

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of

THE OREGON TELECOMMUNICATIONS
ASSOCIATION

Petition to Amend OAR 860-032-0190,
Definition of Basic Telephone Service to
Include Access to Broadband Service.

Docket No. AR 604

**OCTA COMMENTS IN OPPOSITION
TO OTA PETITION TO AMEND THE
DEFINITION OF BASIC TELEPHONE
SERVICE TO INCLUDE ACCESS TO
BROADBAND SERVICE**

INTRODUCTION

The Oregon Cable Telecommunications Association (“OCTA”) appreciates this opportunity to comment on the Petition filed by the Oregon Telecommunications Association (“OTA Petition”). The OTA Petition requests that the Commission amend the definition of “basic telephone service” in Oregon Administrative Rule (“OAR”) 860-032-0190 to include the term “access to broadband.” For the reasons set forth below, OCTA opposes the OTA Petition and urges the Commission to deny the OTA Petition and close Docket No. AR 604.

COMMENTS IN OPPOSITION

I. The Commission Should Deny the OTA Petition for the Same Reasons It Denied OTA’s 2013 Request for the Exact Same Relief.

The OTA Petition is not new, but rather a repeat of a nearly identical petition filed with the Commission by OTA on November 4, 2013, which the Commission denied.¹ That petition was considered by the Commission at two public meetings, on January 27, 2014 and March 4, 2014, in Docket Nos. AR 577 and UM 1481. At the January 27, 2014 public meeting, the Commission adopted Staff’s recommendation to deny the OTA petition and directed Staff to continue to examine the issues and make additional recommendations at the March 4, 2014

¹ Order No. 14-113 at 2 (Docket Nos. AR 577, UM 1481, April 7, 2014).

public meeting.²

At the March 4, 2014 public meeting, the Commission declined to open a rulemaking to amend OAR 860-032-0190 to include access to broadband in the definition of basic telephone service.³ This decision was codified in Order No. 14-113, entered April 7, 2014.⁴ The Commission cited three primary reasons for the denial that equally apply to the present OTA Petition: (1) there was insufficient evidence to cause the Commission to adopt the proposed change; (2) the Oregon Legislature had indicated its intent to address universally available broadband access via legislation, and (3) rulemakings at the federal level could impact the issue as it relates to the Oregon Universal Service Fund (“OUSF”).⁵

Rather than attempt to regulate broadband, the Commission directed the Administrative Law Judge (“ALJ”) in Docket No. UM 1481 “to take such steps as necessary to produce a report

² Id.

³ The OTA Petition acknowledges in a footnote that “the issue had been considered in AR 577,” but tries to distinguish the earlier petition by noting that it predated: (1) FCC “action to redefine the language for federal universal service support”; and (2) OUSF funding issues being dealt with in UM 1481. OTA Petition at 17 n 27. These purported “distinctions” are illusory at best and disingenuous at worst. First, the FCC’s “redefinition” of federal universal service support was accompanied by a complete overhaul of the federal universal service funding mechanism, including the creation of narrowly targeted funding for broadband facilities investment where there is no unsubsidized competitor, reverse auctions in which service providers bid for the amount of support required to serve an area without broadband, and other reforms, none of which would accompany the rule change that the OTA Petition proposes for the OUSF. *See generally, In re Connect Am. Fund, 26 FCC Rcd 17663 (“USF Reform Order”).* Furthermore, the FCC has made clear that it has forborne for now from extending federal universal service contribution requirements to broadband Internet access service. *Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5835 ¶¶ 488-489 (2015) (“2015 Open Internet Order”).* Second, while Order No. 16-093 in Docket No. UM 1481 Phase III adopts a stipulation that caps OUSF distributions and the OUSF surcharge for a five-year period, that stipulation “also recommends the Commission initiate a new proceeding in 2019 to review the OUSF and issue a final order prior to the end of the term of the * * * [s]tipulation.” Order No. 16-093 at 2. The OTA Petition would instead have the Commission predetermine issues that have been reserved for consideration in the Commission’s contemplated 2019 comprehensive review of the OUSF. Finally, the stipulation also allows “any Party to file a petition to request review of the Stipulation if there is a substantive change in Oregon law that materially affects the terms of th[e] Stipulation * * *.” *Id.* at App. A, p. 4 of 12. While OCTA does not believe the rule amendment the OTA Petition seeks would trigger this provision, absent an express commitment by OTA that it will not file such a petition in the event the Commission amends the rule, OTA’s representation that its requested rule amendment will not have an adverse effect on the OUSF must be viewed with skepticism. *See* OTA Petition at 13-14.

⁴ Order No. 14-113 at 3.

⁵ *Id.* at 2-3.

on the status and outlook of broadband availability in rural telephone exchange service areas and related issues.”⁶ The Commission ordered the production of that report in Docket No. UM 1481 because:

Issues relating to the OUSF and the associated carrier compensation, sources and amounts of revenue, eligible services, and the fund’s long term purpose and goals are currently being investigated in docket UM 1481. The current status of broadband service in rural areas is integrally related to these issues, and parties that could provide relevant information are already actively participating in that docket. They are in a position to gather information that the Commission will be able to use in its analysis of the issues in UM 1481 and in advising the legislature on broadband access policy.⁷

The Commission, thus, recognized that it plays an advisory role to the Legislature on broadband policy because the Commission can only act within the scope of the authority delegated to it by the Legislature.⁸ This overriding principle has not changed and continues to dictate that the Commission reject the OTA Petition.⁹

II. State Law Prohibits the Commission From Granting the OTA Petition.

While the Legislature has delegated authority to the Commission to define the term “basic telephone service,” it has not authorized the Commission to expand the scope of that definition to include “access to broadband.” In fact, the Legislature has passed a number of statutory provisions that strictly limit the Commission’s use of OUSF in the context of broadband services. The Legislature has made clear that this Commission can only use universal

⁶ Id.

⁷ Id.

⁸ See *Beaver Creek Cooperative Telephone v. PUC*, 162 Or App 258, 262, 986 P2d 592 (1999)(“a]s a creature of statute, PUC derives authority from its enabling legislation and from general administrative laws); see also *1000 Friends of Oregon v. LCDC (Clatsop Co.)*, 301 Or 622, 627, 724 P2d 805 (1986).

⁹ The OTA has shared with OCTA a draft OTA Bill that would amend the OUSF statute, ORS 759.425, to address access to broadband. OCTA reserves its right to address as appropriate any bill that is formally introduced to the Legislature.

service funds for broadband mapping purposes.¹⁰ In Docket No. AR 577, in response to the nearly identical 2013 OTA petition, OCTA thoroughly briefed the limitations that state law places on the Commission’s authority in this context and incorporates those arguments herein by reference.¹¹ Ultimately, the Commission rejected OTA’s request for the Commission to exceed its authority under state law. And the Commission should likewise reject the identical request in the current OTA Petition.

III. Federal Law Prohibits the Commission From Granting the OTA Petition.

Even assuming *arguendo* that state law were to provide the Commission with sufficient authority to grant the OTA Petition, the amended rule would impermissibly conflict with federal law and regulations and would therefore be preempted. Broadband Internet Access Service (“BIAS”) is a jurisdictionally interstate service subject to the authority of the Federal Communications Commission (“FCC”) and its “comprehensive regulatory framework governing broadband Internet access services nationwide.”¹² In contrast, basic telephone service is, by definition, local—and all of its elements, as currently defined under Oregon law, are *intrastate* elements over which the Commission has primary jurisdiction (*e.g.*, 911, intrastate relay, Operator Services, and access to intrastate long distance).¹³

¹⁰ See *e.g.*, ORS 759.425(6).

¹¹ See “OCTA Comments In Opposition To OTA Petition to Amend the Definition of Basic Telephone Service,” filed December 6, 2013, in Docket No. AR 577.

¹² *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5803 ¶¶ 431, 433 (2015) (“2015 Open Internet Order”). There, the FCC “announce[d] [its] firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt.” *Id.* ¶ 433. The FCC also “ma[d]e clear that the states are bound by our forbearance decisions,” which declined to subject BIAS providers to “a swath of utility-style provisions,” including 27 provisions of Title II of the federal Communications Act and more than 700 codified FCC rules. *Id.* at ¶¶ 38, 51.

¹³ Access to long distance service in the definition must be read to include only *intrastate* long distance, consistent with the decision in *AT&T Communs., Inc. v. Eachus*, 174 F. Supp. 2d 1119, 1125 (D. Or. 2001) that struck down as preempted by federal law the Commission’s attempt to apply the OUSF surcharge to interstate service revenues.

Any attempt to redefine intrastate basic telephone service to include access to broadband would directly conflict with and frustrate the purpose of federal regulations and policy goals. As noted above, the FCC's *USF Reform Order* adopted an overarching federal policy judgment for the funding of broadband facilities investment by targeting support to specific geographic areas, prohibiting the use of federal USF in areas served by an unsubsidized provider of broadband service, and allowing for reverse auctions to allocate USF support in certain circumstances.¹⁴ The OTA Petition would conflict with these federal policy judgments by subjecting BIAS to utility-style regulatory treatment at the state level and by supplanting the FCC's national approach to USF support mechanisms for broadband.¹⁵

In addition, in its *2015 Open Internet Order*, the FCC adopted a narrowly tailored regulatory approach, emphasizing that "we are *not* regulating broadband Internet access service as a utility or telephone company."¹⁶ The FCC's reclassification of BIAS as "telecommunications" under Title II of the federal Communications Act, therefore, is not a

Furthermore, access to *interstate* long distance is supported by the Subscriber Line Charge ("SLC"), which is a purely interstate charge.

¹⁴ See *USF Reform Order*, 26 FCC Rcd. at 17673 ¶ 20 (creating the federal Connect America Fund ("CAF"), "which will ultimately replace all existing high-cost support mechanisms," and which "will rely on incentive-based, market-driven policies, including competitive bidding, to distribute universal service funds as efficiently and effectively as possible"); cf. 47 U.S.C. § 254(f) ("A State may adopt regulations *not inconsistent* with the [FCC's] rules to preserve and advance universal service.") (emphasis added). Notably, the FCC found it "[i]mportant[]" that the CAF "will only provide support in those areas where a federal subsidy is necessary to ensure the build-out and operation of broadband networks." *USF Reform Order*, 26 FCC Rcd. at 17673 ¶ 24. Therefore, "[t]he CAF will not provide support in areas where unsubsidized competitors are providing broadband that meets [the FCC's criteria]."

Id.

¹⁵ The FCC has also affirmed continuing federal supremacy over USF contribution mechanisms, making clear in the *2015 Open Internet Order* that "any state requirements to contribute to state universal service support mechanisms that might be imposed on such broadband Internet access services would be inconsistent with federal policy and therefore are preempted * * * at least until such time that the [FCC] rules on whether to require federal universal service contributions by providers of broadband Internet access service." *2015 Open Internet Order*, 30 FCC Rcd. at 5836 ¶ 490 n.1477; cf. 47 U.S.C. § 254(f) ("A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.").

¹⁶ See *Id.* ¶ 430 n.1274 (emphasis added).

proper basis for this Commission to characterize access to broadband as basic telephone service under a state-law framework long associated with utility-style regulation of rates, terms, and conditions. Indeed, the FCC made clear that “should a state elect to * * * regulate the rates of broadband Internet access service through tariffs or otherwise, we expect that we would preempt such state regulations as in conflict with our regulations.”¹⁷ Accordingly, the Commission must deny the OTA Petition.

IV. CONCLUSION

For all of the foregoing reasons, the Commission must reject the OTA Petition. The Commission has already denied a nearly identical OTA petition on the basis that the Legislature has reserved to itself through legislation the issue of universal access to broadband, prior to any Commission action on that front. This fundamental fact has not changed since 2014 when the Commission denied OTA’s last request to modify the definition of basic telephone service to include access to broadband. Therefore, the basis for the Commission’s rejection of the OTA petition in AR 577/UM 1481 remains equally applicable to the OTA Petition filed September 9, 2016. Furthermore, both state and federal law prohibit the Commission from including access to

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¹⁷ Id. ¶ 433 (The FCC announced its “* * * firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order.”).

broadband in the definition of basic telephone service. OCTA, therefore, urges the Commission to deny the OTA Petition.

Dated this 23rd day of September, 2016.

Respectfully submitted,



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