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**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UM 1677**

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

JOINT PARTIES' RESPONSE TO LEAGUE OF  
OREGON CITIES' OPPOSITION TO  
FRONTIER'S MOTION FOR AN ORDER  
APPROVING THE STIPULATION AND PRICE  
PLAN

Three of the Joint Parties in this proceeding (Frontier, the Public Utility Commission Staff, and the Citizens' Utility Board of Oregon (CUB), herein the Joint Parties) submit this response to the League of Oregon Cities' (League) opposition to the Joint Parties' stipulation and price plan.

**THE LEAGUE MISREADS ORS § 183.335(5).**

The League cites ORS § 183.335(5) as a primary reason why the Commission may not waive the application of OAR 860-022-0042. However, that section of the statute refers to the situation where an agency is adopting, amending or suspending a rule without prior notice or hearing. It does not address the situation where, as here, a petitioner is asking for a waiver in a fully noticed and (with regard to this issue) contested proceeding. In this docket, the Joint Parties are not proposing a waiver without prior notice; on the contrary, the League has had full notice of the initiation of this petition and has intervened in the docket in due course.<sup>1</sup> Administrative Due Process requires both notice and the opportunity to respond. In this proceeding, the League has had both. The League had notice of the two settlement conferences held prior to their intervention and would have been able to attend and participate. The League's petition to intervene was followed the next day by a document titled "Comments," which stated grounds for intervention consistent with its position expressed in its Opposition here. Despite its expressed concerns regarding the request for waiver within the context of this docket and stated

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<sup>1</sup> See Administrative Law Judge ruling dated February 12, 2014, titled: Disposition: Petition to Intervene Granted.

1 preference for an entirely separate rulemaking procedure, the League has made full use of its due  
2 process rights and is a party to a contested case within the meaning of both those terms as  
3 defined in the Oregon Administrative Procedures Act.<sup>2</sup> Notably, the League does not address a  
4 need for separate proceedings for the several other rules which are the subject of a waiver request  
5 in this docket. The Joint Parties contend that it is entirely appropriate to consider the request for  
6 waiver of OAR 860-022-0042 within the context of this docket.

7 The League cites two cases to bolster its argument that the Commission should not  
8 consider a waiver in this proceeding. Neither of the League's cited cases deal with a situation  
9 factually similar to the one here: where the Petitioners seek a prospective waiver of a rule from  
10 the Agency, in accordance with the Agency's rules, and with notice and opportunity to respond  
11 to the party in opposition. In fact, both Wegroup and Harsh Investment, the cases cited by the  
12 League, deal with factual situations where the Plaintiffs sought a judicial finding of waiver of an  
13 agency rule retroactively, after incidents where the Plaintiffs had failed to comply with a rule  
14 and/or ask for a waiver prior to taking an action. Here, the Joint Parties are asking for a  
15 prospective waiver, not of state contracting rules as in the cited cases, but of a Commission rule  
16 that does not explicitly make clear where Frontier's customers' money is actually going in an  
17 increasingly competitive environment. Despite the League's insistence otherwise, the Joint  
18 Parties are not requesting the adoption, amendment, or suspension of a rule. The League points  
19 to ORS § 183.335(5) as being a prerequisite for the consideration of a rule waiver, but their  
20 reliance is misplaced. ORS § 183.335(5) addresses the situation where an Agency is adopting,  
21 amending, or suspending a rule without prior notice or hearing. The Joint Parties are not asking  
22 for a no-notice adoption, amendment, or suspension of a rule. A waiver is a different matter, and  
23 is addressed and permitted by the Commission's rules.

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<sup>2</sup> ORS § 183.310 (2) and (7).



1           **THE COMMISSION HAS AUTHORITY TO WAIVE DIVISION 22 RULES**

2           The League argues that the Commission lacks authority to waive OAR 860-022-0042.

3           That position is directly at odds with the unambiguous language in OAR 860-022-0000, which  
4           reads in pertinent part at (2):

5                     “Upon request or its own motion, the Commission may waive any of the Division  
6                     022 rules for good cause shown. A request for waiver must be made in writing,  
                      unless otherwise allowed by the Commission.”

7           The Joint Parties have filed, as part of the Stipulation and proposed Price Plan, a written  
8           request for waiver of a number of rules, including OAR 860-022-0042. Despite its contention  
9           that the Commission has no statutory authority to waive OAR 860-022-0042, the League cites no  
10          evidence that they timely and properly challenged the Commission’s rule at OAR 860-022-0000.  
11          The Commission has undisputed statutory authority to adopt rules and regulations as granted by  
12          ORS § 756.060. Therefore, the Commission has authority to exercise its discretion to waive any  
13          Division 22 rule under OAR 860-022-0000.

14           **THE LEAGUE INCORRECTLY IMPLIES THAT NOTHING HAS CHANGED WITH**  
15           **RESPECT TO THE TELECOMMUNICATIONS INDUSTRY SINCE THE**  
                      **COMMISSION’S ORDER IN DOCKET AR 218**

16          Manifold changes have occurred in the telecommunications industry since 1990, the date  
17          Order No. 90-1031 (“Order”) was issued. At the time the Order was issued and the rule adopted,  
18          local exchange telecommunications service was still regulated as a monopoly service.<sup>3</sup>  
19          Ratepayers had no choice in which company to choose as their local telephone provider, because  
20          there was no local competition. That has changed dramatically over the last quarter of a century.  
21          Currently, Frontier has less than forty percent market share.<sup>4</sup> In essence, the League would have  
22          the Commission ignore the fundamental shifts in the telecommunications industry over the  
23          quarter of a century and their argument implies that because the Commission made a finding in  
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25          <sup>3</sup> At the time of the Order and rule, “[t]elecommunications utilities make use of the streets and highways  
26          within Oregon’s municipalities to provide local exchange service to at least 96 percent of the access in the  
                state, and to provide interexchange/toll service to an even higher percentage of lines.”

<sup>4</sup> See: Frontier's Amended Petition for Approval of Price Plan Pursuant to ORS 759.255, pp. 3 – 6.

1 1990, the Commission is somehow estopped from waiving the rule it created in consideration of  
2 changed and current facts. In this instance, the Joint Parties are requesting waiver of a rule for  
3 good cause shown because circumstances have changed and the parties are proposing a change in  
4 the form of regulation.

5 **GOOD CAUSE EXISTS TO WAIVE THE RULE**

6 As OAR 860-022-0000 recites, waiver of the Division 22 rules requires good cause. The  
7 Joint Parties offer the following examples of good cause to waive the rule:

8 1. Transparency. At the time the rule was established, customers did not have choices  
9 regarding from which provider to order services. However, today many Oregon customers have  
10 choices. In an environment with more customer choices, it is important that customers have  
11 accurate information, including billing information, to make informed choices.

12 2. Leveling the Playing Field. Another primary reason to waive the rule is to level the  
13 playing field between Frontier and its competitors, who are also subject to paying Privilege  
14 Taxes but do not have the requirement to have a portion of those fees reflected in the base price  
15 of their services, as does Frontier. Competitors may pass along the entirety of these taxes and  
16 fees to their customers as a separate line item. The League argues that there are no references to  
17 an equal playing field in Order No. 90-1031. The Joint Parties point out that a number of  
18 references in ORS § 759.255 implicate the concept of a level playing field in a competitive  
19 environment, particularly the considerations in Section (2):

20 “(2) Prior to granting a petition to approve a plan under subsection (1) of this  
21 section, the commission must find that the plan is in the public interest. In making  
22 its determination the commission shall consider, among other matters, whether the  
23 plan:

- 23 (a) Ensures prices for telecommunications services that are just and reasonable;
- 24 (b) Ensures high quality of existing telecommunications services and makes new  
25 services available;
- 26 (c) Maintains the appropriate balance between the need for regulation and  
27 competition; and
- (d) Simplifies regulation.”



1           3. Disclosure of the Privilege Tax is Consistent with the Price Plan Statute and the  
2 Commission’s Mission. It ensures safe and reliable utility services are provided to consumers at  
3 just and reasonable rates “*while fostering the use of competitive markets to achieve these*  
4 *objectives.*” Granting the requested waiver balances the need for regulation with the realities of  
5 competition, and would simplify regulation (ORS § 759.255(c) and (d)).

6           4. A Waiver Does Not Impact Cities’ Ability to Collect the Tax. The amount is capped  
7 at 7 percent by ORS § 221.515. The waiver does nothing to limit that collection, but only gives  
8 more accurate information to consumers in a competitive environment.

9           5. If the Commission Grants Frontier’s Petition, Traditional Rate Base Regulation Will  
10 Not Apply. The League appears to ignore the impact of ORS § 759.255 on the concept of the  
11 rate base, on which their argument relies. Frontier’s initial petition and the subsequent  
12 negotiation resulting in the Stipulation and Price Plan will, if ultimately approved by the  
13 Commission, have the effect of divorcing the regulation of prices from consideration of  
14 Frontier’s return on investment. There will be no rate-making for, or rate of return guaranteed to  
15 Frontier if the Stipulation and Price Plan are approved. The statute goes on to preclude the  
16 Commission from considering return on investment at all during the operation of the approved  
17 plan, and allows the Commission to waive compliance by the petitioning carrier with a number  
18 of other traditional rate-regulation statutes.<sup>5</sup> Clearly, the Commission, the Legislature, and the  
19 Industry have all moved significantly forward since 1990 with regard to traditional rate  
20 regulation and the presence of competition in the local exchange market.

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<sup>5</sup> ORS 759.255, §§ (3), (5).

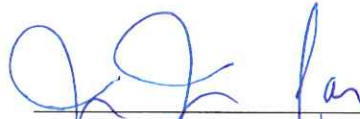
1 CONCLUSION

2 The Joint Parties submit, despite arguments from the League, that the Commission has  
3 wide discretion to waive Division 22 rules, including OAR 860-022-0042. Further, the  
4 Commission has provided more than sufficient administrative due process to the League with  
5 regard to its consideration of whether or not to grant the waiver. The Joint Parties are not  
6 stipulating to the adoption, amendment, or suspension of a rule without notice. Instead, the Joint  
7 Parties are stipulating that (among other powers) the Commission has the authority to consider  
8 waiving a number of rules in this docket, especially those in Division 22. Finally, the Joint  
9 Parties have submitted a number of examples of good cause to waive the rule. Therefore, the  
10 Joint Parties respectfully request the Commission dismiss the League's Opposition and grant  
11 Frontier's Motion for an Order Approving the Stipulation and Price Plan.

12 DATED this 6<sup>th</sup> day of June 2014.

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**CERTIFICATE OF SERVICE**

I certify that on June 6, 2014, I served the foregoing UM 1677 Joint Motion upon all parties of record in this proceeding by delivering a copy by electronic mail only as all parties waive paper service.

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