

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UCB 35

CITIZENS TELECOMMUNICATIONS
COMPANY OF OREGON, d/b/a FRONTIER
COMMUNICATIONS OF OREGON

Complainant,

ORDER

vs.

QWEST CORPORATION

Defendant.

**DISPOSITION: MOTION FOR SUMMARY JUDGMENT GRANTED
IN PART; MOTION TO ALLOW FILING OF
RESPONSIVE EXHIBIT DENIED**

I. INTRODUCTION

On September 23, 2008, Citizens Telecommunications Company of Oregon, d/b/a Frontier Communications of Oregon (Frontier), filed a complaint against Qwest Corporation (Qwest). In the complaint, Frontier alleges that, on May 1, 2008, Qwest unilaterally began charging Frontier for transiting local and local extended area service (EAS) traffic at a rate of \$.0045 per minute. Frontier asserts that Qwest has not filed a tariff with the Public Utility Commission of Oregon (Commission) authorizing these charges, nor does Qwest have an agreement with Frontier allowing the charges. Frontier further alleges that Qwest arbitrarily set the \$.0045 per minute rate without establishing that the rate was just and reasonable, and that the costs of transiting EAS traffic are already recovered in the EAS rates that the Commission established in docket UM 1061. Finally, Frontier alleges that Qwest's decision to bill Frontier, but not other similarly situated carriers, is discriminatory. Frontier asks the Commission to invalidate the charges billed to date, order Qwest to cease unilaterally charging Frontier for transiting local and EAS traffic, and impose penalties against Qwest for its discriminatory conduct.

Qwest filed a motion to dismiss Frontier's complaint on October 24, 2008, arguing that the Federal Communications Commission (FCC) has exclusive jurisdiction over transit service. The Oregon Telecommunications Association (OTA) filed a petition to

intervene on October 29, 2008, which the Administrative Law Judge (ALJ) granted during a prehearing conference held on November 20, 2008.¹ Qwest filed its answer to Frontier's complaint on November 12, 2008. Frontier and OTA filed responses to Qwest's motion to dismiss, but during the prehearing conference, the parties agreed that some issues in Frontier's complaint would be better addressed through a motion for summary judgment.

Frontier filed its Motion for Summary Judgment (Motion) on December 9, 2008. Qwest, OTA, and Commission Staff (Staff) filed responses on January 9, 2009. On January 23, 2009, Frontier, OTA, and Staff filed replies. The parties present three issues for our resolution. First, does this Commission have jurisdiction over local and EAS transit traffic? Second, did Qwest violate ORS 759.175 and ORS 759.205 by charging Frontier for transiting local and EAS traffic without having a tariff or agreement in place that authorized such charges? And finally, did Qwest violate ORS 759.260 and ORS 759.275 by charging Frontier for transiting local and EAS traffic, but not charging other similarly situated carriers?² We conclude that this Commission does have jurisdiction, and that Qwest has violated ORS 759.175 by charging Frontier for transiting local and EAS traffic without a Commission-approved tariff or agreement authorizing such charges. We decline, however, to find that Qwest's actions amount to unjust discrimination under ORS 759.260 or ORS 759.275.

II. PROCEDURAL ISSUES

As part of the pleadings related to Frontier's Motion for Summary Judgment, the parties have provided copies of documents from a similar case before the Minnesota Public Utilities Commission (MPUC). The Minnesota case involves affiliated parties, the same facts, and similar issues under Minnesota statutes. On December 31, 2008, Frontier filed the MPUC's Order Finding Jurisdiction, Granting Petition, and Directing Qwest to Handle Local EAS Transit Traffic without Additional Charge (MPUC Order) as supplemental authority in this docket. Given the similarities between the MPUC case and this docket, we take official notice of the MPUC Order and include it as part of the record.³

On January 23, 2009, Frontier filed its Reply to Responses to Motion for Summary Judgment (Frontier's Reply) and included Qwest's motion for reconsideration of the MPUC Order as an attachment. In response, OTA filed a Motion to Allow Filing of Responsive Exhibit, asking this Commission to also include CenturyTel's response to Qwest's motion for reconsideration of the MPUC Order as part of the record in this docket. Qwest's motion for reconsideration is limited to the question of whether the MPUC Order affects Qwest's contract with CenturyTel, which includes provision governing local EAS transit traffic. The questions at issue in the motion for reconsideration are specific to Qwest's agreement with CenturyTel and are irrelevant to the issues in Frontier's Motion in

¹ Qwest filed an objection to OTA's petition to intervene on November 6, 2008, but withdrew its objection at the November 20 prehearing conference.

² Frontier did not ask for summary judgment on the issues of whether the \$.0045 rate is unjust and unreasonable, or whether the costs of transiting EAS traffic are recovered in the Commission-approved EAS rates established in docket UM 1061.

³ OAR 860-014-0050(1)(b), Any party may object to the notice within 15 days of this order pursuant to OAR 860-014-0050(2).

this docket. We therefore deny OTA's motion to allow filing of responsive exhibit. We also decline to include the motion for reconsideration attached to Frontier's Reply as part of the record in this proceeding.

III. LEGAL STANDARD

Under Oregon Rules of Civil Procedure (ORCP) 47(C), summary judgment is appropriate when the "pleadings, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law."⁴ In determining whether there is no genuine issue of material fact, the Commission must view the evidence "in a manner most favorable to the adverse party."⁵

IV. UNDISPUTED FACTS

In October 2007, Qwest sent a letter to Frontier stating that it was terminating all agreements with Frontier governing the transit of Frontier's local and EAS traffic, effective May 1, 2008.⁶ Qwest further stated that it would only continue to transit Frontier's local and EAS traffic after May 1 if Frontier executed an infrastructure sharing agreement under section 259 of the Telecommunications Act of 1996 (the Act).⁷ Under the terms of Qwest's proposed agreement, Qwest would charge Frontier \$.0045 per minute for transiting local and EAS traffic that originates on Frontier's network and terminates on another telecommunications carrier's network.

In response to Qwest's letter, Frontier told Qwest that Qwest could not unilaterally terminate any agreement and could not begin billing Frontier for transiting local and EAS traffic without a Commission-approved tariff or agreement. Frontier refused to execute Qwest's proposed section 259 agreement. Neither Qwest nor Frontier identified an existing agreement governing payment for transiting local and EAS traffic.

Although Qwest has not filed a tariff with this Commission establishing charges for transiting local and EAS traffic, and despite Frontier's refusal to sign the agreement, Qwest began issuing transit service invoices to Frontier in July 2008. The invoices total \$146,909.44 and include charges for transiting Frontier's local and EAS traffic from May 1 through October 31, 2008, at a rate of \$.0045 per minute. Frontier has refused to pay the invoices.

⁴ "The Oregon Rules of Civil Procedure shall govern in all cases except as modified by these rules, by order of the Commission, or by ruling of the ALJ." OAR 860-011-0000(3).

⁵ ORCP 47(C).

⁶ Affidavit of Jack Phillips, Exhibit A to Motion (Dec. 9, 2008) (Phillips Affidavit).

⁷ The Communications Act of 1934, as modified by the Telecommunications Act of 1996, is codified at 47 USC §§ 151-614.

V. DISCUSSION

A. Does the Commission have jurisdiction over local and EAS transit traffic?

1. *Parties' Positions*

Although the issue of the Commission's jurisdiction over transiting local and EAS traffic was raised in Qwest's Response to Frontier's Motion (Qwest's Response), and not in the Motion itself, we must address this issue first because there is no need to resolve the second and third issues if this Commission lacks jurisdiction. Qwest argues that transit service is a form of infrastructure sharing that is governed by section 259 of the Act. Qwest further argues that the FCC has exclusive jurisdiction over section 259 issues, and therefore this Commission lacks jurisdiction to resolve Frontier's complaint.

Frontier, Staff, and OTA dispute Qwest's assertions.⁸ Frontier argues that "Qwest has not identified a single court order, FCC decision or state public utility commission order that supports its position that the transiting of intrastate traffic falls within the scope of Section 259."⁹ Frontier also contends that Qwest has failed to show that Congress intended section 259 to preempt state law.

Staff argues that Qwest has not shown that section 259 of the Act applies, nor has Qwest shown that section 259 preempts state authority over intrastate transit services. OTA contends that Qwest has not shown that intrastate transit services are infrastructure sharing services and accuses Qwest of attempting to make section 259 applicable simply by labeling a service as an infrastructure sharing service. OTA states that Qwest's approach "would lead to outright chaos in the industry."¹⁰

2. *Resolution*

All of the parties agree that the traffic at issue here is intrastate traffic. Intrastate traffic has long been governed by state law and state regulatory commissions. The United States Supreme Court recognized that federal law "establishes * * * a system of dual state and federal regulation over telephone service."¹¹ With certain exceptions not applicable here, Congress explicitly retained the division between intrastate EAS traffic (subject to state jurisdiction) and interstate traffic (subject to federal jurisdiction): "[N]othing in this Act shall be construed to apply or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations of or in connection with *intrastate* communication service by wire or radio of any carrier * * *."¹²

⁸ Frontier, Staff, and OTA also debate the issue of whether rates for transiting local and EAS traffic are better established via tariff or via intercarrier agreements. This debate is outside the scope of Frontier's Motion, and this docket generally, and is therefore not addressed here.

⁹ Frontier's Reply at 4.

¹⁰ OTA's Reply to Qwest's Response and Staff's Response at 3.

¹¹ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 US 355, 360, 106 S Ct 1890, 90 L Ed 2d 369 (1986) (discussing the Communications Act of 1934).

¹² 47 USC § 152(b) (emphasis added).

Qwest appears to be arguing that the type of traffic at issue, whether interstate or intrastate, is not determinative of jurisdiction in this case. Instead, Qwest argues that the *service* at issue—transiting—is an infrastructure sharing service that is governed exclusively by federal law. There are two primary problems with Qwest’s position.

First, as Frontier points out, Qwest cites no legal authority to support its position that transiting local and EAS service falls within the scope of section 259 of the Act. Qwest simply asserts that transit service is an infrastructure sharing service, without explanation or support.

Second, even if transit service is considered an infrastructure sharing service and section 259 applies, Qwest cites no authority supporting its conclusion that infrastructure sharing services are exclusively within federal jurisdiction. The plain language of section 152 of the Act reserves state jurisdiction over “intrastate services.” Furthermore, the Act includes the following provision: “This Act and the amendments made in this Act shall not be construed to modify, impair, or supersede Federal, State, or local law *unless expressly so provided in such Act or amendments.*”¹³

In the absence of any evidence or authority to the contrary, we conclude that transiting intrastate traffic is an “intrastate service” under section 152(b) of the Act. We therefore conclude that we have jurisdiction to determine whether Qwest violated state statutes by unilaterally charging Frontier for transiting local and EAS traffic without an applicable Commission-approved tariff or agreement.

B. Did Qwest violate ORS 759.175 and ORS 759.205 by charging Frontier for transiting local and EAS traffic without having a tariff or agreement in place that authorized such charges?

1. Parties’ Positions

Frontier asserts that the undisputed facts are clear: (1) Qwest began charging Frontier for transiting local and EAS traffic on May 1, 2008; (2) Qwest does not have a tariff or rate schedule in Oregon that establishes the terms, conditions, or rates for transiting local and EAS traffic; and (3) Frontier does not have an agreement with Qwest that allows Qwest to charge Frontier for transiting local or EAS traffic. Based on these undisputed facts, Frontier argues that it is clear that Qwest violated the statutory requirement to file its rates (ORS 759.175), as well as the statutory requirement to charge only those rates that are on file with the Commission (ORS 759.205). Staff and OTA support Frontier’s position.

Qwest does not specifically respond to the substance of Frontier’s arguments. Instead, Qwest argues that its transit service is governed by federal law, and therefore state statutes such as ORS 759.175 and ORS 759.205 are inapplicable.

¹³ Pub. L. No. 104-104, § 601(c), 110 Stat. 56 (1996) (emphasis added).

2. *Resolution*

ORS 759.175 provides:

(1) Every telecommunications utility shall file with the Public Utility Commission, within a time to be fixed by the commission, schedules showing all rates, tolls and charges that the utility has established and that are in force at the time for any service performed by the utility within the state, or for any service in connection with or performed by any utility controlled or operated by the utility. Schedules filed with the commission shall be open to public inspection.

(2) Every telecommunications utility shall file, with and as part of every schedule filed under subsection (1) of this section, all rules and regulations that in any manner affect the rates charged or to be charged for any service.

(3) Where a schedule of joint rates or charges is or may be in force between two or more telecommunications utilities, the schedule shall in like manner be printed and filed with the commission.

Qwest admits that it is a telecommunications utility subject to ORS 759.175. Qwest also admits that there is “no state tariff or rate schedule showing prices or terms and conditions for transit service offered under state law,”¹⁴ and there is there is no agreement authorizing Qwest to charge Frontier for intrastate transit traffic. Finally, Qwest admits that it began charging Frontier for transiting local and EAS traffic on May 1, 2008, at a rate of \$.0045 per minute.

We agree with Frontier, Staff, and OTA that the undisputed facts in this case demonstrate that Qwest violated ORS 759.175 by charging Frontier for transiting local and EAS traffic without establishing the rate for such transit service through a Commission-approved tariff or intercarrier agreement. We therefore grant Frontier’s motion for summary judgment on the question of whether Qwest violated ORS 759.175. Qwest must either file a tariff establishing the terms, conditions, and rates for the transit of local and EAS traffic, or enter into intercarrier agreements (which must also be filed with the Commission) governing its provision of transit services. Until such a Commission-approved tariff or agreement is in place, Qwest may not charge Frontier for transiting local and EAS traffic, and Frontier is not obligated to pay the amounts charged in Qwest’s transit service invoices from May 1, 2008, through the date of this order. Because our findings regarding ORS 759.175 are sufficient to grant Frontier’s requested relief, we do not address the issue of whether Qwest’s actions also violated ORS 759.205.

¹⁴ Qwest Response at 3.

C. Did Qwest violate ORS 759.260 and ORS 759.275 by charging Frontier for transiting local and EAS traffic, but not charging other similarly situated carriers?

1. Parties' Positions

Relying on ORS 759.260, Frontier's contends that Qwest is illegally discriminating against Frontier by billing Frontier for transiting local and EAS traffic, but not billing other similarly situated carriers for the same service, or billing at a lower rate. Frontier further contends that Qwest's actions violate ORS 759.275 by giving undue preference to certain carriers to the disadvantage of Frontier. Frontier request that we impose penalties upon Qwest of its violations of these statutes.

Staff seems to support Frontier's position, stating that Qwest must "treat all carriers equitably in its imposition of a charge for transit services."¹⁵ OTA did not address this issue.

Qwest does not specifically respond to the substance of Frontier's arguments. Instead, Qwest argues that its transit service is governed by federal law, and therefore state statutes such as ORS 759.260 and ORS 759.275 are inapplicable.

2. Resolution

ORS 759.260 provides:

(1) Except as provided in ORS 759.265, no telecommunications utility or any agent or officer thereof shall, directly or indirectly, by any device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by it than:

(a) That prescribed in the public schedules or tariffs then in force or established; or

(b) It charges, demands, collects or receives from any other person for a like and contemporaneous service under substantially similar circumstances. A difference in rates or charges based upon a difference in classification pursuant to ORS 759.210 shall not constitute a violation of this paragraph.

(2) Any telecommunications utility violating this section is guilty of unjust discrimination.

¹⁵ Staff's Response to Frontier's Motion for Summary Judgment at 2.

In support of its contention that Qwest has violated this statutory provision, Frontier relies solely on the affidavit of its employee, Jack Phillips, which states that Qwest has publicly acknowledged that it has only sought “to impose the transiting service charge on the largest incumbent local exchange carriers in its service territories.”¹⁶ Frontier does not provide any details regarding this statement, such as when it was made and under what circumstances, nor does Frontier identify which carriers are being charged and which are not. Frontier also does not attempt to identify any reason for Qwest’s alleged disparate treatment of carriers (for example, Qwest may have a Commission-approved agreement with a carrier governing local and EAS transit traffic). From the evidence provided by Frontier, it is impossible to determine if Qwest is providing “a like and contemporaneous service” to other telecommunications carriers “under substantially similar circumstances.” There is simply insufficient information in the record to conclude that Frontier is entitled to prevail as a matter of law on its claim that Qwest has violated ORS 759.260.

ORS 759.275 provides that a telecommunications utility is guilty of unjust discrimination if the utility gives “undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.” To support its contention that Qwest has violated this statute, Frontier again relies on the assertion that Qwest is charging some carriers, but not all, for transiting local and EAS service. Frontier also alleges that Qwest may be charging some carriers different rates for the same service. Frontier again fails to provide any information about which carriers are being charged and which are not, nor does Frontier identify those carriers who are being charged a different rate, or even what that rate may be. Qwest may legitimately be entitled to charge a carrier a lower rate pursuant to a negotiated contract with that carrier, and the rate may be lower for a specific reason (for example, the carrier may have agreed to limit the amount of transit traffic). Without further information, it is impossible to determine if Qwest is giving one carrier an “*undue or unreasonable* preference or advantage” or subjecting Frontier to an “*undue or unreasonable* prejudice or disadvantage.” We therefore cannot conclude that Frontier is entitled to prevail as a matter of law on its claim that Qwest has violated ORS 759.275.

VI. ORDER

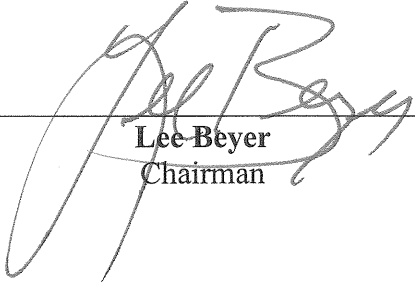
IT IS ORDERED that:

1. The Motion for Summary Judgment, filed by Citizens Telecommunications Company of Oregon, d/b/a Frontier Communications of Oregon, is granted in part.
2. Qwest Corporation must immediately cease charging Citizens Telecommunications Company of Oregon, d/b/a Frontier Communications of Oregon, for transiting local and EAS traffic.

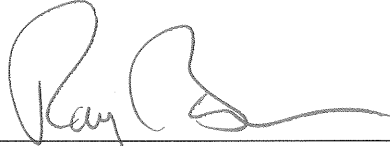
¹⁶ Phillips Affidavit at 2.

- 3. Qwest Corporation must continue to provide transiting local and EAS traffic to Citizens Telecommunications Company of Oregon, d/b/a Frontier Communications of Oregon.
- 4. Qwest Corporation may not charge Citizens Telecommunications Company of Oregon, d/b/a Frontier Communications of Oregon, for transiting local and EAS traffic unless authorized by a Commission-approved tariff or intercarrier agreement.
- 5. Any invoices delivered by Qwest Corporation to Citizens Telecommunications Company of Oregon, d/b/a Frontier Communications of Oregon, which charged for transiting local and EAS traffic from May 1, 2008, until the date of this order are declared invalid. Citizens Telecommunications Company of Oregon, d/b/a Frontier Communications of Oregon, is not obligated to pay these charges.


Made, entered and effective MAR 31 2009.



Lee Beyer
 Chairman



Ray Baum
 Commissioner



John Savage
 Commissioner



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 under applicable law.