

ORDER NO. 00-299

ENTERED 6-7-00

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 177

In the Matter of the Application of BEAVER	)	
CREEK COOPERATIVE TELEPHONE	)	
COMPANY for a Boundary Line Amendment to	)	ORDER
its Certificate to Provide Telecommunications	)	
Service in Oregon As a Cooperative Corporation.	)	

DISPOSITION: PETITION DENIED

**Introduction**

By this petition (Petition), Beaver Creek Cooperative Telephone Company (BC) seeks to add territory currently served by U S WEST Communications, Inc. (USWC), to its authorized local telecommunications exchange service area. The Petition, which BC captioned as an “Application,” does not include any representation that USWC has agreed to assign or transfer the service area in question.

The Commission has been asked to decide, based upon facts that have been stipulated by BC, USWC and the Commission staff (Staff), whether the instant Petition should be granted. For the reasons set forth below, we find that the Petition violates Oregon state statutes and the Administrative Rules of the Commission. The Petition must, therefore, be denied.

**Background**

The facts in this matter are not in dispute. USWC is a telecommunications utility having authorized service territories in Oregon, including the Oregon City exchange. BC is a cooperative telecommunications company having a territorial allocation to provide telecommunications service in the exchange of Beaver Creek, adjacent to the Oregon City exchange.<sup>1</sup> By Order No. 96-248, entered September 23, 1996, the Commission granted BC’s

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<sup>1</sup> See PUC Order No. 88-281 granting BC’s 1987 application under ORS 759.025(2), expressly setting BC’s service territorial boundaries in conformance with a map filed with the Commission. On August 6, 1997, by Order No. 97-297 in Docket UA 55, the latest of three actions by the Commission modifying BC’s boundaries, the Commission approved the transfer of approximately one-half square mile of territory from USWC to BC in the Oregon City-Beaver Creek area. No other transfers of allocated territories have occurred between the parties since that time.

application to become a competitive service provider in USWC's Oregon City exchange territory.<sup>2</sup>

On September 9, 1999, a Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact was filed with the Secretary of State, Archives Division in Docket AR 365, regarding certain changes to Division 032 of the Commission's rules. Among the changes proposed was the addition of a new subsection (4) to OAR 860-032-0010, which clarified the Commission's intention that telecommunications utilities or cooperatives who provided telecommunications services in the service territory of an existing telecommunications utility were to be classified as competitive providers.<sup>3</sup> BC filed comments objecting to these proposed, new provisions. On December 2, 1999, the Commission received BC's Petition to modify its boundaries to extend into the exchange area of Oregon City currently served by USWC. A map showing the current and proposed service territories of BC and USWC is affixed to this Order as Attachment A.

A prehearing teleconference was held on February 23, 2000, in which BC, USWC and Staff participated. There being no material questions of fact in dispute, the parties agreed to waive a hearing and brief the legal issues in this matter. We have reviewed the record and briefs of the parties and the Staff and make the following conclusions of law:

### CONCLUSIONS OF LAW

#### **The Commission's Revised Rules Apply to the Application of Beaver Creek**

OAR 860-032-0010(4) provides as follows:

Local exchange telecommunications service provided by a telecommunications utility or a cooperative within the boundaries of local exchanges belonging to another telecommunications utility or cooperative, which exchanges are defined pursuant to ORS 795.005(2)(c), shall be considered the operations of a competitive provider, and may only be provided pursuant to a certificate of authority granted by the Commission under ORS 759.020. Such service shall be considered operations of a competitive provider without regard to the manner the provider treats those operations.

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<sup>2</sup> By way of explanation as to why the Commission's approval of BC's application in Docket CP 131 was insufficient, and the instant Application was necessary, BC offered the following: "Because of the uncertainty as to how to proceed in the early days following the passage of the Telecommunications Act of 1996, Beaver Creek agreed to apply under ORS 759.020. However, it now appears that it would have been more appropriate at that time, and today is far more appropriate, that Beaver Creek amend its existing certificate granted in Docket UM 177." BC does not explain what it means by "appropriate."

<sup>3</sup> Those provisions were adopted in Order No. 00-068, entered February 8, 2000.

BC is a telecommunications cooperative seeking to provide local exchange service within another telecommunications utility's territory. It is therefore clearly and directly subject to the rule. This rule is consistent, not only with the statutory authority conferred upon the Commission by ORS 759.020, but also with respect to 759.050, the law establishing competitive zone regulation service. In the absence of any overriding rule, statute or judicial decree, the rule requires us to deny BC's Petition. BC offers five legal arguments to override this rule. We reject each of them for the reasons set forth below:

**Beaver Creek is Incorrect in its Analysis of the Scope of the Commission's Jurisdiction**

BC argues that, as a general principle, based upon the law in Oregon, it is not subject to Commission jurisdiction, except when it wants the Commission to issue it a certificate.<sup>4</sup> We previously disposed of BC's interpretation and analysis of ORS 759.025 in Order No. 00-068, entered February 8, 2000, in Docket AR 365, as follows:

BC asserts, citing ORS 759.025(2), *supra*, that cooperatives are not subject to the Commission's rules when providing competitive services. It contends that a cooperative may freely pursue new customers solely by amending its existing certificate to add service territories, even while behaving, in all other respects, as a competitive telecommunications provider.... ORS 759.025(2) ensured legal and service continuity on January 1, 1986, the date that new laws regarding competitive service providers became effective. Cooperatives, as well as telecommunications utilities, who were serving particular territories prior to that date, were given statutory authority to continue to do so. BC's assertion is not factually correct. Cooperatives are not exempt from all other sections of ORS Chapter 759.... ORS 759.510 to 759.530 set forth the procedures for persons providing telecommunications utility services to contract with each other to modify the territorial boundaries which each party is certificated to serve. ORS 759.535 provides the procedures for applications to serve unserved territory. ORS 759.540 sets forth the particular criteria under which such applications will be granted. Indeed, subsection (2) of that statute provides: 'The commission, before approving an application for the allocation of territory shall find that the applicant is exclusively serving the territory covered by the application . . .' (Order, page 8.)

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<sup>4</sup> BC asks us to take official notice of a January 26, 1987, letter from Commissioner Charles Davis to certain Oregon Cooperative Telephone Companies as a validation of its position. In addition to the context and nature of the letter, it should be noted that the Commissioner's letter states: "This letter is not intended to, nor can it, change or create Oregon law. If you have specific questions concerning interpretation of Oregon law, I encourage you to contact your attorney." The letter further states that, rather than issuing a decision or opinion, "...the PUC has *taken the position* that a telephone cooperative...is not a telephone public utility."

BC has failed to acknowledge, much less explain away, the applicability of these statutes upon its claim of legal entitlement to an amended certificate.

### **Beaver Creek is Not Entitled, As a Matter of Law, to a Revised Certificate**

BC next argues that the Commission must issue the certificate because the certificate must reflect the cooperative's *services* that were offered on January 1, 1986, not the cooperative's geographic territory. Thus, it argues, as long as BC offers local exchange service, "... the Commission must—it has no choice—issue the certificate to cover the area served by Beaver Creek as a cooperative." (Memorandum, page 4.) BC cites the order in Docket UA 55 as a case in point of the Commission having granted BC a certificate for territory where USWC already had facilities: "In UA-55, the Commission granted Beaver Creek's request to expand the boundaries of the cooperative to serve an area that was a portion of US WEST's Oregon City exchange."

BC's citation and discussion misapprehend the case and omit key factual distinctions. Although BC filed a petition requesting the allocation, the Commission did not act on that request, but upon another: USWC had filed an application "for an Order Transferring Right to *Exclusively* Served Territory..." to BC and "[b]ased upon the application and Staff's Report..." the Commission ordered that the agreement to transfer be implemented (emphasis supplied). Thus, the Commission did not authorize two local exchange carriers to provide service in the same territory as BC asserts, but granted the transfer of exclusive rights.

There is another facet to UA 55 that distinguishes it from BC's current petition. In its comments, USWC takes care to emphasize "... that, in Docket No. UA 55, Beaver Creek and U S WEST agreed to a transfer of territory. That is not the case here. U S WEST is on record opposing the reallocation of the service territory...." (USWC Response, page 1, emphasis in text). The transfer that both USWC and BC sought in UA 55 occurred pursuant to and in BC's reliance upon ORS 759.560(1), one of the statutes BC now claims is inapplicable. The argument is rejected.

### **Beaver Creek Has Not Been Unfairly Treated**

BC next argues that it is a victim of detrimental reliance because its Petition was filed on or about November 30, 1999, and "was in conformance with each and every rule that existed at the time of filing.... It is not appropriate to hold the Petition that was filed in conformance with the then existing rules until after new rules are adopted and then dismiss the Petition as failing to comply with the Commission's Rules." (BC Memorandum in Support of Petition, page 5.)

BC was aware of the proposed clarifying rule; it filed arguments in opposition to it well before its Petition was filed. Rather than being caught by unfair surprise, as BC implies, the Petition was filed solely for the purposes of avoiding being subject to the impending changes in Division 032 of the Commission's Rules.

The Commission did not “hold the Petition...until after new rules are adopted” as BC alleges, but dealt with it in the ordinary course. On December 3, 1999, the Commission wrote to USWC, whose territory was the object of BC’s petition. By letter of December 13, 1999, USWC indicated its opposition to the transfer of the territory in question, but took no position at that time regarding the BC petition. It did, however, ask to be notified about the scheduling of future proceedings. In the absence of a stipulation as to all relevant facts by Staff and parties, the Commission would have scheduled a hearing at some point, after which proposed findings would have been filed and a decision rendered by the Commission. It would have been an extraordinary occurrence, requiring the assent of all parties and the Commission, for all of these steps to have been completed prior to February 8, 2000, the date on which the Commission adopted the rules that govern this case. At no time, either coincident or subsequent to the filing of its Petition, did BC cite the impending rule’s negative impact on its Petition and ask for expedited consideration so that it might “get in under the wire,” as it now claims it should have been entitled to do.

### **The Rule is Consistent With Section 253 of the Telecommunications Act of 1996**

BC next claims that OAR 860-032-0010(4) creates an impermissible barrier to entry, because BC would be required to “artificially” divide its operations and create increased operating costs.<sup>5</sup> The truth is precisely the opposite of BC’s contention. In our discussion of the rule in our Order No. 00-068, we noted the following at pages 8 & 9:

All parties seeking to provide telecommunications services within a particular area must be regulated in a competitively neutral manner. Applying common regulations to all such parties is a key element to that treatment. At both the state and national level, cooperatives and other small, rural companies receive financial and regulatory treatment reflecting their unique circumstances, tasks and responsibilities.... However, once they seek to move beyond the scope of their original circumstances and become competitive providers in areas already served by others, federal law requires that they be treated as are all other parties.

### **The Rule is Well Within the Statutory Authority of the Commission**

Finally, in a variation of an earlier position, BC contends that ORS 759.020(1) precludes us from adopting any rules applying to a cooperative, regardless of where it operates, so long as customers become members in order to obtain service. We examined and rejected this argument in Docket AR 365, Order No. 00-068, at pages 5 and 6:

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<sup>5</sup> BC does not offer evidence on the record in this docket to substantiate its claim that its operating costs will be increased or that we are requiring it to divide its operations, “artificially” or otherwise. We will, however, take official notice of the comments that BC’s president and CEO, Tom Linstrom, made at the Public Meeting held on February 8, 2000, when we adopted the instant rule. BC derives substantial tax advantages from its status as a cooperative. If it becomes a competitive provider, like anyone else who may wish to compete with USWC in Oregon City, it risks losing its unique tax status and attendant competitive advantage.

Indeed, while current subsection (10) states that cooperatives are not subject to ORS 759.015, *et seq.*, in fact, ORS 759.025(2) deals exclusively with telephone cooperatives. Although ORS 759.025(2) states that granting cooperatives continuing certificates of authority ‘shall not subject such cooperative corporations or associations to the commission’s general powers of regulation,’ it does not proscribe *every* form of oversight. In fact, there are specific areas where Oregon law gives the Commission jurisdiction over cooperatives to their benefit (e.g., the rules allowing an incumbent to protest, or become a party to an application proceeding, apply to incumbent cooperatives as well as telecommunications utilities).

At page 8 of that Order, we noted that ORS 759.500 includes cooperatives within the definition of “person” subject to ORS 759.500 to 759.570. ORS 759.550 provides that “(1) Territory served by more than one person providing similar telecommunications utility service may only become an allocated territory by a contract approved by the Public Utility Commission. (2) No other person shall offer, construct or extend telecommunications utility service in or into an allocated territory.” This very statute applies to the facts of this case. To change BC’s boundary would be to allocate territory to it that everyone acknowledges is now being served by USWC. There is no contract between USWC and BC relative to this Petition. For the Commission to allocate this territory to BC would directly violate the statute. We find no reasoning in this, or in any of the previous arguments raised by BC, to cause us to change our opinion and our resulting conclusion.

**ORDER**

The Petition filed by Beaver Creek Cooperative Telephone Company for an amendment to its existing certificate to provide telecommunications service in Oregon as a cooperative corporation is denied.

Made, entered, and effective \_\_\_\_\_.

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**Ron Eachus**  
Chairman

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**Roger Hamilton**  
Commissioner

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**Joan H. Smith**  
Commissioner

ORDER NO. 00-299

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.