

ORDER NO. 03-696

ENTERED NOV 26 2003

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 467

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| In the Matter of |) | |
| |) | |
| MONROE TELEPHONE COMPANY |) | ORDER |
| |) | |
| Petition by Monroe Telephone Company to |) | |
| amend OAR 860-032-0190. |) | |

DISPOSITION: PETITION DENIED

On July 30, 2003, Monroe Telephone Company (Monroe) filed a petition to amend OAR 860-032-0190. Monroe proposes the Commission amend its definition of basic telephone service to add extended area service (EAS) to the list of basic services.

Following a review of the petition, the Commission Staff recommended the Commission deny the petition. Staff's analysis and basis for its recommendation is contained in its Staff Report, attached as Appendix A and incorporated by reference.

At its August 20, 2003 Public Meeting, the Commission adopted Staff's recommendation and denied the petition. This order memorializes the Commission's decision made at that meeting.

ORDER

IT IS ORDERED that the rulemaking petition, filed by Monroe Telephone Company, is denied.

Made, entered, and effective _____.

BY THE COMMISSION:

Becky L. Beier
Commission Secretary

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A party may appeal this order to a court pursuant to ORS 756.580.

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**PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: August 20, 2003**

REGULAR X CONSENT EFFECTIVE DATE NA

DATE: August 12, 2003

TO: John Savage through Phil Nyegaard

FROM: Dave Booth

SUBJECT: AR 467: Petition by Monroe Telephone Company to amend OAR 860-032-0190, Definition of Basic Telephone Service.

STAFF RECOMMENDATION:

Staff recommends that the Commission deny the petition of Monroe Telephone Company to amend OAR 860-032-0190, which defines basic telephone service.

DISCUSSION:

Summary of the petition

On July 30, 2003, Monroe Telephone Company (Monroe) filed a petition under ORS 183.390 and OAR 860-013-0020 to amend OAR 860-032-0190. The latter rule defines basic telephone service for purposes of ORS 759.410 (price cap regulation) and ORS 759.425 (Oregon Universal Service Fund). ORS 183.390 requires the Commission to act on a petition for rulemaking within 30 days of the file date. Therefore, the Commission must grant or deny the petition by August 29, 2003. A copy of Monroe's petition is attached.

Monroe proposes to amend the Commission's definition of basic telephone service in OAR 860-032-0190 to add extended area service (EAS) to the list of basic services. Monroe presents two arguments in support of its proposal:

- (1) Excluding EAS from basic telephone service is discriminatory because it causes rural customers to pay higher rates than urban customers for EAS service. According to Monroe, this violates ORS 759.425(1), which states in part, "the Commission shall establish and implement a competitively neutral and nondiscriminatory universal service fund to ensure basic telephone service is available at a reasonable and affordable rate."

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(2) Excluding EAS is inconsistent with federal law, namely Section 254 of the Telecommunications Act of 1996 (the Act). ORS 759.425(1) requires that the Oregon Universal Service (OUS) Fund conform to Section 254. Therefore, according to Monroe, the exclusion of EAS also violates state law. Monroe contends that exclusion of EAS from basic telephone service fails to conform to Section 254 because "by not providing support for the high cost rural areas, those services are not available 'at rates that are reasonably comparable to rates charged for similar services in urban areas'." In addition, Monroe contends that Section 254 requires the OUS Fund to support the same services that the Federal Communications Commission (FCC) supports under the interstate universal service program. Since the interstate program supports EAS, the OUS Fund must do the same.

In Monroe's view, ORS 759.425(1) and Section 254 of the Act require the Commission to support EAS service through the OUS Fund. However, Monroe's petition notes that another state law, ORS 759.400(1), is arguably inconsistent with ORS 759.425(1) and Section 254 of the Act. According to the petition,

Monroe recognizes that ORS 759.400(1) can be read to restrict basic telephone service to a subset of the items found under the definition of local exchange telecommunications service as defined in ORS 759.005. However, to that extent ORS 759.400 and ORS 759.425 are themselves inconsistent. If two provisions of statute are inconsistent with one another, the rule of statutory construction is that a way must be found to try to harmonize the two seemingly inconsistent provisions. One way to do this is to recognize that the legislature has not explicitly defined EAS as separate from local exchange service. (Petition, at page 5.)

ORS 759.400(1) reads as follows:

"Basic telephone service" means local exchange telecommunications service defined as basic by rule of the Public Utility Commission.

ORS 759.005(2)(c) reads as follows:

"Local exchange telecommunications service" means telecommunications service provided within the boundaries of exchange maps filed with and approved by the commission.

The petition offers a way for the Commission to resolve this alleged conflict between ORS 759.400(1) and ORS 759.425(1). Monroe suggests the Commission can reinterpret the statutory meaning of "local exchange telecommunications service" in

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ORS 759.005(2)(c). Monroe's approach is to construe the phrase "within boundaries of exchange maps" as including "services that are provided within the confines of more than one, single exchange. Monroe goes on to say, "In other words, EAS falls within the definition because it is 'within the boundaries of exchange maps'."

Staff analysis

Staff recommends the Commission deny Monroe's petition for the following reasons:

(1) The Commission has already considered whether to include EAS in basic telephone service, and has declined to do so. The Commission adopted its current definition of basic telephone service in docket AR 368. See Order No. 00-265, May 19, 2000. The OTA Small Company Committee filed comments in AR 368, in part to advocate inclusion of EAS as a basic telephone service. Monroe Telephone Company is listed in docket AR 368 as a member of the OTA Small Company Committee. Neither ORS 759.400 nor ORS 759.425 have changed since the AR 368 order. Section 254 of the Act is unchanged as well. Staff does not believe the Federal Communications Commission (FCC) has issued new rules of relevance. Neither has this Commission. In essence, Monroe's petition amounts to an untimely request for reconsideration of Order No. 00-265.

In docket AR 368, staff recommended the Commission not include EAS service in basic telephone service. Staff offered two reasons for its recommendation. First, the Commission had already determined in its investigation of universal service in docket UM 731, that basic telephone service should include access to EAS service, but not EAS service itself. See Order No. 95-1103. Second, based on advice from the Department of Justice, staff advised the Commission that ORS 759.400(1) precludes the Commission from including EAS in the definition of basic telephone service. ORS 759.400(1) limits the scope of basic telephone service to "local exchange telecommunications service" only. The Commission has on numerous occasions found that EAS is an interexchange service, not a local exchange telecommunications service.¹ The Commission adopted staff's recommendation to exclude EAS service from the definition.

The OTA Small Company Committee (Small Companies) filed comments in docket AR 368 critical of staff's proposed rule. On the issue of EAS, the Small Companies (including Monroe) said the following:

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¹ For example, see docket AR 188, Order No. 88-1522, p. 16, docket UM 189, Order No. 89-815, p. 7, and docket UT 80, Order No. 91-1598, p. 25. Classification of EAS as an interexchange service is a key aspect of how the Commission regulates this service.

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The Commission has deemed EAS an interexchange service and, as such, EAS is not considered basic. However, it should be emphasized that in many areas of the state, affordability for a rural telephone customer includes the cost of EAS, as this is the only way to reach essential services. EAS should be included as part of basic telephone service. If not, then customers of rural areas will not be getting comparable services at affordable rates. If legislation is needed to correct this exclusion, it should be given top priority next session.

In summary, the Small Companies said in AR 368 that they would like to have EAS included as a basic telephone service, but acknowledged that the Commission has determined EAS to be an interexchange service and, as such, not basic telephone service. The Small Companies specifically noted that a legislative solution might be needed. To staff's knowledge none of the small companies have introduced or supported legislation to change ORS 759.400(1) so that EAS could be included as a basic telephone service.

Now, after failing to seek legislation to address its concerns, Monroe is asking the Commission to do what the legislature has not done. The Commission should decline the invitation. There is no emergency. The Commission should not be rushed into piecemeal revisions to the basic telephone service definition. Rather, the Commission should conduct a comprehensive review of the definition at an appropriate time. ORS 759.425(2)(a) already requires the Commission to periodically review, "at its discretion", "the services included in basic telephone service." Staff contemplates requesting the Commission to open such a review sometime in 2005. By then, the Commission, the industry, and consumers will have considerable experience with the OUS Fund and Qwest Corporation's price cap plan under ORS 759.410.

(2) Monroe's suggestion that the Commission should reinterpret the definition of "local exchange telecommunications service" in ORS 759.005(2)(c) so that it includes EAS service is hard to understand. It also conflicts with the description of EAS in other statutes.

First, Monroe's view of the statute is contrary to the plain language of ORS 759.005(2)(c). According to the statute, a service is local exchange telecommunications service if the service is "within the boundaries of exchange maps filed with and approved by the commission." Quite clearly, the service takes place "within the boundaries" of each map. Monroe places great emphasis on the fact that the word "maps" is plural. The simpler, and therefore preferable, interpretation is that the word "maps" is plural because there are multiple exchanges in the state, and therefore multiple maps.

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Second, Monroe's reinterpretation of ORS 759.005(2)(c) conflicts with the description of EAS in ORS 759.410(10). The latter statute was enacted in 2001 to deal with cost recovery for new EAS routes involving telecommunications utilities that elect price cap regulation under ORS 759.400 through ORS 759.410. Since EAS is non-basic, and therefore price-capped, the original legislative scheme would have prevented an electing utility from raising EAS rates to account for new EAS routes. ORS 759.410(10) creates a limited exemption from price caps for EAS when the Commission approves new EAS routes. ORS 759.410(10) clearly recognizes that EAS is not basic telephone service. Otherwise it would have no purpose. This statute also unambiguously identifies EAS as an interexchange service.²

ORS 759.410(10) reads as follows:

Notwithstanding any other provision of this section, the commission shall establish prices for extended area service in a manner that allows a telecommunications carrier that elects to be subject to this section and ORS 759.405 to recover all costs and lost net revenues attributable to implementing new extended area service routes. The provisions of this subsection apply to telecommunications service provided on a flat or measured basis between exchanges defined by exchange maps filed with and approved by the commission.

(3) Contrary to Monroe's claim, the OUS Fund is not discriminatory simply because monthly EAS rates in more rural exchanges like Monroe tend to be higher than monthly EAS rates in relatively urban exchanges like Eugene-Springfield. First, EAS rates vary from carrier to carrier. In this example, the Monroe exchange is served by Monroe Telephone Company, and the Eugene-Springfield exchange is served by Qwest Corporation. Rates vary from carrier to carrier for numerous reasons, including differences in company profits, differences in the degree of rate regulation, and differences in rate design strategy, such as setting the ratio of residential to business rates, the ratio of local exchange to EAS rates, and the markup on custom calling features and other sources of local exchange revenue.

A key reason for rural/urban differences in monthly EAS rates is the higher per-customer volume of EAS calling from rural exchanges to urban exchanges. On a per-customer basis, rural customers tend to make more EAS calls than urban customers, reflecting the desire of rural customers to reach larger population centers and urban services. It is reasonable for customers who make more calls to pay higher monthly rates.

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² A description of EAS similar to the one in ORS 759.410(10) can be found in ORS 759.257 and ORS 759.259.

(4) Contrary to Monroe's claim, a tendency for monthly EAS rates to be higher in rural exchanges does not necessarily violate the comparable rates provision in Section 254 of the Act. Section 254(b)(3) reads as follows:

ACCESS IN RURAL AND HIGH COST AREAS –Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

The key phrase cited by Monroe is "at rates that are reasonably comparable to rates charged for similar services in urban areas." The reasonably comparable standard allows for rate differences. In other words, in Monroe's example the monthly EAS rate can be higher in the Monroe exchange than in the Eugene-Springfield exchange. The difference must be reasonable for similar services. Whether urban/rural rate differences are reasonable requires an analysis of the various factors that can account for variation in rates, such as those mentioned above dealing with Monroe's claim of discrimination. Monroe's petition does not present this kind of analysis. It simply says the rates are different, so there is a violation of Section 254. This claim is insufficient evidence to suggest that urban/rural rate differences are not reasonably comparable under the meaning of Section 254 of the Act.

(5) Monroe's petition claims that according to Section 254(f) of the Act a state universal service program "must at a minimum provide support for the services supported by federal funds" (Petition, at page 4.) Staff disagrees.

Section 254(f) reads as follows:

STATE AUTHORITY – A state may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications service shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific,

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predictable and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

Section 254(f) is not as clear as Monroe would have the Commission believe. In fact, Monroe points to no ruling or order in which the FCC has relied on Section 254(f) to specifically require state universal service programs, at a minimum, to support the services supported by federal funds.

Furthermore, staff does not believe that Oregon is "inconsistent with the [FCC's] rules to preserve and advance universal service" simply because the OUS Fund is not identical to the federal universal service program. Neither does the OUS Fund "rely on or burden "Federal universal service support mechanisms." Federal support mechanisms do not provide more or less support based on inclusion or exclusion of EAS from OUS Fund support in Oregon.

The Commission should not now redefine basic telephone service so it includes EAS, despite the plain language of Oregon law, simply based on Monroe's unconfirmed interpretation of Section 254(f). If Section 254(f) is interpreted differently in the future, it should be left to the legislature to harmonize Oregon and federal law.

The implications of having to support through the OUS Fund every service supported by the federal fund are serious. For example, if the FCC were to decide to add broadband services to the services it supports with federal universal service funds, then according to Monroe's view the OUS Fund would have to do the same. The Commission would have no option but to add broadband services to the definition of basic telephone service. The likely result would be a serious financial blow to the OUS Fund and the OUS surcharge rate. It would also impact Qwest Corporation's price-cap plan under ORS 759.410, since that plan must use the same basic service definition as the OUS Fund. Qwest's broadband services would become basic and therefore under more intensive Commission rate regulation. Clearly, this is a matter the legislature would need to address.

(6) Granting Monroe's petition and proposed rule would mean substantial work to revise the OUS Fund. The Commission would need to revisit the universal service benchmark and recalculate the cost of providing basic telephone service in areas throughout the state. OUS Fund support is provided to eligible telecommunications carriers according to the formula in ORS 759.425(3)(a). The latter statute reads as follows:

The Public Utility Commission shall establish a benchmark for basic telephone service as necessary for the administration and distribution of the universal service fund. The universal service fund shall provide

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explicit support to an eligible telecommunications carrier that is equal to the difference between the cost of providing basic telephone service and the benchmark, less any explicit compensation received from federal sources specifically targeted to recovery of loop costs and less any explicit support received by the carrier from a federal universal service program.

In docket UM 731, Order No. 00-312, the Commission established the benchmark as the composite average economic cost of providing basic telephone service in areas served by Oregon's two major local exchange carriers, Qwest Corporation (Qwest) and Verizon Northwest Inc. (Verizon). If EAS were added to the definition of basic telephone service, the Commission would need to recalculate the composite average economic cost for Qwest and Verizon so it would include the cost of EAS. Those costs are now excluded. In addition, the Commission would need to recalculate the cost of providing basic telephone service in each support area. The Commission should not take on this task in response to piecemeal rule changes and when the OUS Fund is still in its infancy. It is better to wait until after a comprehensive review of the basic telephone service. As mentioned above, staff contemplates the Commission would begin such a review in 2005.

PROPOSED COMMISSION MOTION:

That the petition by Monroe Telephone Company to amend OAR 860-032-0190, definition of basic telephone service, be denied.

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