BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of Amendments to	)
OAR 860-032-0007 to Address	)
Call Termination Issues	)

REPLY COMMENTS OF THE OREGON CABLE TELECOMMUNICATIONS ASSOCIATION

COMES NOW the Oregon Cable Telecommunications Association (the "OCTA") and submits these reply comments to the Public Utility Commission of Oregon (the "Commission") in response to the initial comments submitted by other parties in this proceeding.

I. The Initial Comments Demonstrate a Lack of Support for the Proposed Rules

Of those filing initial comments, only the Citizens' Utility Board of Oregon ("CUB") and the Monroe Telephone Company ("Monroe") unequivocally support the Commission's proposed rules that, if adopted, would constitute new subsections of Rule 860-032-0007. CUB and Monroe do not address the specific merits of the rules, and Monroe chooses to focus on criticizing the Federal Communications Commission's (the "FCC") intercarrier compensation reforms – the same reforms that, once implemented, will resolve the underlying causes of the call termination issues addressed in this docket.[1]

The Oregon Telecommunications Association (the "OTA"), which initially supported the Commission's proposed rules, no longer offers its unequivocal support. The OTA instead supports the adoption of modified versions of subsections (16) and (17), and no longer appears to support the adoption of proposed subsections (18) through (20).[2] Moreover, the OTA's support for the Commission's adoption of *any* rules in this docket is clearly undermined by the arguments the OTA

[1] Monroe also refers to a letter from the California Communications Association filed on August 16, 2012 with the FCC. Monroe did not attach the letter to its comments and the FCC's files do not appear to contain it.

[2] The OTA does suggest a change to subsection (20) if that provision is adopted. The suggested change, together with the OTA's proposed modifications to proposed subsections (16) and (17), are discussed below.

makes in its own comments. Specifically, the OTA's comments refer to an *ex parte* filing submitted to the FCC by the National Association of Regulatory Utility Commissioners ("NARUC") as supportive of the Commission's efforts to adopt state-specific rules. NARUC's *ex parte* filing, however, expresses no such support. NARUC's *ex parte* filing, instead, urges the FCC to undertake enforcement action ***on a case-by-case basis*** – the same argument every carrier and industry association, other than the OTA and Monroe, has urged the Commission to undertake as appropriate to address service quality issues in Oregon.

II. The Initial Comments Demonstrate Near-Consensus of Industry Participants that the Proposed Rules Are Unnecessary and Ill-Advised

Those industry participants that have provided initial comments in this proceeding are remarkably united across all industry sectors – competitive providers, interexchange carriers and incumbent local exchange carriers alike – in underscoring the following points made by the OCTA in its initial comments:

A. State specific rules are not necessary to address call termination issues.

Call completion issues are national in scope and affect both interstate and intrastate call delivery. The FCC has taken significant steps to address call termination issues, including through its *Declaratory Ruling*[3] and *Universal Service and Intercarrier Compensation Transformation Order*.[4] The communications industry as a whole has been investigating call termination issues and adopting best practices and other measures affecting call termination, through organizations such as

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

[4] *See 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 an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011).

the Alliance for Telecommunications Industry Solutions ("ATIS").[5] The FCC's and the industry's efforts should reduce and, ultimately, eliminate call termination issues.[6]

B. A patchwork of state-by-state rules is impracticable for carriers operating in multiple states.[7]

Even the OTA concedes that the Commission's proposed rules could create problems for entities operating in several states and could cause operating problems and expense.[8]

C. The Commission should take the same approach as the FCC and address issues on a case-by-case basis.[9]

The Commission has sufficient authority to regulate call termination issues through case-by-case adjudication, including through resolution of complaints between carriers.[10]

D. Proposed subsections (16) through (20) are overbroad, vague and, if adopted, would lead to unintended, harmful consequences.[11]

Proposed subsection (16) is overbroad and incorrectly imposes strict liability for violations. The subsection would prohibit even reasonable practices in which carriers engage to safeguard their networks. The subsection does not require that carriers have knowledge (or that they should know) of call completion problems or they have a pattern or practice of engaging in acts or omissions that

[5] Comments of Frontier Communications (Frontier Communications Northwest Inc. and Citizens Telecommunications Company of Oregon d/b/a Frontier Communications of Oregon) ("Frontier"), p. 1. CenturyLink's (United Telephone of the Northwest, CenturyTel of Oregon, CenturyTel of Eastern Oregon, and Qwest Corporation) Initial Comments ("CenturyLink"), p. 1. Initial Comments of tw telecom of oregon llc, Level 3 Communications, LLC and Sprint Communications Company, LP ("Joint Commenters"), pp. 1, 4-5. Verizon's (MCI Communications Services, Inc. d/b/a Verizon Business Services and MCImetro Access Transmission Services LLC d/b/a Verizon Access) Opening Comments in the Call Termination Docket ("Verizon"), p. 3-9, 12. AT&T Comments ("AT&T"), pp. 5-7.

[6] Verizon, pp. 2-3, 10. *See* AT&T, pp. 4-5, 7.

[7] Frontier, p. 1.

[8] Comments of the Oregon Telecommunications Association, p. 2. *See* AT&T, pp. 1-2.

[9] CenturyLink, pp. 2-3. *See* Joint Commenters, pp. 1, 4.

[10] Joint Commenters, p. 4.

[11] Joint Commenters, p. 1. Verizon, p. 3. AT&T, pp. 7-8.

allow or effectively allow such conditions to exist. The proposed subsection instead would invoke liability even if the carrier did not know of or inadvertently engaged in violations.[12]

Proposed subsection (17) is unnecessary, given that the subject matter of proposed subsection (16) concerns the call termination practices that are the focus of this proceeding.[13] With respect to call routing generally, and proposed subsection (17) specifically, the only legitimate basis for exercising the Commission's authority consistently with the *Declaratory Ruling* is to address the failure of call completion.[14] Proposed subsection (17) also is flawed because it contains two undefined terms, "lower quality service" and "higher quality service," without identifying any metrics upon which to objectively measure service quality.[15] Compliance with and enforcement of the proposed rule would therefore be impracticable, if not impossible.[16]

Proposed subsection (18) is beyond the announced purpose of this proceeding and the Commission's jurisdiction. Deceptive practices are regulated under Oregon law other than through Commission action and there is no statutory authority in Chapters 756 or 759 of the Oregon Revised Statutes to regulate such practices.[17] The proposed subsection also is overbroad in scope and vague in application. Though presumably intended only to address call termination issues by prohibiting fraudulent misrepresentations to consumers that a telephone number is out of service or unreachable, the proposed subsection is drafted so broadly that it prohibits a far wider sphere of activity, including activity that has nothing at all to do with call termination issues.[18]

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[12] Verizon, pp. 12-14. *See* AT&T, p. 7.

[13] Joint Commenters, pp. 6-7.

[14] Verizon, p. 14. CenturyLink, p. 3.

[15] Joint Commenters, p. 7. Verizon, p. 14.

[16] Joint Commenters, p. 7.

[17] CenturyLink, pp. 3-4. Verizon, p. 15.

[18] Joint Commenters, pp. 7-9.

With respect to the proposed rules generally, and proposed subsection (19) specifically, there is no statutory authority for the Commission to change the law of agency by declaring that underlying carriers are agents or employees of certificated service providers. As discussed in section III below, there can be no agency relationship in the absence of the ability to "control" the actions of another. The only "control" that certificated carriers may exercise over the actions of their underlying carriers is through contracts. However, the ability to "control" the actions of others through contracts is constrained by the commercial bargaining power of the parties. Contracts also cannot be unilaterally modified and in many instances cannot be readily terminated for conduct in breach of the agreement. [19] Moreover, even the best-drafted contract cannot govern the actions of remote entities. Although a carrier may contract with one or more underlying carriers to route traffic on its behalf, such underlying carriers may utilize the services obtained through one or more third-tier carriers. Such third tier carriers may then arrange with other carriers for the continued transmission of traffic to its ultimate hand-off to a terminating carrier. The proposed rules potentially would impose liability on a certificated provider for the actions of such third-tier or remote carriers that might route a portion of the certificated carrier's traffic. If liability were to be imposed in such situations, subsection (19) could unjustly impose liability on a carrier where it has no control over (*i.e.*, contractual privity with) an underlying provider, or does not even know the identity of the other providers. Moreover, underlying carriers may engage in willful or negligent behavior for which the certificated entity should not be held accountable as a matter of law. Creating liability in the foregoing circumstances would be manifestly unfair and unreasonable.[20]

Subsection (19) also would require a certificate holder to "ensure" that the actions of any such "agent" or underlying carrier "would not put the certificate holder in violation of any

[19] *See* CenturyLink, p. 4.,Joint Commenters, pp. 9-11, Verizon, p. 16.

[20] Verizon, p. 16. Joint Commenters, pp. 9-11.

Commission rule." Such a requirement would extend far beyond the limited scope of this proceeding, and potentially could give rise to all sorts of allegations and claims that go well beyond the call termination issues addressed in this proceeding.[21]

Finally, proposed subsection (20) suffers from the same flaws as proposed rule (19) and should be rejected based for the same reasons. Proposed subsection (20) would incorrectly hold a carrier strictly liable, even when a certificate holder takes corrective action once it becomes aware of a problem, all of which is inconsistent with FCC policy.[22] The OTA seeks to exacerbate the flawed nature of subsection (20) by contending that the subsection, if adopted, should expressly *include* strict liability for independent contractors and subcontractors.[23] However, the flaws of subsection (20) can only be remedied through elimination of the proposal, not by widening its scope to stray even farther afield from the constraints imposed on the Commission by law.

III. If the Commission Proceeds with Adopting Rules, the OCTA's Modifications to Subsection (16) Should Be Adopted and the Subsection Should Be Subject to Review and Sunset

The OCTA agrees with the Joint Commenters that, if the Commission adopts rules in this proceeding, only subsection (16), with modifications, is appropriate for consideration. As stated by the Joint Commenters, subsection (16), if adopted, should: (1) be limited to attempts to avoid paying access charges; (2) ensure that only proven intentional actions are deemed violations; and (3) provide carriers notice of potential issues and the opportunity to take remedial actions, and encourage parties to work together to resolve problems prior to the commencement of litigation.

Hence, the OCTA conditionally proposes the following language regarding subsection (16), which is nearly identical to that suggested by the Joint Commenters in their initial comments:

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[21] Verizon, pp. 16-17.

[22] Joint Commenters, p. 11. Verizon, pp. 16-18.

[23] OTA, p. 3.

> 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.[24]

Although similar to the modifications to subsection (16) proposed by CenturyLink, Frontier and the OTA,[25] the OCTA's suggested language for subsection (16) differs from those parties' proposed language in the following significant respects:

A. <u>The language proposed by CenturyLink, Frontier and the OTA would impermissibly shift the burden in a penalty proceeding to an entity to demonstrate that it should not be fined</u>.

The OCTA does not endorse, and the Commission is not legally able to adopt, the phrase "can demonstrate that" in subsection (16). The Commission does not have the authority to shift the burden of proof to the entity defending a penalty action. The Commission's statutory enforcement authority regarding penalties is defined and circumscribed by Or. Rev. Stat. §§ 759.990 and 756.990, which place the burden on the Commission to demonstrate that there has been a rule violation justifying the imposition of penalties.

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[24] The OCTA's proposed language is identical to that proposed by the OCTA in its initial comments, except for the addition of "intrastate" in the first sentence of subsection (16) as modified.

[25] CenturyLink, Frontier and the OTA propose the following language for subsection (16):

> Except to the extent authorized by law, the certificate holder shall not, directly or indirectly, 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 to invoke a penalty for 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 can demonstrate that it did not have knowledge of the violation. An aggrieved party is required to notify the certificate holder of any issues and parties are encouraged to resolve any issues informally before seeking relief under this rule.

B. Premising a violation on "indirect" responsibility would expand carriers' liability beyond the scope of their responsibility as defined by state law.

The proposed language of CenturyLink, Frontier and the OTA would effectively invoke strict liability, even if the certificated carrier did not itself request or engage in the activity the rule seeks to prohibit. Moreover, any rule adopted by the Commission cannot impose penalties for conduct that is not within the statutory scope of responsibility of a certificated entity. Or. Rev. Stat. § 759.990(7) limits the liability of a respondent in a penalty proceeding to:

> 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*.

(Emphasis added). Or. Rev. Stat. § 756.990(6) states that:

> the act, omission or failure of any *officer, agent or other person acting for* or employed by any public utility, telecommunications utility or other person subject to the jurisdiction of the commission *acting within the scope of the person's employment* shall in every case be deemed to be the act, omission or failure of [the] person subject to the jurisdiction of the commission.

(Emphasis added). Thus, Oregon law limits responsibility of carriers to the actions of agents and employees acting within the scope of their employment. Thus, there must be both an agency relationship and an action within the scope of that relationship before liability can be assessed as a result of the action. As stated recently by the Supreme Court of Oregon,

> Classically, an agency relationship 'results from the manifestation of consent by one person to another that the other shall act on behalf and subject to his control, and consent by the other so to act.' The agency relationship can arise either from actual consent (express or implied) or from the appearance of such consent. In either circumstance, the principal is bound by or otherwise responsible for the actual or apparent agent's acts only if the acts are within the scope of what the agent is actually or apparently authorized to do.[26]

The Commission cannot impose liability for the actions of remote underlying carriers with which the certificated carrier has no contractual relationship and over which a certificated carrier has no

[26] *Eads v. Borman*, 351 Or. 729, 277 P. 503 (*en banc* 2012). (Citations omitted.)

control. Because subsection (16) as proposed by CenturyLink, Frontier and the OTA expands the scope of responsibility beyond that imposed by applicable statutes, it is impermissible.

C. Reasonable corrective action should be an additional reason to not impose sanctions.

The reasonable efforts of certificated carriers to mitigate call completion complaints should be considered, in addition to the frequency of violations, in an enforcement proceeding. Any rule should offer incentives to encourage the resolution of disputes. The language suggested by the OCTA recognizes these policy considerations and parallels the inclusion of similar language elsewhere in subsection (16) as proposed by CenturyLink, Frontier and the OTA.

D. The context of subsection (16) is the Commission's certification authority, not the Commission's penalty authority, which has been established by statute.

The context of Rule 860-032-0007, and the stated reason for this proceeding, is certification, not penalties. Accordingly, the OCTA proposes that the second sentence of subsection (16) read: "In determining whether there has been a violation of this standard," rather than "whether to invoke a penalty." Any penalty actions should be adjudicated pursuant to Or. Rev. Stat. § 759.990 and other statutory authority.

E. The Commission's jurisdiction is limited to intrastate traffic.

The OTA has added "intrastate" to the first sentence of subsection (16) as modified. The authority of the Commission to certificate and, therefore, to regulate, telecommunications service is limited to the intrastate jurisdiction. *See* Or. Rev. Stat. § 759.005(2) (definition of intrastate telecommunications service); Or. Rev. Stat. §§ 759.020(1) and 759.025 (authority of the Commission to issue certificates limited to intrastate telecommunications service); and Or. Rev. Stat. §§ 759.405(2) and 759.410(3) (price cap regulation).

F. Notification of a dispute should be in writing.

Without requiring that notification of disputes be in writing, it is possible that the "notification" as proposed by CenturyLink, Frontier and the OTA would not guarantee the attention and efforts at resolution that such disputes merit.

For the foregoing reasons, OCTA's modifications are essential to conform the language proposed by CenturyLink, Frontier and the OTA to law and sound policy.

G. If the Commission adopts a call completion rule, it should be subject to a sunset provision within 2 years.

The OCTA concurs with Verizon that any call termination rule have a "sunset" provision.[27] The provision would provide that within a two (2) year period of adoption of subsection (16) as modified – the period within which intrastate terminating switched access charges will transition to parity with interstate terminating switched access charges – the Commission will determine whether the subsection will remain in effect and, if so, whether any revisions are necessary. The OCTA's proposed language for the provision, which could be set forth as part of subsection (16) or in a separate rule, is as follows:

> Within two years of adoption of subsection (16), the Commission will determine, after completing a docket, whether the subsection should be revoked or allowed to continue in effect.

This language would assure the Commission of its ability to monitor and make appropriate changes to rule language as the conditions that created call termination issues are addressed nationally and in Oregon.

[27] Verizon, p. 18.

IV. If the Commission Proceeds with Adopting Rules, Subsection (17) as Proposed by CenturyLink, Frontier and the Oregon Telecommunications Association Should Not Be Adopted

As proposed by CenturyLink, Frontier and the OTA, subsection (17) would be modified to state:

> The certificate holder must take reasonable steps to ensure that it does not adopt or perpetuate routing practices that result in lower quality service, related to the termination of calls, to an exchange with higher terminating access rates than like service to an exchange with lower terminating access rates. In determining whether to invoke a penalty for 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 adoption of subsection (17) – with or without modifications – is unnecessary and would be harmful. If properly worded, subsection (16) would address the reported problems that are the focus of this rulemaking, including call "looping" (the failure of calls to terminate to an end user) – which, as a call termination issue, is a form of traffic restriction – and other "routing" issues. Subsection (17) would be redundant of such efforts to govern call termination issues, and, therefore, as discussed by the Joint Commenters, could be manipulated to impose inefficient or more expensive routing practices to the benefit of carriers seeking to sustain existing intercarrier compensation streams.[28]

The extent to which the Commission can or should impose rules addressing routing is highly questionable. As a preliminary consideration, as discussed above the Commission's jurisdiction is circumscribed to calls originating and terminating within Oregon. Moreover, the FCC noted that "nothing in th[e] *Declaratory Ruling* should be construed to dictate how carriers must route their

[28] Joint Commenters, p. 7.

traffic."[29] If the Commission is intent on adopting rules – as distinguished from the case-by-case enforcement mechanism adopted by the FCC – the rules should not be stated so broadly that they will inhibit facilities-based service, and they should be clear that routing *per se* is not prohibited.

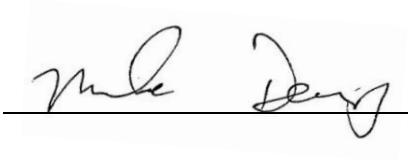
However, the language as proposed by CenturyLink, Frontier and the OTA does not address the flaws in the Commission's proposed subsection (17). Even with the modifications proposed by those parties to the Commission's language, subsection (17) remains a strict liability rule, requiring carriers to "ensure" that no violations occur. Unlike the language proposed by CenturyLink, Frontier and the OTA for subsection (16), their proposed subsection (17) does not require volitional conduct or even knowledge for actions to be deemed rule violations. Subsection (17) continues to go far beyond the scope of responsibility created by existing agency law and the limitations of liability for the actions of agents and employees, discussed with respect to subsection (16), of Or. Rev. Stat. §§ 759.990 and 756.990. Finally, subsection (17), even as modified by CenturyLink, Frontier and the OTA, continues to use the ambiguous term, "lower quality service." Because "lower quality service" can be determined in a number of respects, and there is no requirement that "lower quality service" be materially significant in duration or effect, subsection (17) is capable of multiple and conflicting interpretations, some of which have nothing to do with call termination. Subsection (17) also continues to lack any recognition of the certificated carrier's reasonable attempts to engage in corrective action or attempts to resolve issues. For all of these reasons, the OCTA urges the Commission to reject subsection (17), whether in the form proposed by the Commission or as proposed by CenturyLink, Frontier and the OTA.

[29] *Declaratory Ruling*, para. 12.

V. Conclusion

The majority of commenters urge the Commission not to adopt rules at this time. Importantly, the record demonstrates little support for the Commission's proposed rules. If the Commission nevertheless proceeds with adopting rules, the OCTA recommends the language as proposed by CenturyLink, Frontier and the OTA for subsection (16), but only with the additional limitations, safeguards and sunset provision discussed herein.

Respectfully submitted this 5th day of October, 2012.

By: 

CERTIFICATE OF SERVICE
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I hereby certify that the attached Comments from the Oregon Cable Telecommunications Association (OCTA) was served on October 5, 2012, by email to the following parties:

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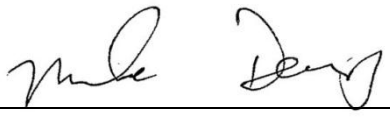
DATED this 5th day of October, 2012

Oregon Cable Telecommunications Association

By: 

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