

PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: May 8, 2018

REGULAR CONSENT EFFECTIVE DATE _____ N/A _____

DATE: April 18, 2018

TO: Public Utility Commission

FROM: Laurel Anderson *LA*

THROUGH: Jason Eisdorfer, *JE* Bryan Conway, *BAC* and Roger White, *RW*

SUBJECT: WARM SPRINGS TELECOMMUNICATIONS (Docket No. DR 52)
Petition for Declaratory Ruling.

STAFF RECOMMENDATION:

Staff recommends that the Commission decline to consider the Warm Springs Telecommunications Company's (WSTC) Petition for Declaratory Ruling.

DISCUSSION:

Issue

Whether the Commission should substantively consider the WSTC Petition for Declaratory Ruling.

Applicable Rule or Law

ORS 756.450 provides, "on petition of any interested person, the Public Utility Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission. A declaratory ruling is binding between the commission and the petitioner on the state of facts alleged, unless it is modified, remanded or set aside by a court."

A petition for a declaratory ruling must meet the minimum filing requirements as provided in OAR 860-001-0430(1):

"(1) A petition for a declaratory ruling under ORS 756.450 must contain six elements:

- (a) The rule or statute that may apply to the person, property, or facts;
- (b) A detailed statement of the relevant or assumed facts, including sufficient facts to show petitioner's interest;
- (c) All propositions of law or arguments asserted by petitioner;
- (d) The questions presented;
- (e) The specific relief requested; and
- (f) The name and contact information, including telephone number, physical address, and electronic mail address of petitioner and of any other person known by petitioner to have legal rights, duties, or privileges that will be affected by the request."

The Commission must determine whether it will substantively consider the petition within 60 days after the petition is properly filed, per OAR 860-001-0430(2). The Commission makes the decision as to whether to proceed at a public meeting, providing an opportunity for public comment.

Per OAR 860-001-0430(2)-(5), if the Commission decides to substantively consider the petition, the Administrative Hearings Division will then initiate proceedings. The petition is generally decided on the facts stated in the petition and no testimony or other evidence may be submitted. Legal briefing will be allowed.

Under ORS 756.515(1), the Commission may open an investigation when it "believes that any rate may be unreasonable or unjustly discriminatory, or that any service is unsafe or inadequate, or is not afforded, or that an investigation of any matter relating to any public utility or telecommunications utility or other person shall be made, or relating to any person to determine if such person is subject to the commission's regulatory jurisdiction."

Background

Pursuant to ORS 759.425, the Commission has established and implemented the Oregon Universal Service Fund (OUSF). The purpose of the program is to ensure basic telephone service is available at reasonable and affordable rates. With Order No. 00-312, in Docket No. UM 731, the Commission adopted the OUSF program and established support amounts to be distributed from the fund to the non-rural incumbent local exchange carriers (ILECs), which, at the time, were Qwest and Verizon. The Commission also set procedures to designate a competitive local exchange carrier (CLEC) as eligible for support in a specific service area. OUSF was expanded to support rural ILECs in Docket No. UM 1017, Order No. 03-082.

For all carriers eligible to receive distributions, distributions were made monthly based on the number of common lines used to provide basic telephone service. See Order

No. 03-082 at pg. 4. In Order No. 03-082, on page eight of Attachment A, the Commission adopted a stipulation that memorialized the process used for support distribution:

“The number of basic common subscriber lines as of the end of the month (referred to as the recording month) will be recorded on the OUS 3 worksheet by wire center or exchange. The OUS 3 worksheet will be due to the OUS Administrator 40 days after the recording month (i.e., the tenth day of the second month following the recording month). Monthly distributions will be made on the 30th day of the second month following the recording month.”

Order No. 03-082 adopted a triennial review for updates to the rural companies' support per line. The first review resulted in a memorandum of understanding (MOU) accepted by the Commission in Order No. 06-297, which was extended an additional three years by Order No. 09-246.

WSTC was designated in the Warm Springs wire center as a CLEC eligible to participate in the OUSF on March 2, 2012, per Order No. 12-089 in Docket UM 1581. WSTC filed its first Form OUS 3 on June 6, 2012, detailing results of its first reporting month, and the first disbursement check was issued to WSTC on June 29, 2012.

With Order No. 12-204, issued June 5, 2012, as corrected by Order Nos. 12-206 and 12-309, the Commission adopted an MOU to be effective for rural companies for one year between Staff, the Oregon Exchange Carrier Association and the Oregon Telecommunications Association on behalf of its members at the time. This MOU resulted from the third triennial review of Order No. 03-082. The MOU states that support would be based on a per line amount, initially based on January 2012 line counts, and adjusted every six months, based on a trailing line count. “For example, since the July, 2012, distributions are based on a January, 2012, line count, the distributions beginning in January of 2013 will be based upon July, 2012, line counts. The per line amount will be adjusted every six months in this fashion.” See Order No. 12-309, Appendix A at 3. The Commission further ordered an investigation into the OUSF in Docket UM 1481, Phase II.

In Docket UM 1481, Phase II, Order No. 13-162, the Commission approved a stipulation executed between the Citizens' Utility Board of Oregon, Comcast Phone of Oregon, LLC, CenturyLink, Frontier, GVNW Consulting, Inc., Oregon Cable Telecommunications Association, Oregon Telecommunications Association, Telecommunications Ratepayers Association for Cost-based and Equitable Rates, Verizon, Staff and WSTC. For non-rural ILECs, the amount of OUSF funding is specified in the stipulation, and the

amounts were not affected by line counts. Rural ILECs received a pro rata reduction in funding, with receipts not affected by line counts, per the MOU approved in Order No. 12-204. Reallocations to rural ILECs that receive OUSF support would be determined by January 1, 2014, and implemented on July 1, 2014, subject to the normal two-month OUSF lag. With respect to CLECs and, specifically, WSTC, the Phase II stipulation states:

“For the period January 1, 2014 through December 31, 2016, a qualified CLEC that is designated as an ETC for purposes of OUSF will draw at the ILEC per-line amount for the area it serves. There will be a \$1.5 million cap on the amount of annual OUSF support that the Warm Springs Telecommunications Company may receive.”¹

WSTC became subject to the \$1.5 million cap in March 2015. The payment that month was \$125,000. The Company received that amount every month until January 2016. In calendar year 2016, WSTC received \$1.5 million in distributions.

Phase III of Docket UM 1481 resulted in adoption of a pair of stipulations as set forth in Commission Order No. 16-093, corrected in Order No. 16-102. One stipulation was executed by Qwest Corporation and Frontier Communications Northwest Inc. The other stipulation was executed by CenturyLink QC et al, Frontier Communications Northwest Inc., Citizens Telecommunications Company of Oregon, Oregon Cable Telecommunications Association, Oregon Telecommunications Association, Verizon, and WSTC. WSTC is again addressed separately in this stipulation, which states:

“It is recognized that the Warm Springs Telecommunications Company is in a unique situation as it builds a new network to serve the Confederated Tribes of Warm Springs Reservation and surrounding area. Pursuant to Order No. 13-162, Warm Springs Telecommunications Company will be capped at \$1,500,000 per year from the OUSF. Beginning with calendar year 2017 and each year thereafter for a period of five (5) years, Warm Springs Telecommunications Company’s adjusted cap will be calculated by reducing the \$1,500,000 cap by three percent (3%) per year, subject to any additional reductions required pursuant to Paragraph 2, above.”²

In February 2017 the company’s payment was reduced in order to remain at the cap for the calendar year.

¹ *In the Matter of Staff Investigation of the Oregon Universal Service Fund*, Docket UM 1481, Phase II, Order No. 13-162, Appendix A pg. 3 (May 2, 2013).

² *In the Matter of Investigation of the Oregon Universal Service Fund*, Docket UM 1481, Phase III, Order No. 16-093, Appendix A pgs. 3-4 (March 4, 2016).

The Phase III stipulation recommends that a new proceeding be initiated in 2019 to review the OUSF and allow for adoption of a new order following the end of the Phase III stipulation on December 31, 2021.

Analysis

WSTC's Position

WSTC requests the Commission issue a declaratory ruling confirming the Commission's intent to clarify and confirm elements of UM 1481 as they relate to WSTC.

WSTC is concerned that as a result of the recent changes to the OUSF funding mechanisms stemming from UM 1481, WSTC has lost \$250,000 in needed funding. WSTC is concerned in particular with two issues: the change to the "two month lag" which has been identified in all the original orders but suddenly dropped without identification; and the impact of the change of funding to a yearly January starting date.

Petition for Declaratory Ruling

WSTC's Petition for a Declaratory Ruling should be declined without substantive consideration because the petition does not meet the minimum filing requirements. First, the petition does not identify a rule or statute that may apply to the statement of facts. The petition refers to Docket UM 1481 as the matter to be considered. The petition also quotes terms for reallocation to the rural ILECs from the Phase II stipulation. However, assuming such terms were applicable to WSTC at one time, that stipulation has been superseded by the Phase III stipulation, in which all parties agreed that, "this Stipulation represents the entire agreement of the Parties and that it supersedes any and all prior oral or written understanding, agreements or representation related to this Stipulation, if any, and no such prior understanding, agreement or representations shall be relied upon by any Party."

Second, the petition does not contain a detailed statement of the relevant or assumed facts. The relevant facts as to whether WSTC is entitled to additional distributions from the OUSF would necessarily include Staff's background section above, describing how distributions from the OUSF are made, and the history of WSTC's participation in the OUSF. None of these facts are mentioned in WSTC's petition. The petition describes the general interest of the petitioner in receiving financial support, but does not provide a statement of facts to which the Commission may apply a rule or statute to issue a ruling. WSTC appears to allege that, as a result of the recent changes to the OUSF funding mechanisms, WSTC has lost \$250,000 in needed funding. Staff disputes the accuracy of this statement, and it is a conclusion, not a fact that may be applied to a rule or law.

Third, the petition does not present legal questions or propositions of law to be resolved. The petition itself requests an investigation of the docket, not a ruling applying a law to facts.³

Perhaps most importantly, a declaratory ruling is only binding on the petitioner. However, WSTC raises concerns about the Phase II and Phase III stipulations, which were executed by multiple parties. In addition, the Commission has been very clear when authorizing other carriers to participate in the OUSF that the first distribution payment due is based on line counts reported from two months prior. Petitioner raises a concern that would, if valid, affect each carrier that has received distributions based on line counts. At the very least, in Order Nos. 03-763, 06-081, 07-116, 07-574, and 08-157, the Commission granted OUSF support eligibility for various wire centers to a local exchange carrier, directing in each the date on which OUSF support payments would begin, based on line counts taken two months earlier. For example, in Order No. 08-157, the Commission states on page two: "Oregon Universal Service Fund support payments to Comspan Communications Inc. shall commence on May 30, 2008, based on its March 31, 2008 line counts."⁴ WSTC alleges that a line count, once made, creates an obligation for the Commission to provide support. Such a ruling would have implications for the support provided under at least these five prior orders.

For these reasons, Staff does not support a substantive review of the petition for declaratory ruling.

Investigation of UM 1481

Staff notes that when considering petitions for declaratory rulings in which the underlying facts are disputed or complex or both, the Commission has occasionally declined the petition, but opened an investigation.⁵ In light of such precedent, Staff analyzed the allegations in WSTC's Petition to determine if a similar Commission action may be warranted in this case. Staff reviewed the prior orders applicable to WSTC's OUSF disbursements. There is no need for an investigation into the UM 1481 orders, which would necessarily involve notice to all of the stipulating parties to the underlying stipulations.⁶

³ DR 52, WSTC Petition for Declaratory Ruling, cover and pg. 4 (March 3, 2018).

⁴ *In the Matter of Comspan Communications, Inc., Application for Approval of Eligibility to Participate in the Oregon Universal Service Fund in the Veneta, Reedsport and Myrtle Point Wire Centers*, Docket UM 1364, Order No. 08-157 (March 5, 2008).

⁵ See, e.g., Order Nos. 01-1084, 02-542, 06-299.

⁶ ORS 756.568.

WSTC's concerns appear to stem from the use of accounting methods that have recorded distributions as accounts receivable before they were due. A CLEC's internal accounting methods are not an appropriate subject for investigation.

As explained in the Background section of this report, the process for OUSF support disbursements was clearly laid out in Commission Order No. 03-082. OUSF support disbursements were to be paid monthly and based on the OUSF support per line per month times the number of common subscriber lines. As of the end of the month (referred to as the recording month) the number of common subscriber lines is recorded on the OUS 3 worksheet by wire center or exchange. The OUS 3 worksheet is due to the OUS Administrator 40 days after the recording month, and distributions are made on the 30th day of the second month following the recording month.

WSTC became eligible for OUSF distributions in March 2012. WSTC filed its first OUS 3 reporting a line count on June 6, 2012 and the first disbursement check was issued on June 29, 2012. April 2012 was the recording month. Each subsequent month, WSTC filed its OUS 3 between the first and the tenth day of the month and the OUSF distribution check associated with submission of that form was issued by the thirtieth day of the month.

WSTC may have recorded receivables for the recording month and the following month. But no payable amount is recorded on the PUC's side because the OUSF is accounted for using a fund accounting modified accrual basis. Using a modified accrual basis, revenue is recognized when it becomes both available and measurable, rather than when it is earned. Expenditures are recognized when the related liability is incurred. The expenditure for OUSF Disbursements is incurred when the company files its OUS 3 report with line counts. This is the moment when Staff has the information it needs to calculate the amount of the disbursement. Because the liability was incurred in the same month that it was paid, OUSF does not record liabilities on its books. The two month lag refers to the line counts. Staff cannot calculate disbursements until after it receives the information on the OUS 3 report, therefore no liability is recorded on the PUC's books and any receivable on the company's side would be due to cash in transit. WSTC does not allege any facts regarding the Commission's accounting. The issue appears to be a matter of accounting by WSTC.

WSTC further claims it was affected by recent changes to the OUSF funding mechanisms. However, there have been no changes to the funding of WSTC other than adjustment of the \$1.5 million cap by three percent per year, as agreed to in the UM 1481 Phase III Revised Stipulation, Order No. 16-093. The OUSF has not failed to pay any amounts due to WSTC, and WSTC is only entitled to continuing payments, subject to adjustments, until the annual cap agreed to in the Phase III stipulation is reached.

Additional Considerations

The Phase III Stipulation has a five-year term which began on January 1, 2017, and is scheduled to end on December 31, 2021. In the stipulation, the parties recommend that the Commission commence a proceeding no later than 2019 to review the OUSF in order to issue a final ruling prior to the end of the five-year term of the Stipulation. There is no agreement in place for any payments to be made after December 31, 2021.

WSTC's concerns about the level of funding it receives may be raised in this upcoming docket. Staff does not recommend opening a separate investigation when the Commission will soon be considering the interests of all companies eligible to receive distributions from the OUSF.

Conclusion

WSTC alleges it has lost \$250,000 in needed funding due to recent changes in the OUSF funding mechanisms, although Staff notes that WSTC has received every OUSF distribution for which it has been eligible. WSTC further requests a declaratory ruling to clarify and confirm certain elements of Docket UM 1481.

The Commission's options are as follows:

1. Decide to substantively consider the request for declaratory ruling and refer it to the Administrative Hearings Division for further proceedings;
2. Decline to consider the Petition and close Docket No. DR 52 with no further action;
3. Decline the Petition and open an investigation into the Commission's accounting practices with respect to the OUSF and WSTC.

WSTC's Petition for a Declaratory Ruling should be declined without substantive consideration because the petition does not meet the minimum filing requirements; does not contain a detailed statement of the relevant or assumed facts; does not present legal questions or propositions of law to be resolved; and such a ruling would impact multiple parties other than petitioner, who would be the only party bound by a declaratory ruling.

The Commission should not open an investigation into the Commission's accounting methods used to operationalize the OUSF because a single company's choice of internal accounting methods are not an appropriate subject for investigation of the Commission's order and practices. The investigation would potentially impact all parties to the stipulation and is unneeded because the process for OUSF support

disbursements was clearly laid out in Commission Order No. 03-082. Even if it can be argued that there was ambiguity in that order, Order No. 16-093 adopted a stipulation that includes the following provision:

“[T]his Stipulation represents the entire agreement of the Parties and it supersedes any and all prior oral or written understanding, agreements or representation related to this Stipulation, if any, and no such prior understanding, agreement or representations shall be relied upon by any Party.”

Finally, the Commission has already directed Staff to commence a proceeding no later than 2019 to review the OUSF in order to issue a final ruling prior to the end of the five-year term of the stipulation. WSTC may raise concerns regarding the level of funding it receives in that proceeding.

PROPOSED COMMISSION MOTION:

Decline to substantively consider the Warm Springs Telecommunications Company’s Petition for Declaratory Ruling.