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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 992

In the Matter of BEAVER CREEK)
COOPERATIVE TELEPHONE) ORDER CLARIFIED
COMPANY's Extended Area Service)
Tariffs.)

DISPOSITION: COMPANY ORDERED TO CEASE AND DESIST FROM VIOLATION OF COMMISSION RULES AND POLICIES; CUSTOMER REFUNDS ORDERED

On October 9, 2000, the Commission issued Order 00-636 in this docket. We are now reissuing that Order, *nunc pro tunc*, for the purposes of clarity. Added clarifying language in the succeeding paragraphs is identified by ***bold italics***. No substantive changes to our Order are intended.

This proceeding arises out of an investigation undertaken by the Commission pursuant to ORS 756.515. The actions which we take in this Order are pursuant to subsection (4) thereof, which states as follows:

The commission may, after making an investigation on the commission's motion, but without notice or hearing, make such findings and orders as the commission deems justified or required by the results of such investigation. Except as provided in subsections (5) and (6) of this section such findings and orders have the same legal force and effect as any other finding or order of the commission.

Background. Beaver Creek Cooperative Telephone Company ("Beaver Creek" or "the Company") is a cooperative within the meaning of ORS 759.005(1)(b)(B). See generally ORS Chapter 62. Although the Public Utility Commission of Oregon (Commission) lacks full regulatory authority over cooperatives, several statutes subject cooperatives to the Commission's authority for specific purposes. Among these statutes are ORS 759.225 and ORS 759.220 which, together, treat cooperatives as

telecommunications utilities subject to Commission authority for purposes of regulating the terms and conditions of “through services.” The Commission’s authority and the validity of the Commission’s rules in this subject area were definitively established in *Beaver Creek Cooperative Telephone Co. v. PUC*, 162 Or App 258, August 4, 1999, review denied 329 Or 479, November 2, 1999:

Cooperatives are subject to PUC’s general powers and duties to regulate telecommunications utilities for purposes of establishing the terms or conditions of through service. One such power is the authority to protect the public generally “from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. (*Id.* at pages 263-4).

Extended area service (EAS) is a through service for which the Commission has jurisdiction over cooperatives, including the authority to regulate EAS rates to ensure that through services are “just and reasonable.” *See* OAR 860-022-0003, OAR 860-034-0015. Among the terms and conditions of through service that have long been required is a flat rate EAS service option. (*See* Order 89-815, p. 20, issued June 19, 1989; ordering clauses, Item 2.a., *id.* at 37). The Federal Communications Commission (FCC) has adopted a mandatory flat rate pricing policy with respect to interLATA EAS routes in Oregon (*See, e.g.* FCC Order No. 97-244). Beaver Creek had a proper, policy-compliant EAS tariff on file with the Commission for many years. The most recently approved Beaver Creek EAS tariff, which established the current flat rate business and residential prices, went into effect on December 21, 1993. A copy of that tariff is affixed as Attachment A. As can be seen in that Attachment, there is no reference to any additional EAS usage charges when a customer selects the flat rate service option.

The Company’s Revision of its EAS Tariff. On June 22, 1999, the Company issued a revised tariff sheet covering EAS service rates that purportedly went into effect on July 23, 1999, Attachment B. The revised tariff was not submitted to the Commission. That tariff contained the following new provisions:

Premium Access Service Charge.....\$.0075 per minute

Premium Access Service

The charge for Premium Access Service is applied to Extended Area Service usage that is 3,000 minutes or more per month. Premium Access Service is applicable to *all* Extended Area service options for 632 Prefix and 518 prefix (emphasis supplied).

The Commission learned of these changes in the Company’s tariff as a result of complaints received from several of Company’s customers.

At the Commission's Regular Public Meeting held on September 28, 2000, Mr. Tom Linstrom, the Company's chief executive officer, appeared on behalf of the Company. He stated that the Company had, indeed, been charging customers the above-described premium access service charge since July 23, 1999, but only in those instances where the EAS usage was for *data* traffic, as opposed to voice traffic. Mr. Linstrom indicated that the Company had been recording its customers' usage by type and offered copies of customers' bills to the Commission to demonstrate the Company's ability to track and bill for EAS usage by traffic type.

The Company's Aforementioned Actions are Illegal. We conclude that the Company's actions, as described by Mr. Linstrom, violate state statutes and Commission rules in three distinct ways:

First, the Company did not file a copy of the revised tariff sheet with the Commission as required by OAR 860-022-0005. That rule, *which was applicable to Beaver Creek at the time it implemented its new tariff*, requires that "the original and four conformed copies of each tariff, rate schedule, revision, or supplement shall be filed with the Commission." *Because Beaver Creek is currently subject to ORS 759.175 with respect to its EAS tariff, it remains subject to the requirement to file the tariff, notwithstanding its status as a cooperative (See OAR 860-034-0300(2)). This conclusion follows directly from the Court of Appeals decision, cited above, which established that Beaver Creek is a telecommunications utility with respect to through services, including EAS.* In the absence of such a *proper EAS* filing and Commission review, the preexisting tariff is still in full force and effect, and all increases in rates between that preexisting tariff, marked as Attachment B, are subject to refund.

Second, the Premium Access Service Charge, which is calculated based upon customer usage, appears, on its face, to be applied to the EAS Business Service \$22.50 Flat Rate Service option and the EAS Residential Service \$15.00 Flat Rate Service option, in violation of our Order 89-815, *supra*.

Third, although nowhere described in the new tariff sheet, Attachment B, Mr. Linstrom indicated at the hearing that the Company was charging customers different rates for the same EAS service, based upon Company's analysis of the telephone numbers called by the customers and the type of traffic carried.¹ ORS 759.220, which

¹ Chairman Eachus: "It says 'premium access service is applied to extended area service usage.' Now it doesn't say data or voice. It says extended service usage over 3,000. It's applied to extended area service usage and you've spent a lot of time here trying to say that it's not EAS and it's a separate service." Mr. Linstrom: "Ron, if tariffs had to state every word, we would have tariffs in our industry. I have a letter here. Listen one second. I have a letter here that we send our customers telling them that this is a data service only and applies to data services in a letter that was addressed to each individual customer explaining before this rate went in."

applies to cooperatives, states that "...every unjust and unreasonable rate, classification, regulation, practice and division is prohibited." ORS 759.260 provides that no public utility shall charge customers in a manner other than as prescribed in the public schedules or tariffs then in force or discriminate among customers receiving like services. Thus, based upon Mr. Linstrom's own comments at the Commission's September 28, 2000 public meeting, the Company has discriminated against its customers by charging customers other than as prescribed by its current tariff. Such discrimination has taken place and continues to occur.

FINDINGS OF FACT

After considering Attachments A and B, and information presented at the September 28, 2000 Public Meeting, which includes the statements of Tom Linstrom and the statements and memorandum of Commission Staff, the Commission makes the following findings of fact:

1. Beaver Creek's currently valid EAS tariff, which went into effect December 21, 1993, establishes a flat rate of \$22.50 per month for Business EAS Service and \$15.00 per month for Residential EAS Service.
2. Beaver Creek adopted a purported new tariff, which the company claims went into effect on July 23, 1999, that establishes a flat rate of \$22.50 per month for Business EAS Service and \$15.00 per month for Residential EAS Service below 3000 minutes per month, and per minute rates for service in excess of 3000 minutes per month.
3. Beaver Creek did not file its purported new tariff with the Commission.
4. Beaver Creek's purported new tariff is in violation of Order No. 89-815 in that it does not provide for a flat-rate charge.

Chairman Eachus: "Well, you can explain that but, you know, you've got a tariff here, which is the way we operate, and this tariff is being filed for the terms and conditions that says' it's applied to EAS usage and that means that any time I make a call that's an EAS call, if it's over 3,000 it's considered data."

Mr. Linstrom: "No. That's absolutely wrong. And I'm telling you that right now."

Chairman Eachus: "Then you are not operating according to the tariff that you filed with us."

Mr. Linstrom: "What we're saying is you can't put every single word in the tariff. Beaver Creek's willing to go..."

Chairman Eachus: "You can't put it in, but you have to operate consistently with it. That doesn't mean that you can write a tariff and then change it because you haven't put every single word in the tariff."

Mr. Linstrom: "A tariff and how you operate are two different things."

5. Beaver Creek's purported new tariff does not distinguish between voice and data traffic. However, Beaver Creek ignores the express language of the purported new tariff by applying the per minute charge to data traffic only.
6. As a result of the per minute rate, Beaver Creek has been collecting rates in excess of its currently valid tariff since July 23, 1999.

ORDER

In light of the foregoing, Beaver Creek Cooperative Telephone Company is hereby Ordered:

1. To cease and desist from assessing charges for EAS services in any manner other than as set forth in Advice No. 58, Sheet No. 301.2, filed November 9, 1993, effective December 21, 1993.
2. To refund in full, within 30 days from the date of this Order, all monies collected from customers pursuant to charges for Premium Access Service as described in Attachment B, since July 23, 1999.
3. To notify the Commission within 10 days of the service of this Order, whether the Company has accepted the terms of the Order and the time within which the Order will be obeyed.

Failure to comply with this Order shall make the Company subject to penalties set forth under ORS 759.990.

Made, entered, and effective *nunc pro tunc* _____.

Ron Eachus
Chairman

Roger Hamilton
Commissioner

Joan H. Smith
Commissioner

Pursuant to ORS 756.515(5), a party aggrieved by this order may request the Commission to hold a hearing to determine whether the order should continue in effect. Any such request for hearing shall be submitted to the commission not later than 15 days after the date of service of the order, and the commission shall hold the hearing not later than 60 days after receipt of such a request for hearing. In addition, 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.