

ORDER NO. 02-787

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 439

In the Matter of Rulemaking to Consider)
Oregon Administrative Rules for)
Collection of Oregon Universal Service)
Fund Contributions.) ORDER

DISPOSITION: RULES ADOPTED

At its May 7, 2002, Public Meeting, the Commission granted Staff's request to open a rulemaking docket to adopt rules establishing procedures for the collection, payment, and record retention of Oregon Universal Service (OUS) funds owing from telecommunications providers. Staff proposed creating new rules OAR 860-032-0610, 860-032-0620, 860-032-0630, 860-032-0640, 860-032-0650, and 860-032-0660.

On May 13, 2002, the Commission filed a Notice of the Proposed Rulemaking with the Secretary of State, and subsequently served it on persons interested in such matters. The notice summarized the rules proposed by Commission Staff, and included a Statement of Need, Statutory Authority, Principal Documents Relied Upon, and Fiscal and Economic Impact. The notice was published in the Secretary of State's *Oregon Bulletin* dated June 1, 2002. The notice explained how to request a hearing and established June 21, 2002, as the deadline for filing written comments on the proposed rulemaking. No hearing was requested, but Verizon Northwest Inc. filed written comments.

Staff's Proposed Rules

Telecommunications providers pay money collected from customers into the Oregon Universal Service Fund (OUSF). The Commission is responsible for all aspects of the OUSF. The proposed rules outline the procedures for collection, payment, and record retention of those moneys. The proposed rules establish filing and payment requirements, impose penalties and interest for failure to file the OUS contribution report or pay the contribution amount, and establish requirements for audits, hearing, and record keeping.

OAR 860-032-0610. General Provisions.

This proposed rule defines quarterly time periods for reports and payments, provides for electronic transfer of funds, describes Commission actions when a contribution is past-due or a payment document is returned for non-sufficient funds, and establishes that the Commission may suspend or cancel a telecommunications provider's certificate of authority under certain circumstances. Section (7) provides that when the Commission determines that a telecommunications provider has overpaid its contribution, the Commission shall credit that provider's account for the amount of the overpayment.

OAR 860-032-620. Quarterly OUS Report.

This proposed rule establishes the details for filing reports and paying contributions to the OUS Administrator. Section (7) directs the Commission to add interest on any unpaid contribution amount at the rate of 9 percent per annum. The interest starts when the payment is due and continues until payment is received.

OAR 860-032-0630. Estimated OUS Report.

This proposed rule authorizes the Commission to make a proposed contribution assessment when a telecommunications provider fails to file a contribution report as required. The proposed rule establishes the framework and conditions for a proposed contribution assessment.

OAR 860-032-0640. Commission Audit of OUS Reports.

This proposed rule authorizes the Commission to audit a telecommunications provider. The proposed rule establishes the framework and conditions for an audit.

OAR 860-032-0650. Notice and Hearing on Proposed Orders and OUSF Assessments.

This proposed rule provides information on the notice required for an OUS proposed order or proposed assessment and the processes for any hearing held on those actions.

OAR 860-032-0660. OUS Record-keeping Requirements.

This proposed rule establishes requirements for creating and making available records supporting telecommunications provider contribution reports. It also authorizes the Commission to suspend or cancel a certificate of authority for a telecommunications provider's failure to produce for inspection or audit the required records.

Comments of Verizon

OAR 860-032-0610.

If a telecommunications provider overpays its OUS contribution amount, this proposed rule directs the Commission to apply the overpayment to the provider's account. The proposed rule does not provide for the payment of interest between the time of the overpayment and the time when the overpayment is applied to an amount subsequently due from the provider. Verizon suggests that interest should be calculated on overpayments the same as they are calculated for under-or-non-payments.

Commission Decision. We question our authority to pay interest to those who overpay their OUSF contribution amount. Verizon did not cite any authority authorizing us to pay interest on OUSF overpayments, and we are not aware of any statutory authority for paying the requested interest. In fact, the statute authorizing state agencies to refund excess payments they receive, ORS 293.445, does not provide for the payment of interest. It authorizes refunds, but does not authorize interest payments on excess funds received.

Verizon does not say what rate of interest should be paid on the overpayments. It refers to the interest that is accrued on under- and non- payments. That interest rate is 9 percent per annum. If the Commission paid 9 percent per annum on OUSF overpayments, it would create an incentive for providers to overpay their OUSF bills and receive a return of 9 percent per annum on their "investment." The OUSF should not be an investment vehicle.

Because of the legal question and the practical implications of paying interest on overpayments, the Commission declines to adopt Verizon's suggestion. The rule proposed by Staff will be adopted.

OAR 860-032-0620(2).

Included in this proposed rule is the requirement that each telecommunications provider file a quarterly contribution report whether it owes any money or not. Verizon believes quarterly reports are not needed from providers who are not actively doing business. Verizon contends that other Commission reports are sufficient to inform the Commission whether a provider is generating revenue.

Commission Decision. The Commission does not know when companies actually start operations or when they cease operations. The Commission receives annual reports from telecommunications providers, but the OUS program requires quarterly reports. If a provider fails to file a quarterly OUS report, it may have ceased operations or may have simply failed to file the report while it continues to provide telecommunications service. A quarterly report from each provider provides necessary information to the Commission Staff and the OUS Administrator. The quarterly reports will make the providers accountable on a timely basis for

the information they provide. It will not be unduly burdensome for providers to file the quarterly reports. The rule proposed by Staff will be adopted.

OAR 860-032-0620(8).

Sections (5), (6), and (7) of proposed rule 860-032-0620 direct the Commission to impose late report and late payment fees when appropriate and to charge interest on unpaid contribution amounts. Section (8) states that the Commission may issue a proposed order to set the amount due when a contribution is not paid when due. Verizon recommends that the rule include the option for the Commission to waive a penalty or interest. Verizon has in mind the situation in which a provider attempts to pay on time but the actual filing is late due to factors beyond the provider's control.

Commission Decision. We note that the proposed rule states that the Commission may issue a proposed order to set the sum due. The Commission has discretion to issue a proposed order or not issue one. We assume Verizon is concerned that the Commission may decide to issue a proposed order but might waive penalties in an individual case if it had explicit authority to do so.

Verizon makes a valid point as to late payment fees. There may be instances in which the Commission issues a proposed order setting the amount due, but would like to waive penalties when a payment is late due to circumstances beyond the provider's control (the mechanism customarily used to transmit payments malfunctions, for example). We expect the Commission to waive penalties only in very unusual or rare situations in which the imposition of penalties would be unjust. We will add a sentence to section (8) as follows: "The Commission may waive late payment fees if the evidence shows that the provider paid its contribution amount late due to circumstances beyond its control."

Waiving interest payments on past-due accounts is another matter. When the Commission does not receive a payment for the OUSF when due, for whatever reason, interest that would have been earned is not earned for the Fund. Instead, the telecommunications provider receives the interest on the amount due until the transfer of funds is complete. If interest payments are waived, the OUSF loses and the telecommunications provider benefits when a payment is late due to circumstances beyond the provider's control. The burden for the loss of interest income should not be borne by the OUSF. The Commission may waive late payment fees when a payment is late due to circumstances beyond the provider's control, but will not waive interest obligations for late payments.

CONCLUSIONS

Rules are necessary to establish procedures for the payment of OUS contribution amounts and the filing of reports relating to the OUS program. The rules adopted in this order

will meet those needs. The rules are fair, adequate, and appropriate and were adopted at our Public Meeting on November 5, 2002.

ORDER

IT IS ORDERED that:

1. New rules OAR 860-032-0610, 860-032-0620, 860-032-0630, 860-032-0640, 860-032-0650, and 860-032-0660 are adopted as shown on Appendix A to this order;
2. These rules shall become effective when filed with the Secretary of State.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A person may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

860-032-0610

General Provisions

(1) For the purpose of these rules, each calendar year has four quarters as follows: January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through December 31.

(2) For the purpose of OARs 860-032-0610 through 860-032-0660, the quarterly revenue worksheet identified as “OPUC OUS 2” shall be known as the “contribution report.”

(3) A telecommunications provider may pay any amounts due to the Public Utility Commission (Commission) by electronic transfer.

(4) The Commission may add all costs incurred in collecting a past-due “Oregon universal service” (OUS) contribution amount. In the event the Commission refers the debt to the Department of Revenue or to a collection agency, the Commission may add to the debt the anticipated amount necessary to generate a net return to the Commission of the amount of the debt.

(5) The Commission shall impose a charge of \$25 for each payment returned for non-sufficient funds.

(6) In addition to any other penalty, obligation or remedy provided by law, the Commission may suspend or cancel the telecommunications provider’s certificate of authority to provide telecommunications service in Oregon for its failure to file its contribution report or its failure to pay its contribution amount in full.

(7) Except as otherwise provided by law, if after an audit or review the Commission determines that the telecommunications provider has overpaid its OUS contribution amount, the Commission shall provide the telecommunications provider a credit in that amount against sums subsequently due from the telecommunications provider.

(8) In computing any period of time prescribed or allowed by these rules, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the time period shall be included, unless it is a Saturday or legal holiday, including Sunday, in which event the time period runs until the end of the next day which is not a Saturday or a legal holiday. Legal holidays are those identified in ORS 187.010 and 187.020.

Stat. Auth.: ORS 183, 192, 756 & 759

Stats. Implemented: ORS 756.040, 759.015 & 759.425

Hist.: NEW

860-032-0620

Quarterly OUS Report: Filing and Payment

(1) For the purpose of the OUS fund, a telecommunications provider shall file its contribution report with the OUS Administrator. The contribution report is due on or before the 10th day of the second month after the close of each three-month quarter (i.e.

approximately 40 days after the end of each three-month quarter). A telecommunications provider shall send its contribution report so that it is received in the OUS Administrator's offices no later than 5 p.m. on the date it is due.

(2) A telecommunications provider shall file the contribution report for each quarter with no exceptions, including when the contribution amount shown on the report is \$0.00.

(3) The amount shown on the contribution report is due and payable by the telecommunications provider on or before the 28th day of the second month after the close of each three-month quarter. Payment shall be made to the Commission. A telecommunications provider shall send payment (electronically or by mail) so that it is received in the Commission's offices by no later than 5 p.m. on the date it is due.

(4) If the contribution amount is less than \$100, a telecommunications provider may defer payment and accumulate it to the following quarter's contribution. This accumulation may continue interest-free until either the accumulated amount is greater than \$100 or four quarters have passed from the first deferment, whichever comes first.

(5) If a telecommunications provider fails to file a contribution report as required by these rules, the Commission shall impose a late report fee of \$100. The Commission shall not impose a late report fee until a contribution report is five business days past due.

(6) If a telecommunications provider files a contribution report but fails to pay the contribution amount in full on or before the day it is due, the Commission shall add a late payment fee equal to 9 percent of the unpaid amount of the contribution, up to a maximum of \$500. The Commission shall not impose a late payment fee until the required payment is five business days past due.

(7) If a telecommunications provider fails to pay the contribution amount in full on or before the day it is due, the Commission shall add interest on the unpaid contribution amount at the rate of 9 percent per annum from the day payment was due until paid.

(8) If the amount shown due on a contribution report is not paid on the due date, the Commission may issue a proposed order to set the sum due. The Commission may waive late payment fees if the evidence shows that the provider paid its contribution amount late due to circumstances beyond its control.

Stat. Auth.: ORS 183, 192, 756 & 759

Stats. Implemented: ORS 756.040, 759.015 & 759.425

Hist.: NEW

860-032-0630

Estimated Report

(1) For any quarter for which a telecommunications provider fails to file a contribution report as required by these rules, the Commission may make a proposed contribution assessment based upon any information available to the Commission.

(2) The proposed assessment shall include a late payment fee equal to 9 percent of the proposed assessment amount, up to a maximum of \$500 for that quarter.

(3) Each proposed assessment shall bear interest on the amount proposed at the rate of 9 percent per annum from the day the contribution amount was originally due.

(4) The Commission's proposed assessment for a non-filed contribution report must be made no later than three (3) years after the contribution report's due date.

(5) Notwithstanding section (4) of this rule, if the telecommunications provider did not hold a certificate of authority, the Commission shall have an unlimited time to propose an assessment for the time period represented by the non-filed contribution report. The proposed assessment shall include all late payment fees and interest as specified in this rule.

(6) Prior to the expiration of the period allowed for filing a petition for a hearing, the telecommunications provider may file its contribution report. The Commission shall accept the report and calculate late report fees, late payment fees, and interest in accordance with the original due date for that quarter's contribution report and payment, if any, accompanying the report.

Stat. Auth.: ORS 183, 192, 756 & 759

Stats. Implemented: ORS 756.040, 759.015 & 759.425

Hist.: NEW

860-032-0640

Commission Audit and Proposed Assessment

(1) For any quarter for which a telecommunications provider's contribution report was due, the Commission may audit the telecommunications provider as the Commission deems necessary and practicable.

(2) The Commission's audit must be commenced no later than three years after the quarter's contribution report's due date. After completion of its audit, the Commission may propose to assess an additional contribution amount due from the telecommunications provider.

(3) In the event the telecommunications provider failed to file a contribution report for the quarter, the Commission shall add to the proposed assessment a late payment fee equal to 9 percent of the amount of the proposed assessment, up to a maximum amount of \$500.

(4) Each proposed assessment shall bear interest on the additional amount proposed at the rate of 9 percent per annum from the day the original contribution amount was due.

(5) Notwithstanding section (2) of this rule, if the telecommunications provider did not hold a certificate of authority, the Commission shall have an unlimited time to audit the telecommunications provider for universal service charges.

Stat. Auth.: ORS 183, 192, 756 & 759

Stats. Implemented: ORS 756.040, 759.015 & 759.425

Hist.: NEW

860-032-0650

Notice and Hearing on Proposed Orders and Assessments

(1) The Commission shall provide written notice of the proposed order or proposed assessment to the telecommunications provider and allow the telecommunications provider an opportunity to request a hearing before the Commission.

(2) Within 30 days after service of the notice of proposed order or proposed assessment, a telecommunications provider may petition the Commission in writing for a hearing. If a petition is not filed within the 30-day period, the Commission shall enter a final order or assessment based upon information in the Commission's files. If a petition is filed within the 30-day period, the Commission shall grant the telecommunications provider a hearing and give the telecommunications provider at least 10 days notice of the time and place of the hearing.

(3) The telecommunications provider must specify in its petition all reasons it disputes the proposed order or the proposed assessment. The Commission shall conduct a hearing on the telecommunications provider's petition under its rules governing hearings and proceedings. Unless the telecommunications provider has filed an amended contribution report, the amount shown on the contribution report shall not be subject to challenge by the telecommunications provider.

(4) A Commission order deciding the petition shall become final after service of the Commission's order upon the petitioning telecommunications provider.

(5) A proposed assessment made by the Commission under these rules is due and payable on the 10th day after the Commission's order becomes final.

Stat. Auth.: ORS 183, 192, 756 & 759

Stats. Implemented: ORS 756.040, 759.015 & 759.425

Hist.: NEW

860-032-0660

OUS Record-keeping Requirements

(1) A telecommunications provider shall produce for inspection or audit upon request of the Commission or its authorized representative all records supporting its contribution reports. The Commission, or its representative, shall allow the telecommunications provider a reasonable time to produce the records for inspection or audit.

(2) A telecommunications provider must keep all records supporting each contribution report for three years, or until a Commission review or audit is complete, whichever is later.

(3) In addition to any other penalty allowed by law, the Commission may suspend or cancel a telecommunications provider's certificate of authority to provide telecommunications service for its failure to produce for inspection or audit the records required by this rule.

Stat. Auth.: ORS 183, 192, 756 & 759

Stats. Implemented: ORS 756.040, 759.015 & 759.425

Hist.: NEW