

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1631

In the Matter of

NORTHWEST FIBER, LLC, dba ZIPLY
FIBER,

Request for Waiver of OAR 860-033-0005,
Minimum Service Standards.

ORDER

DISPOSITION: STAFF'S RECOMMENDATION ADOPTED

At its public meeting on September 22, 2020, the Public Utility Commission of Oregon adopted Staff's recommendation in this matter. The Staff Report with the recommendation is attached as Appendix A.

BY THE COMMISSION:



A handwritten signature in blue ink, appearing to read "Nolan Moser".

Nolan Moser
Chief Administrative Law Judge

A party may request rehearing or reconsideration of this order under 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 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.

**PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: September 22, 2020**

REGULAR X CONSENT EFFECTIVE DATE _____

DATE: September 15, 2020

TO: Public Utility Commission

FROM: Jon Cray

THROUGH: Michael Dougherty and Phil Boyle **SIGNED**

SUBJECT: RESIDENTIAL SERVICE PROTECTION FUND:
(Docket No. UM 1631)
Waiver of OAR 860-033-0005(3).

STAFF RECOMMENDATION:

Staff recommends the Public Utility Commission of Oregon (Commission) deny Northwest Fiber, LLC doing business as Zply Fiber's (Northwest Fiber) petition for waiver of Oregon Administrative Rule (OAR) 860-033-0005(3) and take no action to grant a waiver of OAR 860-033-0010(2) on its own motion. Alternatively, the Commission may grant a partial waiver of the temporary amendments to OAR 860-033-0010(2) with respect to customers of standalone broadband internet access service that does not meet the FCC's minimum service standards through December 31, 2020.

DISCUSSION:

Issues

1. Whether the Commission should grant or deny Northwest Fiber's petition for waiver of OAR 860-033-0005(3).
2. Whether the Commission should grant a waiver of OAR 860-033-0010(2) on its own motion.

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Applicable Law

The definition of broadband internet access service in OAR 860-033-0005(3) has the same meaning as defined in OAR 860-250-0010 and Oregon Laws 2018, Chapter 88, Section 1(1)(b):

- (i) A mass-market retail Internet access service provided by wire or radio that enables a person to transmit data to or receive data between the person's customer premises equipment, including mobile devices, and all, or substantially all, Internet endpoints;
 - (ii) Any service that the Public Utility Commission finds is providing a service that is the functional equivalent of the service described in sub-subparagraph (i) of this subparagraph; or
 - (iii) Any service that is incidental to or that enables the operation of the service described in sub-subparagraph (i) of this subparagraph.
- (B) "Broadband Internet access service" does not include dial-up Internet access service.

Pursuant to the first sentence in OAR 860-033-0010(2), "An Eligible Telecommunications Provider must offer to all low-income customers who meet eligibility requirements [Oregon Telephone Assistance Program] discounts with all service offerings that include broadband internet access service or basic telephone service."

As provided in the first sentence of OAR 860-033-0001(2), "...the Commission [upon request] may waive any of the division 33 rules for good cause shown."

Analysis

Background

The Oregon Telephone Assistance Program (OTAP) is a plan of assistance to low-income customers established under Sections 2 and 6, chapter 290, Oregon Laws 1987, as amended, to assure adequate, affordable residential telecommunication service is available to all citizens and to support broadband internet access service. It is the state counterpart to the Federal Communications Commission's (FCC's) Lifeline program, collectively known as Oregon Lifeline.

The 2019 Oregon Legislature enacted Senate Bill 69,¹ effective January 1, 2020, to align Oregon law with FCC regulations, under which eligible low-income customers can receive the OTAP discount on broadband internet access service. On June 5, 2020, the 2019-2020 Oregon Interim Joint Emergency Board allocated \$3.5 million from the

¹ Or Laws 2019 c.91 §1.

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federal Coronavirus Relief Fund to the Commission to expand access to affordable telephone and broadband internet access service for eligible low-income households by increasing the OTAP discount per month for six months.²

The Commission, in response to the enactment of Senate Bill 69 and the Oregon Interim Joint Emergency Board mandate, adopted temporary rules, effective July 1, 2020, in Docket No. AR 634 on June 30, 2020. The temporary rule amendments addressed the need for expanded support by adjusting the OTAP discount from \$3.50 to \$12.00 and requiring the plan of assistance to include broadband internet access service for eligible low-income households. See Order No. 20-204.

Northwest Fiber filed a petition for waiver on September 2, 2020; the Company requests the Commission grant a waiver of the temporary rule that defines broadband internet access service in OAR 860-033-0005 to the extent it includes broadband internet access service that does not meet the FCC's minimum standard to qualify for the federal Lifeline discount in 47 C.F.R. § 54.408.³

Rule Applicability

The specific rule, OAR 860-033-0005(3), for which Northwest Fiber requests a waiver does not appear to be an inaccurate definition of "broadband internet access service". As Staff understands the Company's request, the Company's concern lies with the rule in the first sentence of OAR 860-033-0010(2) that requires all Eligible Telecommunications Providers, including Northwest Fiber, to offer to all eligible low-income customers the OTAP discount on *all service offerings* that include broadband internet access service.

Compliance

In its petition and prayer for relief, Northwest Fiber contends that the Commission "expand[ed] the scope of eligible products well beyond that which is acceptable under the Federal Lifeline Program." To qualify for the federal Lifeline discount, a low-income household must subscribe to broadband internet access service that has a download speed of 20 megabits per second and an upload speed of 3 megabits per second. The Company does not quantify, but asserts that the temporary rule "substantially increased the number of low-income customers potentially eligible for [the OTAP discount, but not the federal Lifeline discount]..."

² See Oregon State Legislature; *Oregon Legislative Information; 2019-2020 Interim Joint Emergency Board*, <https://olis.oregonlegislature.gov/liz/201911/Committees/EB/2020-06-05-15-00/Agenda> (last visited September 1, 2020).

³ The current minimum standard for fixed broadband internet access service is 20 megabits per second downstream and 3 megabits per second upstream. See <https://docs.fcc.gov/public/attachments/DA-19-704A1.pdf> (last visited September 11, 2020).

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The FCC does not govern the applicability of the OTAP discount; the Oregon Legislature and the Commission do. The Oregon Interim Joint Emergency Board did not impose any minimum standard or speed to which the low-income customer must subscribe to receive the OTAP discount on his or her broadband internet access service. The statute governing the OTAP requires the Commission to support the affordability of broadband internet access service for all citizens of the state. Also, the Commission has a longstanding policy that supports consumer choice. Qualifying low-income Oregonians are permitted apply the OTAP discount on any Eligible Telecommunication Provider's phone service that fits their individual needs and budgets. The temporary rule in OAR 860-033-0010(2) applies the same policy to broadband internet access service. An eligible low-income Oregon customer should not be precluded from receiving the OTAP discount on the basis that his or her broadband internet access service does not meet the FCC's minimum standard.⁴

Since the July 1, 2020 effective date of the temporary rule in OAR 860-033-0010(2), Northwest Fiber has denied the OTAP discount to a total of three (3) Commission-approved eligible low-income customers seeking support for broadband internet access service below the FCC minimum standard. After the Commission adopted the temporary rules in Docket No. AR 634 that Northwest Fiber contacted Staff and expressed concern with compliance regarding this subset of its customers. On a conference call with Staff on July 16, 2020, Northwest Fiber discussed its concerns with Staff. Staff suggested the Company investigate more efficient alternatives that meet the same objective of OAR 860-033-0010(2), e.g., applying a courtesy or promotional credit, or manually applying a bill credit on a monthly basis, for the affected customers or by applying a credit for the effective period once system changes were implemented, but the Company did not find those suggestions acceptable. Northwest Fiber subsequently petitioned the Commission on September 2, 2020, for a waiver with the filing in this docket.

Northwest Fiber opines in its request that 560 hours of significant software development work over the course of several months, at a cost of approximately \$100,000, must be undertaken to conform to the temporary rule and asserts that both state and federal reimbursement reporting has been complicated as a result of the temporary rule. The

⁴ The Commission has filed comments with the FCC on three petitions urging the FCC to reevaluate the minimum standard regulation for the federal Lifeline discount that the Commission observes is causing financial harm and affecting access to broadband internet access service for low-income customers. See Comments of the Oregon Public Utility Commission on Joint Petition to Pause Implementation of December 2019 Lifeline Minimum Service Standards Pending Forthcoming Marketplace Study, WC Docket No. 11-42 (filed July 31, 2019); Comments of the Oregon Public Utility Commission on NTCA – The Rural Broadband Association Petition, WC Docket No. 11-42 (filed August 28, 2019); and Comments of the Oregon Public Utility Commission on the National Lifeline Association Petition, WC Docket No. 11-42 (filed September 15, 2020).

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Oregon Telecommunications Association (OTA) filed comments on September 3, 2020, supporting the waiver petition noting the Northwest Fiber asserts full compliance with the rule will impose substantial additional costs.

Request for waiver of OAR 860-033-0005(3)

Northwest Fiber requests a waiver of the Commission's definition of "broadband internet access service". Staff does not support this request because it is not clear what effect waiving the definition of this term would have on the OTAP program. The request appears overbroad as it seems likely to affect all of the broadband internet access services offered by the Company, not just the standalone services below the FCC's minimum service standard.

Waiver of OAR 860-033-0010(2)

As noted above, Staff understands the Company's concern to be with adjusting its systems and reporting to offer OTAP benefits under the temporary rule to a small number of active customers that have broadband internet access services below the FCC's minimum service standard. The Commission may wish, on its own motion, to grant a waiver of the requirement to offer OTAP on all service offering under OAR 860-033-0010(2) for this purpose.

The Company's statement that it will need to incur significant time and expense to implement software changes to achieve full compliance is surprising to Staff as carriers like Northwest Fiber are subject to different sets of requirements, e.g., rates, etc. in various states and their systems must be modified accordingly on a regular basis. Also, there are other states with state-specific Lifeline discount rates, eligibility criteria, terms and conditions, etc. that the carrier must accommodate in its respective systems. For instance, the California Public Utilities Commission and the Public Utility Commission of Texas have additional program or income criteria on top of the FCC's baseline Lifeline eligibility criteria to address the needs of their respective consumers.⁵ Carriers in those states must exclude customers that do not qualify for the federal Lifeline discount from federal reports. And, as far as Staff is aware, all Eligible Telecommunications Providers except Northwest Fiber are in compliance with the rule.

Rather than supporting a waiver, Staff encourages the Company to take steps that ensure OTAP benefits can be provided to the limited number of customers that appear to be affected in ways that minimizes the administrative burden, such as through the use of existing mechanisms in its systems to apply a promotional credit, or manually entering the discount in the billing system, and applying the credit at a later date once longer-term system upgrades are performed. Staff would support allowing Northwest

⁵ See <https://www.cpuc.ca.gov/General.aspx?id=2752#qualify> and <https://www.texaslifeline.org/> (last visited September 13, 2020).

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Fiber additional time to apply the OTAP discount to these customers' bills in this manner, but does not support a waiver that will prevent these customers from receiving the OTAP benefit.

In addition, the Commission may wish to allow the Company time to implement systems changes that will allow the Company to implement OTAP program changes such as those in adopted in the temporary rulemaking under AR 634. To allow time for such changes, the Commission may a grant a partial waiver of the temporary rule amendments to OAR 860-033-0010(2) up to their expiration on December 31, 2020. Further need for accommodation may be considered in the newly opened permanent rulemaking, Docket AR 635.

With respect to the temporary rule changes to OAR 860-033-0010(2), the Commission may:

1. Take no action on its own motion to waive this rule; or
2. Alternatively, the Commission may grant a partial waiver of the temporary amendments to OAR 860-033-0010(2) with respect to customers of standalone broadband internet access service that does not meet the FCC's minimum service standards through December 31, 2020.

Conclusion

Based on the foregoing, Staff recommends that the Commission deny Northwest Fiber's request for waiver of OAR 860-033-0005(3) and take no to waive OAR 860-033-0010(2). Staff does not support a waiver that would preclude customers that don't qualify for the federal Lifeline discount from receiving OTAP benefits from Northwest Fiber. Rather, Staff recommends the Company continue to explore ways to apply the benefit in ways that avoid significant administrative burden, such as by manually applying this benefit to the small subset of affected customers. Doing so will be consistent with the Commission's policy of expanding affordable access to broadband internet access services to eligible low-income customers in Oregon.

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PROPOSED COMMISSION MOTION:

Deny Northwest Fiber's petition for waiver of OAR 860-033-0005(3) and take no action to waive OAR 860-033-0010(2).

ALTERNATIVE COMMISSION MOTION:

Deny Northwest Fiber's petition for waiver of OAR 860-033-0005(3); and Grant a partial waiver of the temporary amendments to OAR 860-033-0010(2) with respect to customers of standalone broadband internet access service that does not meet the FCC's minimum service standards through December 31, 2020.