, the ILEC proposed rule 17 is overbroad, ambiguous and, above all, unnecessary. The Commission should reject it.

CONCLUSION

National action by the FCC obviates any need to amend OAR 860-032-0007. Joint Commenters continue to believe, as do most participants in this docket, that the best course of action for the Commission is to adopt none of the rule amendments proposed in the Notice of Proposed Rulemaking in this docket. OTA's comments, and the NARUC letter to the FCC attached thereto, actually reinforce the national nature of the problem and need for and efficacy of FCC action, and not State level rules.

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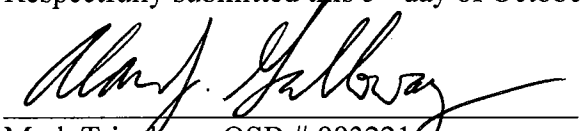
[10] *In the Matter of Developing a Unified Intercarrier Compensation Regime; Establishing Just and Reasonable Rates for Local Exchange Carriers*, CC Docket No. 01-92, WC Docket No. 07-135, Declaratory Ruling, DA 12-154 (rel. Feb. 6, 2012), ¶ 12.

In addition, Joint Commenters urge the Commission to reject the OTA's proposed clarification to rule 20 as its adoption by the Commission would be *ultra vires*. For similar reasons, the Commission must reject the original proposed rules 19 and 20 as they are vague, overbroad and subject to an expansive interpretation that would render their adoption *ultra vires* as well.

Finally, if the Commission determines that *any* amendments to its rules should be made, then Joint Commenters respectfully propose that the Commission adopt ***only*** the Joint Commenters revised proposed rule 16, set forth above, because it is the only proposal that directly and comprehensively addresses intrastate call termination in Oregon and only addresses such issues. The ILEC-proposed rule 17, like the original proposed rule 17, is unnecessary and its language fatally flawed. The Commission should therefore reject it. Any rules adopted in this proceeding should be expressly subject to a sunset provision.

Respectfully submitted this 5th day of October, 2012



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CERTIFICATE OF SERVICE
AR 566

I hereby certify that, on this 5th day of October, 2012, I served the foregoing **Reply Comments of tw telecom of oregon llc, Level 3 Communications, LLC, and Sprint Communications Company, LP** in docket AR 566 upon each party listed in the AR 566 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:

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