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	**Initial 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 comments on the proposed amendments to OAR 860-032-0007 set forth in the Notice of Proposed Rulemaking in this docket. The comments submitted herein address concerns on the need for, scope of, and specific language of the proposed rules. Specifically, the comments below address: (1) why, as a threshold matter, an Oregon-specific call termination rule is not needed and would be ineffective; and (2) how vague and ambiguous language in the proposed rules would lead to unintended consequences far beyond the scope of the perceived call termination issues the rules are ostensibly intended to remedy.

A. No Oregon rule is needed for a national issue the FCC is actively addressing.

There is no evidence of an Oregon-specific problem with call termination in rural areas; rather, the evidence suggests a national issue that the Federal Communications Commission ("FCC") is already actively addressing using existing federal authority. The FCC has recently and emphatically reiterated existing prohibitions on practices that may contribute to call termination problems.

As the FCC noted in its February 6, 2012 *Declaratory Ruling*[1], the FCC has taken a series of steps to address rural call termination issues. On September 26, 2011 – just over one year ago – the FCC created the Rural Call Completion Task Force specifically to "address and investigate the growing problem of calls to rural customers that are being delayed or failing to connect." The FCC Rural Call Completion Task Force held a workshop on October 18, 2011 to identify the causes of the problem and explore solutions.

In its landmark *Transformation Order*,[2] the FCC expressed concern about negative effects of call blocking on the national telecommunications network, and described the importance of ensuring the reliability of telephone service at a *national* level.[3] In the *Transformation Order*, the FCC also reaffirmed its "longstanding prohibition on call blocking,"[4] and reiterated that "Commission precedent provides that no carriers, *including interexchange carriers*, may block, choke, reduce or restrict traffic in any way."[5] The FCC also clarified its longstanding prohibition on blocking with respect to all traffic, including VoIP-PSTN traffic.[6]

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[1] *In the Matter of Developing an 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) ("*Declaratory Ruling*").
[2] *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*Transformation Order*").
[3] *Transformation Order*, ¶ 734.
[4] *Transformation Order*, ¶ 734 (citing FCC's Call Blocking Declaratory Ruling, 22 FCC Rcd at 11629, 11631 ¶¶ 1, 6).
[5] *Transformation Order*, ¶ 734 (emphasis added).
[6] *Transformation Order*, ¶ 973-74.

The FCC has also set up convenient consumer instructions on its website allowing customers experiencing problems to file complaints.[7]

The FCC took concrete steps in its *Transformation Order* to eliminate incentives for carriers to avoid terminating calls in rural areas. The FCC itself noted in the *Declaratory Ruling* that, by "comprehensively reforming [intercarrier compensation], the [Transformation] Order adopted a bill-and-keep methodology for all ICC traffic, and adopted a transition to gradually reduce most termination charges, which, at the end of the transition, should eliminate the primary incentives for cost-saving practices that appear to be undermining the reliability of telephone service."[8] The FCC has expressed confidence that the intercarrier compensation reforms recently put in place will resolve call termination issues. As the chairpersons of the Wireline Competition Bureau and Public Safety and Homeland Security Bureau stated in the FCC's official blog:

> The good news is that new FCC rules – which took effect on Dec. 29 – will provide both short and long-term solutions to rural call completion problems.[9]

More recently, in its February 6th *Declaratory Ruling*, the FCC explained that federal statutory obligations imposes on all carriers clearly prohibit the practices believed to underlie call termination problems. In the *Declaratory Ruling*, the FCC emphasized that both Sections 201 and 202 of the Communications Act of 1934, as amended ("the Act"), are effective tools in preventing carriers from curbing any knowing, persistent failure to complete calls.[10]

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[7] See http://www.fcc.gov/encyclopedia/problems-long-distance-or-wireless-calling-rural-areas.
[8] *Decl. Ruling*, ¶ 10 (citing *Transformation Order* at ¶¶ 736-759).
[9] Official FCC Blog, "New Year Solutions for Rural Call Completion Problems," posted by Sharon Gillett and Jamie Barnett, Chiefs of the Wireline Competition Bureau and Public Safety and Homeland Security Bureau (January 5, 2012).
[10] *Decl. Ruling*, ¶ 11.

The FCC's actions leave no doubt that the call termination issue has captured the FCC's attention and has sparked a determination to resolve the issues nationally. It is also instructive that the FCC, emphasizing its appreciation of the national scope of the problem, chose to emphasize case-by-case enforcement of *existing* federal authority in addressing the problem. This suggests that the cause of the problem is not an absence of relevant legal requirements, but non-compliance with those legal requirements, spurred by anomalies in the existing intercarrier compensation regime, the end of which is assured by the FCC's *Transformation Order*.

Just as call completion issues are not constrained within state lines, nor can effective resolution to those issues be specific to Oregon. The call termination issues in Oregon identified by Staff's investigation are symptoms of a national problem. The problem needs a national solution, and FCC actions to address the causes of the problem, not merely the symptoms, are already underway. Because the market for interexchange services is national, rather than state-specific, and because changes in practices brought on by FCC enforcement activity would therefore necessarily impact both interstate and intrastate traffic equally, any national solution will remedy the situation in Oregon as well. The FCC has recognized the spill-over effect that regulations on interstate traffic have on intrastate carriers in certain contexts.[11]

Furthermore, because of constraints on the Commission's authority over wireless carriers, any Oregon call termination rules would be limited to wireline carriers. The inability of the Commission to regulate wireless carriers renders any Commission-adopted call termination rules ineffective with respect to a significant and ever growing amount of traffic. The FCC, on the other hand, has jurisdiction over wireless carriers. The FCC enforcement efforts, therefore,

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[11] *See Transformation Order*, ¶ 839, n 1601 (suggesting that LECs that sought to block intrastate CMRS traffic could not avoid blocking interstate traffic, and therefore would run afoul of federal prohibitions).

reach all relevant traffic. This is another reason that a national remedy is needed, and why a state-specific rule is neither needed nor effective.

In sum, the FCC's commitment to use its authority to stop prohibited practices and remove the root cause of the problem means that no amendment to Oregon rules is necessary.

B. If the Commission decides to amend its rules, it should focus on adopting only the proposed provision that specifically addresses call termination issues.

In the event that the Commission deems it prudent to amend its rules, then the Joint Commenters would urge the Commission to adopt only the portion of proposed rules that actually focuses directly on the problem. With that principle as a touchstone, the Joint Commenters recommend that, in the event ***any*** rule amendments are made, the Commission adopt ***only*** a modified version of proposed rule (16), as described more fully below. The Joint Commenters recommend the Commission reject proposed rules (17), (18), (19), and (20) because those far-reaching provisions are unnecessarily broad and do not focus on termination issues. Each rule is analyzed in turn, below.

> **(16) Except as otherwise allowed under state or federal law, the certificate holder must not block, choke, reduce or restrict traffic in any way.**

The above rule appears to be lifted from the FCC's February 6, 2012 Declaratory Ruling. Because of the national nature of the telecommunications market, the Joint Commenters believe that renewed FCC emphasis on carrier compliance with federal prohibitions on blocking, choking, reducing or restricting traffic will alleviate both interstate ***and*** intrastate call termination issues. However, if the Commission is determined to adopt a rule, the Joint Commenters would support adoption of only proposed rule (16), with modifications to: 1) clearly indicate that the rule, consistent with the FCC's approach, is limited to attempts to avoid paying access charges; 2) to ensure that only proven intentional actions are deemed violations; 3) to provide carriers notice of potential issues and the opportunity to take remedial actions, and to encourage parties to work together to resolve problems short of litigation. Thus, the Joint Commenters would support, as a last resort, adoption of modified rule (16) that would read as follows:

> (16) Except as otherwise allowed under state or federal law, the certificate holder must not block, choke, reduce or restrict 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 and 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. 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.

With these modifications, the proposed rule (16) would mirror the intent of the existing federal prohibitions while also affording parties due process and directing parties to work cooperatively to resolve issues prior to bringing a complaint under the rule.

> **(17) The certificate holder must take reasonable steps to ensure that it does not adopt or perpetuate routing practices that result in lower quality service to an exchange with higher terminating access rates than like service to an exchange with lower terminating access rates.**

Because proposed rule (16) expressly prohibits all relevant forms of blocking and choking, enactment of the text in proposed rule (17) is not necessary to prevent call termination issues. In addition, the Joint Commenters note that the FCC has expressly avoided interfering in carrier routing practices in order to address call termination issues. Indeed, the FCC *Declaratory Ruling* states: "We note that nothing in this Declaratory Ruling should be construed to dictate how carriers must route their traffic."[12] The Commission should follow the lead of the FCC, and specifically address call termination issues without unnecessary forays into carrier routing practices.

Proposed rule (17) is also flawed because it uses two undefined terms, "lower quality service" and "higher quality service", without identifying any metrics upon which to objectively measure service quality. Compliance with and enforcement of this proposed rule would therefore be impracticable and contentious, if not impossible all together.

Finally, proposed rule (17) is in no way tied to proposed rule (16) or to the call termination issues ostensibly driving this rulemaking docket. Standing alone, as drafted, proposed rule (17) could be used as a tactical weapon to impose inefficient or more expensive routing practices on carriers to the benefit of other carriers seeking increased intercarrier compensation.

For all of the foregoing reasons, the Commission should reject proposed rule (17).

> **(18) The certificate holder must not engage in deceptive or misleading practices including but not limited to informing a caller that a number is not reachable or is out of service when the number is in fact reachable and in service.**

Proposed rule (18), is overly broad in scope, and vague in application. Though presumably intended only to address call termination issues by prohibiting fraudulent misrepresentations to consumers that a number is out of service or unreachable, it is defined so broadly that it prohibits a far wider sphere of activity – including legitimate activity – that has nothing at all to do with call termination issues.

[12] *Decl. Ruling*, ¶ 12.

Even with respect to informing a caller that a number is unreachable, the phrasing of the example fails to specify that to violate the proposed restriction the certificate holder must have knowledge of the true state of the line. A carrier that informs a person in good faith – based on the information at hand – that a number is not reachable should not be held liable if it turns out, after further investigation, that the number was in service, and that the carrier's information was the result of simple error. Yet the plain text of proposed rule (18) – "informing a caller that a number is not reachable or is out of service when the number is in fact reachable and in service" – makes no exception for innocent mistakes.

Even more problematic, the phrase "including but not limited to" shifts the weight of the provision to a number of undefined terms that cannot support it. Notably, the key phrase "deceptive or misleading practices" is wholly undefined. The failure to define that phrase creates significant questions, including whether or not a carrier must have *intent* to deceive or mislead in order to violate this rule. In addition, the failure to define the word "practice" raises the question of whether what is prohibited must consist of affirmative conduct, could be a mere statement, or even an omission. The proposed text similarly fails to identify the "caller" that it is trying to protect, or the specific harm that it targets.

While this docket is ostensibly focused on addressing call termination issues, there is no language whatsoever in proposed rule (18) limiting its application to call termination issues. Instead, it would appear to extend to everything from a carrier's terms and conditions and advertisements to the call detail information that must be provided by the interconnecting companies to identify traffic. In sum, the proposed text is simultaneously far-reaching in scope and impossibly vague in application.

Moreover, if the intent of the rule is to prohibit carriers from intentionally blocking calls and then deceiving consumers about it, such a practice would already be addressed by proposed rule (16), which would simply prohibit blocking. Accordingly, the Joint Commenters recommend the Commission reject this proposed rule.

> **(19) The certificate holder must take reasonable steps to ensure that the actions of any underlying carrier acting as an agent of or employed by the certificate holder used to deliver traffic on behalf of the certificate holder would not put the certificate holder in violation of any Commission rule.**

The language in proposed rule (19) is ambiguous, overbroad and unnecessary. The undefined "acting as" language renders the text uncertain. If limited to liability for actual employees and agents, then the text appears to simply restate existing vicarious liability principles. For example, ORS 759.990(7) provides that "the act, omission or failure of any officer, agent or other person acting on behalf of or employed by a telecommunications carrier and acting within the scope of the person's employment [is] in every case . . . deemed to be the act, omission or failure of such telecommunications carrier." This is similar to the federal standard discussed in the FCC's *Declaratory Ruling.* [13]

In contrast, if the phrase "acting as" is intended to reach underlying carriers, acting through arms-length contracts that are not actually employees or agents, then it amounts to a broad but uncertain expansion of liability. Such an expansion of liability would unfairly burden CLECs. Staff's comments in UM 1547 indicated that the problems identified are with certain

[13] 47 U.S.C. § 217 reads: "In construing and enforcing the provisions of this chapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person."

IXCs, not CLECs.[14] Yet an expansion of liability would impact CLECs while largely failing to reach IXCs. Furthermore, IXCs do not always maintain sufficient records to allow CLECs to trace reported problems to the IXC that may be at the root of the problem. This means that problems experienced by CLEC customers can often be traced no further than the CLEC or initial IXC to which a call is routed, but not to the IXC at the root of the problem. By the time a CLEC is able to trace a reported problem to an IXC, there may be no remaining record of the call, and no way to identify and hold accountable the offending IXC. CLECs should not be burdened with responsibility for the acts of those carriers with whom they may not even have contractual privity, or whom they may have trouble even identifying as the responsible entity for call termination failures. Furthermore, expanding the scope of vicarious liability is a legislative power that the Oregon Legislature has not delegated to this Commission. Thus, the proposed rule (19) would be *ultra vires*, and, therefore, unenforceable.

As with proposed rule (18), the text of proposed rule (19) is undefined in application, but quite broad in scope. The uncertainty again stems from undefined operative phrases. What does it mean to "act as" an employee without being one? And what, in this context, are the "reasonable steps" required? The breadth results from the fact that, while part of amendments offered in response to perceived call termination issues, the proposed rule extends far beyond call termination concerns. Nothing in the language of proposed rule (19) is clearly limited to actions taken in connection with call termination, and instead could be construed to extend to any actions taken in connection with "deliver[ing] traffic." This expedited rulemaking was not

[14] *See also* http://www.puc.state.or.us/PUC/consumer/CallTerminationFactSheetfinal.pdf (depicting problem as looping among long-distance companies (IXCs) that engage in least-cost-routing.

intended to address issues outside of call termination. Accordingly, the Joint Commenters recommend the Commission reject this proposed rule.

> **(20) The certificate holder is liable for the actions of an underlying carrier used to deliver traffic on behalf of the certificate holder, if that underlying carrier is an agent of or employed by the certificate holder and the certificate holder knew or should have known of the underlying carrier's actions.**

Proposed rule (20), which does not include the uncertain "acting as" phrase that appears in (19), nonetheless would have no effect in resolving rural call termination problems, in that it simply restates the vicarious liability principles already present in the common law and in 47 U.S.C. § 217. Accordingly, there is no call for such a rule that, if anything, would only add confusion to existing law concerning agency liability. To the extent that the provision could be interpreted to extend liability where none currently exists – and in particular to extend liability to carriers for the acts of IXCs with whom the carrier has no contractual relationship – then it suffers from the same flaws as proposed rule (19), and should rejected based on the same objections stated above in connection with that proposed rule.

II. CONCLUSION

For the foregoing reasons, amending OAR 860-032-0007 at this time is not necessary in order to correct the serious issue of rural call termination, which is already being effectively addressed by national FCC action. Indeed, there is evidence that the recent activity of the FCC is having a positive impact. Therefore, the Joint Commenters urge the Commission to adopt ***no*** rule amendments in this docket.

In the event that the Commission disagrees and finds that Oregon-specific rules are necessary to address rural call termination, then the Joint Comments recommend the Commission adhere to the limited purpose of this fast-track rulemaking by adopting ***only*** the modified version of proposed rule (16) discussed above, and rejecting proposed rules (17) through (20).

Dated this 28th day of September, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE
AR 566

I hereby certify that, on this 28th day of September, 2012, I served the foregoing **Initial 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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