

ORDER NO. 99-763

ENTERED DEC 16 1999

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

CP 277

In the Matter of the Application of BEAVER)
CREEK COOPERATIVE TELEPHONE)
COMPANY, for a Certificate of Authority to)
Provide Telecommunications Service in)
Oregon and Classification as a Competitive)
Provider.)

ORDER

DISPOSITION: APPLICATION GRANTED WITH CONDITIONS;
AUTHORITY GRANTED BY ORDER NO. 97-298
CANCELED

Note: By issuing this certificate, the Commission makes no endorsement or certification regarding the certificate holder's rates or service.

The Application

On January 30, 1997, Beaver Creek Cooperative Telephone Company (BCT or Applicant) filed with the Commission an application for certification to provide telecommunications service in Oregon. Applicant seeks authority to provide intrastate, interexchange toll service, as a reseller, in the Beavercreek and Oregon City exchanges.

Applicant is a cooperative corporation. Pursuant to ORS 759.025(2), it currently has authority in the Beavercreek telephone exchange to provide local exchange service, interexchange carrier access, and extended area service. See Order No. 88-261. BCT is the incumbent local exchange carrier for the Beavercreek exchange. BCT also has authority, pursuant to ORS 759.020 and ORS 759.050, to provide local exchange service as a competitive local exchange carrier (CLEC), in the Oregon City exchange. See Order No. 96-248. U S WEST Communications, Inc., is the incumbent local exchange carrier in the Oregon City exchange.

The Commission considers BCT's application as a request for authority to provide interexchange, switched (toll) service to customers within its serving area, the Beaver Creek and Oregon City exchanges. The Commission notes that, in its application, BCT requested authority to serve in the 632 and the 518 exchanges. The prefix for BCT customers in the Beaver Creek exchange is 632, while 518 is the prefix for BCT customers geographically located in the Oregon City exchange, where BCT operates as a CLEC. Since, in the future, Applicant may be assigned another prefix, this order will not limit BCT's authority to customers with the 632 or 518 prefixes. However, this order will limit Applicant's authority to the Beaver Creek and Oregon City exchanges.

Operator services are part of switched telecommunications service. Applicant will not directly provide operator services as defined in OAR 860-032-0001. Applicant will not be an 'operator service provider' as defined in ORS 759.690(1)(d). A statement of compliance with Commission rules and with state law, including ORS 759.690 and OAR 860-032-0005 (regarding operator services), was included in the application.

Applicant clarified to Commission Staff (Staff) that it will provide interexchange telecommunications service strictly as a reseller and not as a facilities-based carrier. This order will limit BCT's authority to providing services only as a reseller of other certified carriers' services.

Procedural History

The Commission served notice of the application on the Commission's telecommunications mailing list on February 12, 1997. The Commission did not receive any protests to the application. On June 4, 1997, the Administrative Law Judge (ALJ) issued a ruling that adopted a procedural schedule for the processing of this docket.

On June 9, 1997, Staff distributed a proposed order for review by the parties. On June 13, 1997, Applicant filed exceptions to the proposed order, to which Staff replied on July 9, 1997. On August 6, 1997, the Commission issued Order No. 97-298, which granted the application from BCT to provide toll service in the Oregon City exchange as a competitive provider with conditions. The Commission concluded that Applicant had not met the requirements to be a competitive provider of toll telecommunications service in the Beaver Creek exchange. The Commission required BCT to file tariffs for its proposed toll service in the Beaver Creek exchange, since BCT is the incumbent local exchange carrier in that exchange.

On October 2, 1997, BCT filed an application for reconsideration or rehearing of Order No. 97-298, challenging the Commission's authority to require it to file tariffs for interexchange toll services offered to its local exchange customers. The Commission approved the application for rehearing and scheduled further proceedings. *See* Order No. 97-461. The Commission made a minor correction to Order No. 97-461 by issuing an Errata Order, Order No. 97-482, on December 16, 1997.

From December 1997 to October 1999, Staff and BCT exchanged information and discussed possible resolutions to BCT's objections to Order No. 97-298. Applicant and Staff also agreed to wait for an order from the Federal Communications Commission (FCC) regarding conditions for an incumbent LEC to provide interexchange service to customers within the incumbent's region.

On June 30, 1999, the FCC released the Second Order on Reconsideration and Memorandum Opinion and Order, CC Docket No. 96-149 and CC Docket No. 96-61 (the Order). In the Order, the FCC adopted rules pertaining to in-region, interstate toll service provided by independent incumbent LECs, such as BCT. Those rules have been codified as 47 C.F.R. §64.1901 through §64.1903.

By letter to Staff, dated September 24, 1999, Applicant clarified that it will provide the requested toll service through a separate division of BCT and will operate only as a reseller. In that letter, Applicant stated that it will offer its toll services subject to 47 C.F.R. §64.1903(a). Subsection (a) of §64.1903 imposes several conditions and requires independent, incumbent LECs who offer in-region toll service to do so through a separate subsidiary. Subsection (b) of §64.1903 allows those LECs to offer in-region toll service through a separate division if they are strictly resellers; however, the other conditions of subsection (a) remain in force. Staff and BCT agreed that BCT meets the criteria to allow it to operate as a separate division within BCT, rather than through a separate subsidiary. Furthermore, BCT agreed that it will offer its toll services subject to all provisions of 47 C.F.R. §64.1903. These commitments by Applicant resolve the substantive dispute in this case.

On October 20, 1999, Staff distributed a proposed order for review by the parties. On November 4, 1999, Applicant filed exceptions, to which Staff filed a reply on November 12, 1999.

Exceptions

BCT raised two minor exceptions to the proposed order. The first relates to the wording of the initial paragraph under the heading of "Applicable Law." BCT contends that the paragraph, as written in the proposed order, appears to overstate the extent of the Commission's authority over cooperatives. Because the Commission's authority is somewhat limited by statute, BCT contends that the paragraph should be rewritten to include the following underlined language:

As a cooperative corporation providing intrastate telecommunications service, Applicant is subject to limited Commission regulation under ORS 759.220 as provided in ORS 759.225. ORS 759.220 grants the Commission authority, in some circumstances, to establish joint rates for

through services between telecommunications utilities and cooperative corporations. Toll service is a type of through service. (Footnote omitted.) (Emphasis added.)

In its reply, Staff states that, while it does not necessarily agree with BCT's exception, it is willing to accept the inclusion of the word "limited" in the first sentence. It is not willing, however, to accept the proposed change to the second sentence. Staff contends that BCT's proposed language amounts to a concession that Commission authority is circumscribed more than required by statute or judicial precedent.

The extent of the Commission's jurisdiction over cooperative telephone companies has been the subject of recent proceedings. It is undisputed that cooperatives are not subject to full rate regulation. *See, e.g.*, ORS 759.025(2). Their exemption from regulation is not complete, however. As relevant to this docket, ORS 759.225 expressly provides that cooperatives are subject to regulatory oversight with regard to joint rates and through services as provided in ORS 759.220.

The disputed paragraph in the proposed order merely attempts to summarize Oregon law as it relates to cooperatives. As Staff notes, the Commission cannot modify its regulatory authority in agency orders. Therefore, the parties' dispute over the language used to describe the applicable law is, to a certain extent, immaterial. Nonetheless, the Commission will accept BCT's proposal to insert the word "limited" to modify the scope of the Commission's authority over cooperatives.¹ The Commission declines, however, BCT's proposal to add language to indicate limited Commission authority to establish joint rates for through services. The Commission agrees with Staff that BCT's proposed language is contrary to the express terms of ORS 759.225.

In its second exception, BCT requests that the phrase "consistent with applicable federal and states statutes and rules and applicable judicial precedent" be added to condition 6(c) listed on pages 6 and 7 of the proposed order. Staff does not oppose the request, and the Commission adopts it.

The Commission has reviewed the proposed order, the comments, and the record in this matter. Based on a preponderance of the evidence, the Commission makes the following:

¹ As Staff notes in its clarification to its comments, the revised sentence should not be construed to mean that the Commission's only authority to regulate cooperatives comes from ORS 759.220, as provided in ORS 759.225. The Commission has some regulatory authority over cooperatives pursuant to other provisions of law that are not relevant to this docket.

FINDINGS AND CONCLUSIONS

Applicable Law

As a cooperative corporation providing intrastate telecommunications service, Applicant is subject to limited Commission regulation under ORS 759.220 as provided in ORS 759.225.² ORS 759.220 grants the Commission authority to establish joint rates for through services between telecommunications utilities and cooperative corporations. Toll service is a type of through service.

Applications to provide telecommunications service and for classification as a competitive telecommunications services provider are filed pursuant to ORS 759.020, which provides, in relevant part:

(1) No person [or] corporation * * * shall provide intrastate telecommunications service on a for-hire basis without a certificate of authority issued by the Public Utility Commission under this section.

* * * * *

(5) The commission may classify a successful applicant for a certificate as a telecommunications utility or as a competitive telecommunications services provider. If the commission finds that a successful applicant for a certificate has demonstrated that services it offers are subject to competition or that its customers or those proposed to become customers have reasonably available alternatives, the commission shall classify the applicant as a competitive telecommunications services provider. * * * For purposes of this section, in determining whether telecommunications services are subject to competition or whether there are reasonably available alternatives, the commission shall consider:

(a) The extent to which services are available from alternative providers in the relevant market.

(b) The extent to which services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions.

² ORS 759.225 provides that, “[n]otwithstanding any other provision of law, ORS 759.220 applies to an unincorporated association or cooperative corporation providing intrastate telecommunications service.”

(c) Existing economic or regulatory barriers to entry.

(d) Any other factors deemed relevant by the commission.

ORS 759.690 and OAR 860-032-0005 establish certain requirements that providers of operator services must meet. Included are the following conditions:

The certificate holder involved in the provision of operator services shall:

1. Notify all callers at the beginning of the call of the telecommunications provider's name and allow a sufficient delay period to permit a caller to terminate the call or advise the operator to transfer the call to the customer's preferred carrier.

2. Disclose rate and service information to the caller when requested.

3. Not transfer a call to another operator service provider without the caller's notification and consent.

4. Not screen calls and prevent or "block" the completion of calls that would allow the caller to reach an operator service company different from the certificate holder. In addition, the certificate holder shall, through contract provisions with its reseller clients, prohibit the reseller from blocking a caller's access to his or her operator service company of choice.

5. When entering into operator service contracts or arrangements with clients who in turn resell or provide telephone service to the general public, include in each contract provisions for public notification. A sticker or name plate identifying the name of the certificate holder shall be attached to, or in proximity to, each telephone that has public access.

OAR 860-032-0015(1) authorizes the Commission to suspend or cancel the certificate if the Commission finds that (a) the holder made misrepresentations when it filed the application, or (b) the Applicant fails to comply with the terms and conditions of the certificate.

Designation as a Competitive Provider

As noted above, Applicant is currently certified as a competitive provider of local exchange telecommunications service in the Oregon City exchange. The Commission concludes that Applicant has met the requirements for classification as a competitive provider of toll telecommunications service in the Oregon City and Beavercreek exchanges, provided Applicant meets the conditions of this certificate. BCT's customers or those proposed to become customers in those exchanges have reasonably available alternatives for interexchange toll services. Applicant will face competition from other carriers including U S WEST, AT&T, MCI WorldCom, and

Sprint Communications Company. Subscribers to Applicant's services can buy comparable services at comparable rates from other vendors. Economic and regulatory barriers to entry are relatively low.

Conditions of the Certificate

As part of the application, Applicant agreed to, or acknowledged, several conditions listed in the application. Those conditions are adopted and made conditions of this certificate of authority. Further:

1. Applicant shall not take any action that impairs the ability of other certified telecommunications services providers to meet service standards specified by the Commission.
2. Applicant shall comply with all conditions listed in the application.
3. Applicant shall comply with laws, Commission rules, and Commission orders related to provision of telecommunications service in Oregon.

By the letter dated September 24, 1999, BCT stated it would provide the toll services subject to FCC rules in 47 C.F.R. §64.1903(a). Applicant clarified that it will provide service subject to §64.1903(a) and (b), since subsection (b) allows a reseller of interstate, interexchange service to use a separate corporate division rather than a separate subsidiary. The Commission recognizes that the FCC rules pertain to interstate telecommunications service and that the Commission's jurisdiction is limited to intrastate service. However, as a practical business reality, BCT, like most interexchange carriers, will provide both interstate and intrastate interexchange service using the same business operation, personnel, and facilities. This is because customers make both intrastate and interstate calls. Therefore, the following are also conditions of this certificate of authority:

4. Applicant shall operate strictly as a reseller of other certified carriers' interexchange interstate and intrastate telecommunications service.
5. Applicant shall provide interexchange interstate and intrastate telecommunications service subject to and in compliance with FCC rules in 47 C.F.R. §64.1901 through §64.1903, as adopted by the FCC in the Second Order on Reconsideration and Memorandum Opinion and Order, CC Docket No. 96-149 and CC Docket No. 96-61, released on June 30, 1999.
6. In recognition that Applicant is the incumbent local exchange carrier in the Beavercreek exchange, and the potential for BCT to favor itself over other competitive providers of interexchange service, Applicant shall comply with the

following conditions: Applicant shall not have arrangements or practices that discriminate in favor of itself, or provide preferential treatment for itself, over other competitive interexchange carriers in regard to rates, terms, or conditions for:

- a. The provision of access to BCT's local exchange network;
- b. The provision of customer billing, collection, verification and credit card information, and related services; and
- c. The provision of other products and services such as shared or joint use of facilities and equipment; customer dialing codes; maintenance, testing, and repair services; market promotions and advertised services; network information; and customer and market information, consistent with applicable federal and state statutes and rules and applicable judicial precedent.

These conditions will allow the Commission to readily detect and resolve any competitive issues that may arise with Applicant's provision of interexchange toll services in its Beaver creek exchange.

SUMMARY

In this order, the Commission grants Applicant, BCT, authority to provide interexchange toll service, as a competitive provider, in both the Beaver creek and Oregon City exchanges, with conditions. Therefore, the authority granted in Order No. 97-298 will become superfluous, and the Commission will cancel the authority granted in that order.

ORDER

IT IS ORDERED that:

1. The application of Beaver Creek Cooperative Telephone Company to provide interexchange switched telecommunications service (toll service), strictly as a reseller, and to provide the service through a separate division, with separate books of account, is granted with conditions described in this order.
2. Applicant is designated as a competitive telecommunications provider.
3. Applicant may provide authorized services in the Oregon City and Beaver creek exchanges.

4. Applicant shall comply with conditions of this certificate of authority.
5. The authority granted to Applicant by Order No. 97-298, entered August 6, 1997, in this proceeding, is canceled.

Made, entered, and effective _____.

Ron Eachus
Chairman

Roger Hamilton
Commissioner

Joan H. Smith
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 pursuant to ORS 756.580.