

ORDER NO. 22-280

ENTERED Jul 26 2022

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 649

In the Matter of

Rulemaking to adopt rules pursuant to
ORS 759.425

ORDER

DISPOSITION: ADMINISTRATIVE HEARINGS DIVISION PRIMARY
RECOMMENDATION ADOPTED

This order memorializes our decision, made and effective at July 26, 2022 Regular Public Meeting, to adopt the Administrative Hearings Division's (AHD) primary recommendation in this matter to adopt the proposed permanent rules as presented in Attachment A of the AHD July 21, 2022 Report. The AHD Report with the recommendation is attached as Appendix A.

BY THE COMMISSION:



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
AHD REPORT
REGULAR PUBLIC MEETING DATE: July 26, 2022**

REGULAR CONSENT RULEMAKING EFFECTIVE DATE N/A

DATE: July 21, 2022

TO: Public Utility Commission

FROM: Christopher Allwein **SIGNED**

THROUGH: Diane Davis and Nolan Moser

SUBJECT: OREGON PUBLIC UTILITY COMMISSION ADMINISTRATIVE HEARINGS DIVISION: (Docket No. AR 649) Rulemaking to Adopt Rules Pursuant to ORS 759.425.

AHD RECOMMENDATION:

Adopt the proposed permanent rules as shown in Attachment A.

In the alternative, the Commission may choose to adopt only the proposed amendments in OAR 860-100-0115 and OAR 860-100-0125, and proposed new rule OAR 860-100-0250, allowing Staff and stakeholders and additional opportunity to work with the proposed model and process, after which Staff may propose OAR 860-100-0300 for adoption via a future notice and formal process for Commission consideration in the last quarter of calendar year 2022.

DISCUSSION:

Issue:

Whether the Public Utility Commission of Oregon (Commission) should adopt the amended and proposed rules governing the calculation and disbursement of Oregon Universal Service Fund (OUSF) to eligible telecommunications carriers.

Applicable Law or Rule

Pursuant to ORS 756.060, the Commission “may adopt and amend reasonable and proper rules and regulations relative to all statutes administered by the commission...”

ORS 759.425(3)(a) states that:

“The 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 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 by the telecommunications carrier from federal sources specifically used to recover local loop costs and less any explicit support received by the telecommunications carrier from a federal universal service program.”

OAR Chapter 860, Division 100 contains the existing administrative rules governing the OUSF.

Analysis

Background

Staff has been working to consolidate and clarify the OUSF program into a comprehensive framework within the administrative rules since 2016.¹ In Docket UM 2040, the most recent OUSF investigation, Staff informed stakeholders at the outset that the investigation would be a continuation of this work. Further, Staff conveyed that the UM 2040 docket could not be addressed as a contested case and resolved by stipulation. The docket was to be viewed as policy development docket with the policy conclusion being reflected in a permanent rulemaking in two parts. Phase I (this rulemaking) covers the calculation of OUSF disbursements. Phase II will cover will address accounting and operational issues.

Prior to this rulemaking, disbursements from the fund were governed by Order No. 16-093 until the end of 2021. Temporary rules, effective January 1, 2022, were put in place via AR 650 via Order No. 21-413 and were effective through June 29, 2022. The proposed rules, as discussed below, provide guidance for the remainder of the 2022 calendar year and provide a methodology through the use of the Cost Quest or similar model, to establish the benchmark and disbursement of OUSF support beginning in January of 2023.

¹ See Docket No. AR 605.

Overview

Order No. 21-304, issued on September 21, 2021, adopted Staff's recommendation to initiate this rulemaking to determine the calculation of disbursements via ORS 759.425. On April 20, 2022, Order No. 22-120 initiated the formal rulemaking process.

The proposed rules (Attachment A) contain amendments to reflect the requirement for competitive providers to file the distribution worksheet monthly from January 1, 2023, onwards, and reflect that the portable support amounts would now be based on amounts available in the supported area. Additional rules are proposed to address payments to the Warm Springs Telecommunications Company (WST) for the remainder of 2022, consistent with existing practice, to address payments to telecommunication utilities for the remainder of 2022 and the implications to competitive provider payments, given the expiration of the temporary rules in June.

Finally, the proposed rules add provisions specifying the means of calculating disbursements from the OUSF from January 1, 2023, forward. The rules specify the means of calculating total support required, the means of splitting that amount into two pools (large companies and small companies), and the means of allocating those pools. The rules also allow for a different benchmark for areas that contain tribal lands and other circumstances and provide for a report to the Commission that would contain the specific details of these calculations for its review and adoption.

AHD held a rulemaking hearing on June 1, 2022. The hearing was continued and the comment for written deadline was extended so that Staff and stakeholders could engage in running and reviewing the Cost Quest model to discuss the inputs for the model, establish the benchmark, and to discuss the results of the initial runs of the model. The rulemaking hearing was continued on July 13, 2022, and written comments were due by 4:00 p.m. on July 19, 2022. Staff provided a brief overview of the rules and the modeling during both parts of the rulemaking hearing. No party provided comments at either portion of the hearing.

Written comments were received from the Oregon Telecommunications Association (OTA), Ziplly Fiber, Oregon Cable Telecommunications Association (OCTA), WST, and Lumen Technologies. The comments primarily focus on the use of the Cost Quest model to determine the benchmarks and support amounts.

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Generally, providers are looking for certainty that OUSF support amounts will not be dramatically reduced.

Summary and Discussion of Stakeholder Comments to Staff's Proposed Draft Rules. AHD has no proposed changes, other than to fix a small grammatical error in OAR 860-100-0300.

OAR 860-100-0115

OAR 860-025-0115 as amended requires only competitive providers eligible for OUSF support to file the distribution worksheet each month beginning in January of 2023. The worksheet requests the number of basic service lines the provider has at the end of each month.

Discussion:

There was no significant discussion regarding the amendments to this rule.

Recommendation:

Adopt the rule as presented by Staff.

OAR 860-100-0125

This rule is amended to reflect the portable support amounts would now be based on amounts available in the supported area. An additional rule was added to address payments to WST for the remainder of 2022, consistent with existing practice.

Discussion:

WST supports this rule. There was no other significant discussion regarding this rule.

Recommendation:

Adopt the rule as presented by Staff.

OAR 860-100-0250

This rule is added to address payments to telecommunication utilities for the remainder of 2022 and the implications to competitive provider payments, given the expiration of the temporary rules in June. Provisions addressing the format and timing of disbursements from the OUS Fund from January 1, 2023, have also been added.

Discussion:

OTA provided written comments on May 27, 2022. OTA stated that it supports moving forward and adopting the proposed changes in this section and in sections OAR 860-100-0115 and OAR 860-100-0125, because they allow support to continue for the remainder of 2022. OTA does not support the new rule in OAR 860-100-0300 for reasons discussed in that section.

Zipty Fiber provided written comments on May 31, 2022. Zipty Fiber states that it does not support the “further erosion of support contemplated in this draft rule” (Zipty Fiber notes that it and its predecessor saw an annual decrease in support under the prior, stipulated agreement). Zipty Fiber opines that “a rulemaking is not a substitute for a contested proceeding in which future disbursements from the fund are ordered consciously by the Commission after the presentation of evidence and creation of a record justifying the action.” Zipty Fiber believes a new settlement could be reached and presented to the Commission for consideration in UM 2040. Zipty Fiber believes that this proceeding is embedding a reduction in support within the proposed rule, noting that its cost per line has increased, while at the same time the number of lines it serves is decreasing. Zipty Fiber states that it is wrong for the Commission to consider embedding a reduction in the rule without consideration of ongoing costs.

It is assumed that Zipty Fiber is referring here to the continuation of amounts for 2022 as contemplated by OAR 860-100-0250(1). OTA, WST and OCTA do not oppose or support this rule. OCTA opposes using actual embedded costs to determine OUSF support, as noted in the next section below.

Recommendation:

Adopt the rule as presented by Staff. The modeling tool and subsequent process outlined in the rule will address Zipty Fiber’s stated concerns. Zipty Fiber may participate in the modeling process with other stakeholders and their recommendations will be considered by Staff and the Commission. Given the flexibility of the proposed process, it is not accurate to state that a cost reduction

is embedded within the rules once the process commences for the 2023 year and moving forward.

OAR 860-100-0300

This rule is added and describes specifically the means of calculating disbursements from the OUS Fund from January 1, 2023, forward. The rules specify the means of calculating total support required, beginning with the use of Cost Quest or a similar modeling tool, the means of splitting that amount into two pools (large companies and small companies), and the means of allocating those pools. The rules also allow for a different benchmark for areas that contain tribal lands and other circumstances and provide for a report to the Commission that would contain the specific details of these calculations for its review and adoption.

Discussion:

Warm Springs Telecommunications Company:

WST, which is 100% owned and operated by the Confederated Tribes of Warm Springs and serves the 1,000 square mile reservation, states in its July 19, 2022 comments that it tentatively supports the rule changes, depending on the final results of the modeling and the associated impact on its OUSF support. Specifically, WST supports the establishment of a different benchmark for a support area that contains tribal lands, because WST interprets this as a recognition of the inherent higher cost to serve tribal lands.

WST notes that OUSF is its only source of support as it is not eligible for federal funding. Thus, its support for the rules covering 2023 and forward depends on the maintenance of its current support. WST warns that the amount of OUSF support it receives was previously deemed just and reasonable, and that any reduction in support would jeopardize WST's ability to provide quality service and to continue its work to serve previously unserved and underserved parts of the reservation. In summary, WST requests that the new method of determining OUSF support and the portability rules in amended section OAR 860-100-0125 ensure that WTS continue to provide an adequate level of support for its areas.

Oregon Telecommunications Association:

OTA provided a communication on July 19, 2022, reiterating that, while work with the modeling has commenced, it stands by its May 27, 2022 comments regarding support for the sections above, but not for this new rule section. In its comments,

OTA states that, because it believes that information regarding the Cost Quest model is lacking, it deems the adoption of this rule as premature.

OTA notes that it is not opposed to the use of a cost model, but that there is not enough certainty in how the modeling works to ensure that support amounts generated by the model will be adequate. OTA recommends that an agreement on the inputs and algorithms that will be used should occur prior to the adoption of this rule section.

OTA states that a number of questions need to be answered prior to the adoption of this rule. These include which specific model will be used, how the model is paid for, how stakeholders will access the model, how switching costs will be recognized, and how support areas will be determined. In addition, OTA questions whether the benchmark will be determined by the Cost Quest modeling or if it will be an input to determine support, and requests identification of offsets to be subtracted from initial determinations of support as broadly stated in ORS 759.425.

OTA suggests a two percent safeguard for a maximum range of increase or decrease in support, in order to prevent a significant decrease in support that may hamper the ability of a carrier to provide support.

Lumen Technologies:

Lumen Technologies (Lumen) filed its July 19, 2022 comments on behalf of Qwest Corporation d/b/a CenturyLink, United Telephone Company of the Northwest, d/b/a CenturyLink, CenturyTel of Oregon, d/b/a CenturyLink and CenturyTel of Eastern Oregon, d/b/a CenturyLink. Lumen acknowledges that no model will be flawless in determining OUSF support because the model depends on inputs that are often flawed and must be adjusted. Lumen believes that some tasks assigned to the model may be better suited to alternative methods. For instance, Lumen notes that the determination of an Oregon-specific benchmark could be performed using methodologies published by the Federal Communications Commission. Lumen also recommends that the term “benchmark” be defined in the rules, consistent with Oregon law and federal regulations.

Lumen recommends that the rules should clearly explain the derivation of each model input. Lumen also suggests that the geographic units of measure for costs and support should be at the wire level, rather than through census blocks or census block groups, because census blocks may encompass the areas of two or more providers.

Lumen notes that any bifurcation between small and large companies should be explained and that the basis for such a delineation should be defined. Lumen states that all companies should receive support at similar levels, based not on the size of the company, but on the characteristics of the areas they serve. Absent a rational basis for any differentiation, there is a risk the rules would be discriminatory under state and federal law.

Lumen expresses agreement with OTA regarding its concerns about the costs associated with switching and unseparated loops. Lumen considers it essential to understand how a cost model treats maintenance costs. Lumen states that that any model employed must reflect actual, ongoing operational expenses of maintaining an existing network.

Finally, Lumen attached to its July 19 comments previous comments from the informal phase, dated October 12, 2021, in which it recommends, among other items, that the arrangement from Order No. 16-093 be extended for an additional two years.

Ziplay Fiber:

In its comments, Ziplay Fiber expressed concerns similar to OTA and Lumen about the model and procedure contained in this rule. Specifically, that how the model will work is uncertain, that the rule should not reference a specific vendor, and complains that the wire center designation for a geographic area is a new, contemplated measure for designation of funds. Ziplay notes its concern that the pooling of large and small companies poses an uncertain outcome moving forward.

Oregon Cable Telecommunications Association:

In its comments, OCTA provides some small word changes and notes a grammatical error. Overall, OCTA supports the forward-looking model and notes the Commission's previous references to its preference for such a model. OCTA recommends that the Cost Quest model be adopted. OCTA further recommends that individual, embedded company costs, as proposed by OTA, should not be used to determine the amount of any OUSF support.

Recommendation:

Adopt the rule as presented by Staff, addressing the grammatical error noted by OCTA.

In the alternative, if the Commission determines more Staff and Stakeholder engagement is necessary before adoption of the Cost Quest model, all rules

except for OAR 860-100-0300 may be adopted, allowing more time for Staff and stakeholders to work with the model and propose the rule for adoption at a future date (the last quarter of 2022).

The comments above generally express an ongoing concern about the results that will be achieved by the Cost Quest model. As noted by Staff and presented in the rules, the model is neither the sole nor final determination of how support will be calculated. Once the model runs are completed, the second part of the process is that Staff will review and make adjustments as needed in the calculation results, working with stakeholders, and present the findings and a recommendation to the Commission on or before October 31 of each year. As the proposed rule (860-100-0300(3)) states, the support amounts as calculated by the model, will be identified and the Staff will submit a recommendation to the Commission “to designate the amount to be disbursed from the fund to ensure basic telephone service beginning the next calendar year. In making its recommendations, Staff will consider stakeholder feedback through a public process and Staffs annual report will be filed sufficiently in advance to allow for public comment.”²

Accordingly, we recommend adopting the rule as proposed by Staff and consider the objections presented by OTA and Lumen have been appropriately addressed by Staff in rules. Below we review additional specific objections individually.

Benchmarks: The model may assist in determining the benchmark. Information (cost numbers) can be taken from the model to set a benchmark; in the alternative, Staff, with input from stakeholders, could determine a benchmark outside of the model, then compare it against the model numbers to ascertain reasonableness in developing a recommendation for the Commission to consider.

Census Blocks: Census blocks are generally smaller than wire centers and used by the Federal Communications Commission. Cost Quest provided wire center information in the model, so that census blocks could be consolidated into the appropriate wire center. There may be overlap of providers, but it will likely be immaterial.

Small and Large Category Pools (separated by the 50,000 service line designation): Stakeholders should be familiar with the 50,000 service line delineation, as it is used elsewhere as a way to define large and small

² See Staff’s report on page 4 (Apr 13, 2022).

telecommunications companies.³ It is unclear, and not explained by stakeholder comments, how it would skew the amounts as being used in the model to determine total support and then allocating that into the pools based on census blocks.

In summary, once the initial, forward-looking calculations are completed, the benchmarks and support amounts established will be examined and adjusted through a public process in which stakeholders will participate and the Commission will consider a recommendation for adoption. Changes may be based on the considerations noted in OAR 860-100-0300(2)(b). Therefore, it is recommended that the Commission adopt the proposed amended and new rules as presented by Staff and modified by AHD.

In the alternative, the Commission could at this time adopt the proposed Staff amendments in OAR 860-100-0115 and OAR 860-100-0125, and adopt the proposed new rule OAR 860-100-0250. This would provide a disbursement solution through the end of 2022. In the meantime and over the next several months, Staff and stakeholders could continue working with the Cost Quest model in order to allow stakeholders to understand the proposed process. After providing stakeholders additional opportunity to work with the proposed model and process, Staff could propose OAR 860-100-0300 for adoption via a future notice and formal process for Commission consideration in the last quarter of calendar year 2022. This would require efficient process however, given the limited amount of time remaining in the year.

PROPOSED COMMISSION MOTION:

Adopt new permanent rules as set forth in Attachment A of this memo.

In the alternative:

Adopt as set forth in Attachment A of this memo amendments to OAR 860-100-0115 and OAR 860-100-0125, and proposed new rule OAR 860-100-0250. Direct Staff and stakeholders to work with the proposed model and process, after which time Staff may propose to adopt OAR 860-100-0300 via a future notice and formal process for Commission consideration in the last quarter of calendar year 2022.

³ ORS 759.040 uses a 50,000-service-line limit for grouping affiliates. The proposed rule is not inconsistent with the large/small company split in that statute.

860-100-0115

Distribution Worksheet

A telecommunications competitive provider that has been designated as eligible for OUS Fund support must record its number of basic service access lines at the end of the calendar month (referred to as the recording month) on the distribution worksheet by wire center or exchange and must file the completed worksheet with the OUS Administrator no later than 40 days after the end of the recording month, i.e., by the tenth day of the second month following the close of each month. **Disbursements based on lines recorded by the 10th of each month will be made at the end of the month.**

STATUTORY/OTHER AUTHORITY: ORS 183, ORS 192, ORS 756, ORS 759

STATUTES/OTHER IMPLEMENTED: ORS 756.040, ORS 759.015, 759.425

860-100-0125

OUS Fund Support Portability

(1) OUS Fund support is portable, on a per line basis for basic telephone service, from a telecommunications utility to a competitive provider that has been designated by the Commission as eligible for support in the same geographic support area.

(2) In support areas that are served by both a telecommunications utility and a competitive provider, distributions from the OUS Fund will be shared in the following manner:

(a) For customer lines served by a competitive provider’s own loop facilities, the competitive provider may receive the full OUS Fund support amount per line. ~~The support amount per line is available in a document titled “OUS Support Per ILEC Wire Center” on the Commission’s website, available at: <http://www.puc.state.or.us/ousf/Pages/index.aspx>, unless modified by a Commission order posted on the same webpage~~ **based on the amount available for the support area.**

(b) For customer lines served by a competitive provider that resells a telecommunication utility’s supported retail service and does not provide service with its own loop facilities, the competitive provider may not receive OUS Fund support.

(c) For customer lines served by UNE loops leased from a telecommunications utility by a competitive provider, the utility and the competitive provider may share the OUS Fund support amount per line. ~~The shared support amount per line with amounts allocated to the telecommunications utility and to the competitive provider is available in a document titled “OUS Support Per ILEC Wire Center” on the Commission’s website, available at: <http://www.puc.state.or.us/ousf/Pages/index.aspx>, unless modified by a Commission order posted on the same website.~~

(d) For customer lines served by Warm Springs Telecommunications Company, the support amount for these lines for calendar year 2022 shall be as set forth in Table A of this rule.

STATUTORY/OTHER AUTHORITY: ORS 183, ORS 192, ORS 756, ORS 759

STATUTES/OTHER IMPLEMENTED: ORS 756.040, ORS 759.015, 759.425

Table A

	2022 OUSF Support Amounts (\$m)
Ziply	5.075
Qwest	7.613
Rural ILECs	12.234
Warm Springs	1.288

860-100-0250

OUS Fund Support Distributions

(1) For customer lines served by telecommunications utilities, the support amount for these lines for the calendar year 2022 shall be a continuation of the amounts provided for in Appendix A to Public Utility Commission Order No. 16-093, as corrected by Public Utility Commission Order No. 16-102, as set forth in Table A of this rule.

(2) The support amount for qualified competitive providers for the calendar year 2022 will be adjusted to reflect the percent reduction that has occurred for the specific Non-Rural Company that owns the wire center between 2016 and the date the support amount is being calculated. Any review of support amounts stipulated in previous orders has been suspended for calendar year 2022.

(3) Beginning January 1, 2023, the administrator shall make a monthly disbursement to each telecommunications provider that has been designated by the Commission as eligible to receive support from the OUS Fund in a specific geographic area, and when the Commission has calculated that support is required in that area, and funds are available to make a disbursement.

(a) Monthly disbursements shall be processed before the 28th day of the month.

(b) The amount of each telecommunications utility’s monthly disbursement shall be one-twelfth of its annual determined support amount.

(c) Each eligible competitive provider shall receive support as per 860-100-0125.

(4) The administrator shall not pay, and shall hold in escrow, any disbursements otherwise due to an eligible provider that is also a contributing company if that company is not in compliance with its contribution requirements.

STATUTORY/OTHER AUTHORITY: ORS 183, ORS 192, ORS 756, ORS 759

STATUTES/OTHER IMPLEMENTED: ORS 756.040, ORS 759.015, 759.425

Table A

	2022 OUSF Support Amounts (\$m)
ZiPLY	5.075
Qwest	7.613
Rural ILECs	12.234
Warm Springs	1.288

860-100-0300

OUS Fund Support Disbursement Calculations

(1) The provisions of this rule apply to the calculation of disbursements made on or after January 1, 2023.

(2) The Commission uses the Cost Quest model, or a similar model approved by the Commission to calculate total support amounts. The model will be used to assist in setting a benchmark for basic telephone service, calculate the cost of providing basic telephone service, and to calculate the difference between the cost and the benchmark, minus the explicit compensation and support identified in ORS 759.425. When the cost, after subtracting the explicit compensation and support identified in ORS 759.425, as applicable, exceeds the applicable benchmark in a particular geographic support area, the Commission may designate the support area as one requiring support from the OUS Fund.

(a) For purposes of this rule, “support area” may mean a census block or a wire center.

(b) The Commission may establish a different benchmark for a support area, based on the following considerations:

(A) changes in competition in the telecommunications industry;

(B) changes in federal universal service support; or

(C) other relevant factors as determined by the commission, including but not limited to whether it contains tribal lands, as defined in 47 C.F.R. 54.5.”

(3) The Commission will identify initial total required support amounts for all support areas using the approved cost model and adjust the required support for a support area as necessary annually in 2023 and 2024 and then every five years thereafter, beginning in 2029. On or before October 31 of a year in which support amounts must be identified, Commission staff shall prepare a report that details the calculation of required support amounts for Commission review and approval and submit a recommendation to the Commission to designate the amount to be disbursed from the fund to ensure basic telephone service beginning the next calendar year. In making its recommendations, Staff will consider stakeholder feedback through a public process and Staff’s annual report will be filed sufficiently in advance to allow for public comment.

(a) The available amount to be disbursed from the fund will be split into two categories for purposes of allocating the required support at the support area level between:

(A) Category one: The large company pool, which consists of support for support areas served by a telecommunications provider or affiliated group of telecommunications providers that serves 50,000 or more access lines in Oregon.

(B) Category two: The small company pool, which consists of support for support areas served by a telecommunications provider or affiliated group of telecommunications providers that serves fewer than 50,000 access lines in Oregon.

(b) The size of the Category one and Category two pools will be proportionally reduced to reflect the amount available to be disbursed from the fund when the amount available from the fund, given statutory limits, is less than the required support amount in a given year.

(c) The support amount for an individual telecommunications provider is based on an allocation of the applicable category pool. Each pool will be allocated among eligible telecommunications providers as follows:

(A) Category one: The large company pool will be allocated using the Cost Quest or a similar model approved by the Commission, with annual updates, as necessary.

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(B) Category two: The small company pool will be allocated using the historic embedded cost model as described in Commission Order No. 03-082. The Commission will use historic cost data submitted by a provider on Form I to the Commission.

STATUTORY/OTHER AUTHORITY: ORS 183, ORS 192, ORS 756, ORS 759

STATUTES/OTHER IMPLEMENTED: ORS 756.040, ORS 759.015, 759.425