Davis Wright Tremaine LLP

Suite 2400
1300 SW Fifth Avenue
Portland, OR 97201-5610

Mark P. Trinchero
503-778-5318 tel
503-778-5299 fax

marktrinchero@dwt.com

October 14, 2022

VIA US MAIL
& Email: puc.publiccomments@puc.oregon.gov

Chair Decker
Commissioner Tawney
Commissioner Thompson
201 High St. SE, Suite 100
Salem, OR 97301-3398

Re: October 18, 2022, Public Meeting Item RA2
UM 2040: Disbursements from the Oregon Universal Service Fund for 2023

Dear Commissioners:

This letter, submitted on behalf of the Oregon Cable Telecommunications Association ("OCTA"), addresses the Commission Staff's Report in docket UM 2040 setting forth the calculation of disbursements from the Oregon Universal Service Fund ("OUSF") for 2023. OCTA appreciates this opportunity to comment on the Staff's recommendation. However, given Staff's desire to have disbursements for 2023 "in place by mid-October,"[1] OCTA is concerned that the Commission has not been provided adequate time to consider stakeholder input and to revise Staff's disbursement calculation recommendations should it desire to do so. Instead, the Staff Report states:

> Staff notes that the resulting disbursement amounts are more or less in line with the current disbursements in calendar year 2022. However, this calculation does not set a precedent for future calculations, as Staff is required to make a recommendation by October 31 of 2024, based on the circumstances at the time of its report. Staff intends to engage further with stakeholders before preparing the Staff report for 2024, soliciting further comment on the areas of contention listed above, and refining its analysis.

Staff Report at 5.

[1] Staff Report at 3.

While OCTA appreciates that the calculation methodology in the Staff Report will have no precedential effect, and that significant policy issues will be taken up in the context of determining disbursements for 2024,[2] OCTA is disappointed that these issues will likely not be resolved by the Commission for the 2023 disbursements. The opening of UM 2040 in December 2019 was intended to provide sufficient time for the Commission to resolve any disputed issues in time for the 2022 disbursements.[3] Nevertheless, many of these issues remain unresolved to date.

Despite Staff's assertion that 2023 disbursements must "be in place by mid-October," OCTA urges the Commission to take the time needed to consider OCTA's concerns with the calculation methodology reflected in the Staff Report and to make any revisions it deems appropriate. OCTA's concerns with the Staff's calculation methodology, which were shared with Staff on September 23, 2022, are detailed below.

In the alternative, in order to provide the Commission adequate time to resolve any disputed issues for the 2024 disbursements, OCTA recommends that the Commission open a contested case proceeding immediately to allow Staff and stakeholders to develop an evidentiary record and to fully brief the Commission on disputed issues well in advance of the October 31, 2023, deadline for the Staff Report.[4] The schedule in the docket should allow the parties to submit disputed issues to the Commission no later than second quarter 2023. This would allow the Commission to issue a decision and for Staff to file its Report in advance of the October 31st deadline.

OCTA Concerns Regarding Staff's Disbursement Calculation Methodology

1. **Disbursements Should be Based on Recipient Line Counts.**

Staff's calculation method would provide OUSF support to eligible carriers for all locations, whether actually served by the eligible carrier or not. The model shows approximately 1.56 million voice locations in the State, while ILECs serve only approximately 360,000 lines total statewide. The Staff's methodology is a significant change from the Commission's past practice. The Commission established the OUSF to support only lines actually served by eligible carriers (*i.e.*, incumbent local exchange carriers ("ILECs") and eligible competitive providers ("CETCs"). This is reflected in the OUSF rules and in Commission Orders dating back to 1998.[5]

[2] The 2024 disbursement amounts will be held constant for a five-year period and will not be updated until 2029. OAR 860-100-300(3)

[3] The Commission extended by rule the 2021 disbursement amounts set forth in the UM 1481 stipulation for use in calendar year 2022.

[4] As Staff notes in its Report, "UM 2040 was from the beginning viewed as policy development with the results being transferred to a permanent rulemaking." Staff Report at 2-3. This was done over the objection of multiple stakeholders, who urged Staff to conduct UM 2040 as a contested case, with the opportunity for discovery, pre-filed testimony, a hearing if needed, and briefing to the Commission.

[5] *See* OAR 860-100-0250(1) (support for ILECs in 2022 based on "customer lines served by ILECs.") *see also,* OAR 860-100-0125 (per line support for competitive providers based on per line support for ILECs); *see also* Order No. 00-312 at 17, 20 (entered June 16, 2000, in Docket UM 731, Phase IV)(OUS should support all residential and business local exchange lines. OUS Administrator will be able to verify line counts by wire center without undue difficulty).

While line counts were dispensed with for purposes of the stipulations adopted in UM 1481 Phase II and Phase III, disbursements for 2023 and beyond will not be based on stipulated total amounts for each carrier or class of carrier. Instead, on a going-forward basis, OUSF disbursements should be calculated based on sound methodology and should support only residential and business basic service lines actually served by ILECs (and CETCs) in high-cost areas.

Support disbursements should not be calculated to provide carriers with support for locations served by another carrier or not served at all. Doing so would be contrary to the Commission's long-standing approach to OUSF and would unduly inflate the size of the OUSF, resulting in perverse market signals and incentives for disbursement recipients. For example, under the Staff proposed disbursements, a rational OUSF recipient would have the incentive to try to shed as many high-cost lines as possible to save on Operating Expense while collecting OUSF for those locations—which is an incentive that is precisely contrary to the OUSF's intended goal. Furthermore, Staff's error would promote an anti-competitive dynamic in that disbursement recipients would receive OUSF support for locations served by unsubsidized competitors.

2. **The End-User Common Line Charge ("EUCL") Should Be Deducted From Support.**

Staff's proposal omits the EUCL (also referred to as Subscriber Line Charge, or SLC)[6] from federal support that should be subtracted from support amounts. This is an error. The EUCL is clearly included within the statutory provision that requires deducting from disbursement amounts "any explicit compensation received by the telecommunications carrier from federal sources specifically used to recover local loop costs." ORS 759.425(3)(a). It has traditionally been deducted from support amounts in the past. (The OUSF formula adopted in UM 731 included a subtraction of EUCL, and it was the formula proposed by Staff. See Order No. 00-312 pp. 22-23.) Nothing about the use of the CostQuest model should impact the need to subtract the EUCL.

3. **Intercarrier Compensation Support ("ICC") Should Be Deducted From Support.**

Staff's proposal omits Intercarrier Compensation support (one of Federal Universal Service ("FUSF") High Cost Support mechanisms) from federal support that should be subtracted from support amounts. However, ICC is clearly included within the statutory provision that requires deducting from disbursement amounts "any explicit support received by the telecommunications carrier from a federal universal service program." ORS 759.425(3)(a). Nothing about the use of the CostQuest model should impact the need to subtract ICC support. The only reason the ICC has not been addressed in previous Commission orders is that the ICC was not implemented at the

[6] *See* FCC WC Docket No. 20-71, In the Matter of Eliminating Ex Ante Pricing Regulation and Tariffing of Telephone Access Charges, Notice of Proposed Rulemaking, adopted March 31, 2020 (FCC 20-40), ft. 102: "the Subscriber Line Charge (also called the End User Common Line charge)… ."

federal level until after the last time the Commission calculated disbursements outside the context of a stipulation.

4. **OUSF Should Not Support Lines In Census Blocks Served By Unsubsidized Competitors**.

Staff's proposal would continue to provide support in areas with unsubsidized competitors. At the last workshop, Staff indicated that this issue has not been adequately examined and should be presented to the Commission in 2023 for the 2024 distribution calculations. OCTA disagrees. This issue was first raised with the Commission in UM 1481 as early as 2010 and was expressly included within the scope of both Phase II and Phase III of UM 1481.[7] Based on the Phase II and Phase III stipulations, the parties agreed to postpone the issue to this proceeding. It is now ripe for consideration and should not be further postponed. Further, the concept of excluding support to census blocks with unsubsidized competitors has similarly been adopted by the FCC with respect to FUSF, and the FCC makes publicly available census-block level data sufficient to implement this approach. Finally, including areas with unsubsidized competitors distorts the competitive landscape. Contributions to the OUSF by unsubsidized competitors advances a direct subsidy transfer to their ILEC competitors. This is anticompetitive. To correct for the anticompetitive impact of OUSF, OCTA has previously provided the calculation methodology and impacts of removing from the OUSF distribution calculations those census blocks served by unsubsidized competitors. OCTA urges the Commission to amend Staff's disbursement calculations accordingly.

5. **Staff's Proposed Cost Allocation between Broadband and Voice Services is Unsupported and Inconsistent with the CostQuest Model and Industry Trends.**

As the Commission is well aware, cost allocation is a critical part of any costing exercise in public utility regulation, be it in the telecommunications, electric or gas industries. Cost allocation is also often a point of contention, as it is here (see Staff Report, page 4), given its significant impact on cost estimates.

Staff's proposal uses a 70%/30% split in the allocation of cost between broadband and voice services. That is, 30 percent of the network costs calculated by CostQuest are allocated to basic voice services for the determination of the OUSF. This cost allocation is demonstrably incorrect and should be readjusted for several reasons.

First, contrary to the Commission's instructions that cost results should be methodologically sound and principled, there is no substantive support for Staff's proposed 30 percent cost allocation factor.

[7] *See,* UM 1481 Consolidated Issues List, Issue No. 25 (filed September 8, 2010); *see also,* Direct Testimony of August H. Ankum, Ph.D. on Behalf of the Oregon Telecommunications Association, pp. 70-83 (filed December 10, 2012, in UM 1481 Phase II); *see also,* Order No. 15-162 at 4, Phase III Proceeding, Issue (c) (entered May 2, 2013, in UM 1481 Phase II).

Second, Staff's proposed cost allocation factor is inconsistent with the CostQuest model. The CostQuest model calculates costs for a state-of-the-art *broadband network*, that, of course, can also transmit basic voice services. Voice service is just a service application provided on a broadband network and represents only a small fraction of use of that network's capacity. In fact, since the CostQuest model assumes a total bandwidth at each location of at least 5.4 Mbps (*see* CostQuest Model documentation), basic voice services of 64 kbps would use less that 1.2 percent of network capacity. That is dramatically smaller than Staff's 30 percent allocation.

Moreover, *not all modelled locations will use voice services*. Per the FCC, only 32 percent of the households in the Oregon use fixed voice.[8] This contrasts with 84 percent of the households that use fixed broadband.[9] This means that even a 1.2 percent cost allocation would greatly overstate the costs of providing basic voice service.

The capacity cost of a broadband network is mostly a fixed cost, much like the capacity cost of a nuclear powerplant or the transmission network in the electricity industry. In the electric industry, such capacity (demand related) costs are most typically allocated based on a measure of demand (in various forms of peak demand) in terms of KW. This practice is consistent with cost causation. For example, if a customer class uses 60 percent of a generating facility's capacity at the peak it may get 60 percent of the capacity (demand) costs allocated. While other peak allocations methods exist, the underlying concept of cost causation is the same, and intuitively obvious.

The authoritative NARUC cost allocation manual (referenced in most electric utility rate cases) notes the following:[10]

> Once the customer classes to be used in the cost allocation study have been designated, the functionalized and classified costs are allocated among the classes as follows:
>
> **Demand-related costs** - Allocated among the customer classes on the basis of demands (KW) imposed on the system during specific peak hours.

The telecommunications analog to KW capacity is Mbps. Just as the Commission allocates capacity costs in the electric industry based on capacity, it should, for methodological consistency and soundness—in terms of cost causation—do the same in the telecommunications industry. And whatever measure of peak demand the Commission may select (single peak or multiple peaks), it will most certainly result in a cost allocator that is but a fraction of Staff's proposed 30 percent.

Finally, given that the overall trend in the telecommunications industry is toward broadband, it is archaic and backward-looking to assign as much as 30 percent of the network costs

---

[8] FCC Voice Report, as of June 2021, Table 3, and Monitoring Report as of Dec. 2020, Table 6.11.

[9] *Id*.

[10] NARUC Electric Utility Cost Allocation Manual, January 1992. Chapter 2, Overview of Cost of Service Studies and Cost Allocations, Page 22.

to voice services. Staff's proposal is simply wrong and out of touch with the direction of national and state policies and industry trends.

Thank you in advance for your consideration of these matters. OCTA looks forward to answering any questions the Commissioners may have at the October 18, 2022, Public Meeting.

Sincerely

Davis Wright Tremaine LLP

Mark P. Trinchero
Attorney for OCTA

cc: UM 2040 Service List