

ORDER NO.

12 113

ENTERED

APR 07 2014

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 577, UM 1481

In the Matter of a Petition filed by the
OREGON TELECOMMUNICATIONS
ASSOCIATION to Amend OAR 860-
032-0190 (AR 577)

and

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON

Staff Investigation of the Oregon
Universal Service Fund (UM 1481).

ORDER

DISPOSITION: REPORT TO BE SUBMITTED IN DOCKET UM 1481

I. SUMMARY

This order codifies our decision, made and effective at the March 4, 2014 Public Meeting, to decline to open a rulemaking proceeding to amend OAR 860-032-0190 to include access to broadband in the definition of basic telephone services. Instead, we order the presiding administrative law judge to direct the parties and Staff in docket UM 1481 Phase III to prepare a report on the status of broadband services provided in rural exchanges and to submit that report to the Commission no later than December 1, 2014.

II. BACKGROUND AND PROCEDURAL HISTORY

“Basic telephone service” is defined in OAR 860-032-0190 as retail telecommunications service that is single party, has voice grade or equivalent transmission parameters and tone-dialing capability, provides local exchange calling and gives the customer access to specific services, such as long distance services and directory assistance, although such services are not included as part of basic service. This definition determines which services receive distributions from the Oregon Universal Service Fund (OUSF) whose

purpose is “to ensure basic telephone service is available at a reasonable and affordable rate.” ORS 759.425(1).

Since the time of its inception, the OUSF has grown considerably, and its future role is the subject of a current proceeding, docket UM 1481, *In the Matter of the Public Utility Commission of Oregon Staff Investigation of the Oregon Universal Service Fund*. OTA is a party in that case.

OTA filed petition for rulemaking on November 4, 2013 seeking to include “access to broadband” within the basic telephone service definition. In its petition, OTA said that there have been substantial changes in technology since the Commission determined which services constitute basic telephone service and argues that broadband access has become nearly ubiquitous in Oregon and is vital to economic and community development.¹ The Commission has the authority to modify the definition of basic telephone service by rule.²

The Commission sent out a notice to interested persons seeking comment on November 6, 2013. Comments were filed by the Citizens’ Utility Board of Oregon; tw telecom of Oregon llc; AT&T Corp.; Frontier Communications; Oregon Cable Telecommunications Association; Verizon; the Oregon Telecommunications Ratepayers Association for Cost-Based and Equitable Rates; Northwest Telecommunications Association, and Commission Staff.

ORS 183.390 requires that we either deny the petition or initiate rulemaking within 90 days of the filing of a petition for rulemaking. At the January 27, 2014 Public Meeting, we adopted Staff’s recommendation to deny the OTA petition and directed Staff to continue to examine the issues and make additional recommendations at the March 4, 2014 Public Meeting. *See* Order No. 14-033. On February 25, 2014, Staff submitted a report to the Commission for consideration with the OTA petition at the March 4, 2014 Public Meeting. Staff recommended that the Commission decline to open a rulemaking proceeding to amend OAR 860-032-0190 to include access to broadband in the definition of basic telephone services. Staff also identified an alternative path that would allow the Commission to “open an investigation to determine if Voice over Internet Protocol (VoIP) and similar technologies providing last-mile services satisfy the statutory criteria for inclusion as a basic telephone service.” A copy of that report is affixed to this order as Attachment A.

III. DISCUSSION

The petition seeks to make a significant change to the list of services eligible to receive support under the OUSF by the inclusion of access to broadband. There is insufficient evidence to cause us to adopt such a change at this time. Moreover, the Oregon

¹ OTA Petition at 2, 5-9.

² *Id.* at 3-4, citing ORS 759.400(1).

Legislature has previously indicated its intention to address more universally available broadband access via legislation. Furthermore, rulemakings providing broadband services support at the federal level may well impact this issue as it implicates the OUSF.³

Under these circumstances, we find that the Commission can best serve the public interest by gathering information from providers of both basic and non-basic services in rural areas. Proceeding expeditiously will also give the Commission the opportunity to evaluate the data and provide input, if needed, to discussions during the 2015 Legislative Session.

IV. CONCLUSION

We decline to open a rulemaking proceeding to amend OAR 860-032-0190 to include access to broadband in the definition of basic telephone services. Issues relating to the OUSF and the associated carrier compensation, sources and amounts of revenue, eligible services, and the fund's long term purposes and goals are currently being investigated in docket UM 1481. The current status of broadband service in rural areas is integrally related to these issues, and parties that could provide relevant information are already actively participating in that docket. They are in a position to gather information that the Commission will be able to use in its analysis of the issues in UM 1481 and in advising the legislature on broadband access policy.

Accordingly, we order the presiding administrative law judge to take such steps as necessary to produce a report on the status and outlook of broadband availability in rural telephone exchange service areas and related issues.

Finally, Staff offered an alternative path for the Commission that we undertake an investigation to determine if VoIP and similar technologies providing last-mile services satisfy the statutory criteria for its inclusion as a basic telephone service. We decline to open such an investigation at this time,

³ See FCC 11-161, *In the Matter of Connect America Fund et al.*, released November 18, 2011.

V. ORDER

IT IS ORDERED that the administrative law judge shall direct the parties in docket UM 1481 and the Commission Staff to jointly prepare and submit a report, no later than December 1, 2014, that addresses the status of broadband availability in rural telephone exchange service areas

Made, entered, and effective APR 07 2014

Susan K. Ackerman
Susan K. Ackerman
Chair

John Savage
John Savage
Commissioner

Stephen M. Bloom
Stephen M. Bloom
Commissioner



A person may petition the Public Utility Commission of Oregon for the amendment or repeal of a rule under ORS 183.390. A person may petition the Oregon Court of Appeals to determine the validity of a rule under ORS 183.400.

ITEM NO. 1

PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: March 4, 2014

REGULAR X CONSENT _____ EFFECTIVE DATE _____

DATE: February 25, 2014

TO: Public Utility Commission

FROM: Roger White *RW*

THROUGH: Jason Eisdorfer and Bryan Conway *E BK*

SUBJECT: OREGON TELECOMMUNICATIONS ASSOCIATION: (Docket No. AR 577) Staff's Additional Recommendations Regarding Petition for Rulemaking.

STAFF RECOMMENDATION:

Staff recommends that the Commission decline to open a rulemaking proceeding to amend OAR 860-032-0190 to include access to broadband in the definition of basic telephone services.

DISCUSSION:

On November 4, 2013, the Oregon Telecommunications Association (OTA) filed a petition to modify OAR 860-032-0190. The petition proposed a single change to the rule: establish access to broadband as one of the telecommunications services that a customer could reach when they picked up their telephone handset or phone and connected with the network to make a phone call, or in the jargon of the telecommunication industry, when they "go off-hook."¹

In support of its petition, OTA asserts that there has been a substantial change in technology since the Commission first determined what services are "basic telephone services."² OTA argues that broadband access has become nearly ubiquitous in Oregon and is vital to economic and community development.³ OTA further asserts the Commission is authorized to designate access to broadband as a basic service under

¹ I will be using the phrase "going off-hook" in this memorandum to describe the situation where a customer picks up their phone to dial and gets a dial tone.

² OTA Petition 2.

³ OTA Petition 5-9.

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ORS 759.400(1) and ORS 759.425, which authorize the Commission to define basic telephone service and periodically review services in Oregon for this purpose.⁴

OAR 860-032-0190 plays a key role in managing the disbursements from the Oregon Universal Service Fund (OUSF) in that the rule defines basic telephone service.⁵ OTA states that implementing its proposed change to the rule would not increase the size of the OUSF nor would it have an impact on UM 1481, an ongoing docket in which the Commission is reviewing various aspects of the OUSF.⁶

History of basic telephone service

In ORS 759.400, *et seq.*, the term "basic telephone service" is used in two different contexts. First, the Commission is required to establish prices for basic telephone service provided by telecommunications utilities with over 50,000 lines, whether the telecommunications utility is operating under an alternative form of regulation or rate of return regulation.⁷ Second, basic telephone service is the service supported by the OUSF.

Basic telephone service is comprised of local exchange telecommunications services. (See ORS 759.425). Local exchange telecommunications service is telecommunications service provided within the boundaries of exchange maps filed with and approved by the Commission.⁸ Essentially, basic telephone service consists of the last-mile facilities and a set of services (e.g., 911 or long-distance) that a customer can connect to when they use their phone.

In Order No. 00-265, the Commission determined which local exchange services comprise basic telephone service. See OAR 860-032-0190.⁹ ORS 759.425(2)(a) allows the Commission to review and update the list of services contained in this rule. Specifically, ORS 757.425(2)(a) authorizes the Commission to review and evaluate the status of telecommunications service in the state for the purpose of modifying the services included in the definition of basic telephone service. Beyond just making changes to the services included in the definition of basic telephone service, ORS

⁴ OTA Petition 3-4.

⁵ ORS 759.400(1) "Basic telephone service means local exchange telecommunications service defined as basic by rule of the Public Utility Commission."

⁶ OTA Petition 10.

⁷ ORS 759.410(3) and ORS 759.425(2). Companies with less than 50,000 lines are exempt from rate regulation, which is all but two of the telecommunications utilities operating in Oregon, are exempted from these price-setting provisions. ORS 759.425(2)(b).

⁸ "Telecommunications" and "telecommunications service" are defined at ORS 759.005(7) and (8).

⁹ Order No. 00-265; *In the Matter of a Rulemaking to Define Basic Telephone Service as Required by Chapter 1093, Laws of 1999 (SB 622)*(Docket No. AR 368).

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759.425(1) authorizes the Commission to adopt rules to conform the universal service fund to section 254¹⁰ of the federal Telecommunications Act of 1996 and related rules of the Federal Communications Commission ("FCC").

Summary of Comments regarding the OTA Proposal

Generally, the comments were opposed to OTA's proposal. Of the nine sets of comments, seven were opposed to OTA's petition and the remaining two neither opposed nor supported the petition. (See Appendix A; summary of comments.)

On the issue of opening a rulemaking docket, six of the commenters opposed it, one was silent on the issue, and two were in favor. Both Staff and the Citizens' Utility Board of Oregon (CUB) supported the opening of a rulemaking. Staff concurs with OTA that substantial changes in technology have led to ambiguities in how OUSF is collected and disbursed. However, after further analysis and as discussed later in this memorandum, Staff now concludes that a general investigation should precede any rulemaking proceeding because the various issues connected with modifying what constitutes basic telephone service are better suited to an investigation.

The commenters' general argument against the OTA proposal is that the FCC has determined that access to broadband is an information service, not a telecommunications service, and that therefore the Commission has not been given authority by statute to add it to the list of telephone services a consumer can access when they go off-hook.

Commenters also assert that the Oregon Legislature has signaled that it did not intend that access to broadband be designated as basic telephone service and that designating access to broadband as a basic telephone service would be bad public policy.

¹⁰ Section 254(b) of the Telecommunications Act of 1996 established the Universal Service Principles referenced by ORS 759.425. The 1996 Act is codified at 47 U.S.C. § 153 *et. seq.* Second on the list of principles, below quality and rates, is the principle that telecommunications users should have access to advanced telecommunications and information services and these services should be provided in all regions of the Nation.

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DEPARTMENT OF JUSTICE ANALYSIS

As several of the commenters note a service must be a local exchange telecommunications service under ORS 759.005(3) and (8) to be categorized as basic telephone service.¹¹ These commenters further assert that the FCC has decided that access to broadband service is an information service under the definition of "information service" in 47 C.F.R. § 153(24) and for that reason the Commission does not have authority to classify access to broadband for purposes of including it in the definition of basic telephone service.

It is not clear that the FCC's decision in 2005 to categorize access to broadband as an information service is in and of itself a bar to this Commission classifying it differently under Oregon statute.¹² This is because the Telecommunications Act of 1934 "divided authority among the FCC and the state commissions in an unusual regime of 'cooperative federalism,' with the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states."¹³ Notwithstanding the cooperative federalism prescribed by Congress, however, states cannot adopt laws or regulations that stand as an obstacle to the accomplishment and execution of the full purposes and objectives of federal law.¹⁴

An examination of the purpose underlying the FCC's decision to classify access to broadband as an information service leads to the conclusion the Commission is preempted from classifying access to broadband as basic telephone service under Oregon statutes. Until 2005, the FCC regulated wireline access to broadband as a telecommunications service.¹⁵ In 2005, the FCC changed course, deciding to categorize access to broadband as an information service in order to exclude wireline broadband providers from common carrier regulation under Title II of the 1934 Act.¹⁶ The FCC had previously concluded that broadband access service by cable modem providers was an information service.¹⁷ Accordingly, until the FCC decided to re-classify wireline access to broadband as an information service, wireline broadband,

¹¹ See OPUC Order No. 11-472.

¹² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* ("Wireline Broadband Order"), 20 F.C.C.R. 14,853 (2005) (2005 WL 2347773).

¹³ *Global Naps v. Mass.*, 427 F.3d 34, 46 (1st Cir. 2005).

¹⁴ *Arizona v. U.S.*, ___ U.S. ___, 132 S. Ct. 2492, 2501 (2012).

¹⁵ See *Time Warner*, 507 F.3d 205 (3rd Cir. 2007) (describing history of FCC's regulation of "enhanced services").

¹⁶ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* ("Wireline Broadband Order"), 20 F.C.C.R. 14,853 (2005) (2005 WL 2347773).

¹⁷ *Inquiry Concerning High-Speed Access to Internet over Cable and other Facilities* ("Internet Over Cable Declaratory Ruling"), 17 F.C.C.R. 4,798 (2002) (2002 WL 407567).

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and cable modem providers were subject to different regulatory treatment for the same service.¹⁸

While it may be possible for this Commission to diverge from the FCC and classify "access to broadband" as a telecommunication service for certain purposes under Oregon statutes, it may not do so if the classification will "stand as an obstacle" to the FCC's objectives.¹⁹ Designating a local exchange telecommunications service as basic telephone service subjects that service to regulation under ORS 759.410(3) and ORS 759.425(2)(a). Regulating wireline access to broadband under ORS 759.410(3) and 759.425(2)(a) would serve as an obstacle to the FCC's objective of exempting wireline broadband providers from common carrier regulation and would likely be preempted.

GENERAL INVESTIGATION VERSUS RULEMAKING PROCEEDING

Based upon the legal advice set forth above, Staff recommends that the Commission decline to open a rulemaking proceeding to include access to broadband as a basic telephone service.²⁰

Although Staff does not recommend that the Commission grant OTA's petition, Staff notes that OTA's petition highlights that there have been significant technological and policy changes since the Commission initially determined what services are basic telephone service twelve years ago. In its *USF/ICC Reform Order* issued in November 2011, the FCC noted that it is obligated under section 254 of the 1996 Telecommunications Act to review advances in telecommunications and information technologies and services to establish what should be included in the evolving level of

¹⁸ See *Ad hoc Telecom Users Committee v. FCC*, 572 F.3d 903 (D.C.Cir. 2009) ("The FCC ultimately decided that services offering the same essential functions to residential customers should not be regulated under different statutory frameworks simply because of the wire used. To harmonize its regulatory approach, the FCC ruled that many common-carrier obligations would not apply to *residential* broadband lines, whether DSL or cable modem. See *Internet Over Cable Declaratory Ruling*, 17 F.C.C.R. 4,798 (2002); see also *Wireline Broadband Order*, 20 F.C.C.R. 14,853 (2005); see generally *Brand X*, 545 U.S. 973-74, 125 S.Ct. 2688; Daniel F. Spulber & Christopher S. Yoo, *Rethinking Broadband Internet Access*, 22 HARV. J.L. & TECH., 1, 16-18 (2008).")

¹⁹ *Arizona v. U.S.*, ___ U.S. ___, 32 S. Ct. 2492, 2501 (2012).

²⁰ Staff does not believe it is necessary to address the commenters' other legal arguments in depth. However, Staff briefly notes that it disagrees with the assertions that the legislature's previous amendments to ORS 759.425 or enactment of other statutes related to broadband indicate the legislature intended to exclude access to broadband from basic telephone service. The legislature delegated to the Commission the authority to determine which local exchange telecommunications services are basic telephone services. The legislature's decision to provide the Commission specific authority with respect to deploying broadband does not mean the legislature intended to limit the Commission's authority to conclude that access to broadband is a local telecommunications.

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telecommunications that make up universal service.²¹ The Commission has received similar direction from the state legislature.²²

ORS 759.425 authorizes the Commission to adopt rules to conform the OUSF to section 254 of the 1996 Act and related rules of the FCC. And, ORS 759.425(2)(a) authorizes the Commission to periodically review and evaluate the status of telecommunications services in the state and designate the services included in basic telephone service. Given the amount of time that has passed since it adopted OAR 860-032-0190 and given technological and policy changes occurring in that time, it may be appropriate for the Commission to open an investigation to determine whether there are local exchange telecommunications services provided in Oregon that should be included in basic telephone service but that currently are not.

Staff notes there is a growing use of Voice over Internet Protocol (VoIP) in the last-mile to deliver voice services to customers. In its *2011 USF/ICC Reform Order*, the FCC found that consumers are increasingly obtaining voice services through interconnected VoIP providers that “allow consumers to make real-time voice calls to, and receive calls from, the PSTN[.]”²³ These last-mile networks typically are capable of broadband. The FCC decided to include voice service provided over broadband in the definition of universal service eligible for USF support based on consumers increasing use of such service.²⁴ The FCC’s findings and actions regarding VoIP suggest that a Commission investigation into whether some VoIP services should be added to the list of basic telephone services in Oregon may be warranted.

While the FCC has classified access to broadband as an information service, it has not taken that step with respect to all VoIP services. In December 2013, the United States Supreme Court noted that the “FCC has yet to provide its view on whether the Telecommunications Act categorically preempts intrastate access charges for VoIP calls.”²⁵ Whereas the FCC’s deliberate choice to exempt access to broadband from regulation under Title II of the Telecommunication Act (by classifying access to broadband as an information service) preempts the states from filling the regulatory vacuum with its own regulations, the same is not true where the FCC has simply failed to act.²⁶ Accordingly, Staff’s counsel advises that the Commission does not appear to be preempted by the FCC from concluding that VoIP is a telecommunications service rather than an information service.

²¹ USF/ICC Order at 17685 ¶ 62; 2011 WL 3438198 at 19.

²² See ORS 759.425.

²³ *Id.*, at 17865 ¶ 63.

²⁴ *Id.* at 17684 ¶ 62.

²⁵ *Sprint Communications v. Jacobs*, ___ U.S. ___, 134 S.Ct. 584 (2013).

²⁶ See e.g., *Southern New England Telephone Co. v. Comcast*, 718 F.3d 53, 58-59 (2nd Cir. 2013) (holding FCC’s failure to regulate transit service did not preempt states from doing so).

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Further, no order of the FCC precludes the Commission from finding VoIP is intrastate, rather than interstate, telecommunication, provided the facts show the access is in fact local and intrastate. In 2004, the FCC concluded that a state's regulation of intrastate portable VoIP service was preempted because it was not possible or practical to separate the intrastate telecommunications from the interstate telecommunications.²⁷ However, this impossibility scenario (one of the two circumstances that comprise one subcategory of "conflict preemption") would not apply if the Commission can separate the intrastate from interstate telecommunications. This inquiry is fact-driven and subject to the expertise of the Commission.²⁸ Notably, other state regulatory commissions have exercised jurisdiction over access charges for VoIP traffic.²⁹

To the extent the Commission is interested in exploring whether to expand the definition of basic telephone service to include VoIP to address technological and federal policy changes in the telecommunications industry, Staff recommends that the Commission do so by opening an investigation rather than a rulemaking. Whether VoIP is properly classified as a "telecommunications service" under ORS 759.005(8) and a "local exchange telecommunications service" under ORS 759.005(3) are factual inquiries better suited to an investigation than a rulemaking proceeding. And, Staff has identified technical issues associated with expanding basic telephone service that should be addressed. Further, commenters in this proceeding have raised significant policy questions related to the expansion of the OUSF. Finally, whether any voice services that satisfy the statutory criteria for inclusion as a basic service also satisfy the Commission's discretionary criteria may turn on factual issues. Staff believes all these issues questions are better suited to an investigation than a rulemaking.³⁰

²⁷ *Vonage Holdings Corp.*, 19 F.C.C.R. 22404 (2004)(2004 WL 2601194).

²⁸ *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 579 (8th Cir. 2007)("Whether VoIP services can be separated into interstate and intrastate components is largely fact-driven inquiry requiring a high level of technical expertise[.]").

²⁹ *Sprint Communications Co., LP v. Iowa Telecommunications Services, Inc.*, 2011 WL 459686 (Iowa Utilities Board concluding that it has jurisdiction over certain non-nomadic VoIP traffic); *Palmerton Telephone Company v. Global NAPs*, Pennsylvania PUC Docket C-2009-2093336, Order (Pennsylvania Public Utility Commission concluding that indirect transmission of VoIP traffic by one company to another constitutes common carrier telecommunications service that falls within its jurisdiction); *State of Maine Public Utilities Commission Investigation into Whether Providers of Time Warner 'Digital Phone' Service and Comcast 'Digital Phone' Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service*, Docket No. 2008-421, Order (Maine Public Utility Commission concluding non-nomadic VoIP services offered by two companies are "telephone services" under Maine law).

³⁰ See OPUC Order No. 00-265 at 6.

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Recommendation

Staff's analysis outlined above leads to the following recommendation:

Staff recommends that the Commission decline to open a rulemaking proceeding to include access to broadband as a basic telephone service.

Commission Alternative

Decline to open a rulemaking proceeding to include access to broadband and open an investigation to determine if VoIP and similar technologies providing last-mile services satisfy the statutory criteria for its inclusion as a basic telephone service.

Impact on UM 1481

Staff believes that an investigation to identify additional voice services being provided in Oregon that may be considered basic telephone service would not impact the schedule in docket UM 1481. The remaining portion of the schedule addresses the issues of allocating costs among the services sharing the network and determining if companies need support when unsubsidized competitors can provide the same service.

PROPOSED COMMISSION MOTION:

The Commission decline to open a rulemaking proceeding to amend OAR 860-032-0190 to include access to broadband in the definition of basic telephone services.

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Appendix A

Summary of comments filed:

Verizon

Verizon states that the Oregon Legislature has made clear that access to broadband is not a basic telephone service and that the Commission does not have authority to decide otherwise.³¹ Verizon notes that the Oregon Legislature amended ORS 757.425 in 1999 to authorize the Commission to use the OUSF to facilitate the availability of broadband and then amended the statute again in 2011 to remove that authority.³² Verizon asserts that “[b]ecause the thrust of the 2009 amendment was to ‘facilitate the availability of broadband,’ that is to provide greater access to broadband, it is likewise evident that broadband access is not a component of basic telephone service under Oregon state law.”³³

Verizon also argues that notwithstanding the history of ORS 759.425, “access to broadband” cannot be a basic telephone service because these services must be “local exchange telecommunications service” under ORS 759.005(3) and (8), and access to broadband does not fit the definition.³⁴ Verizon also notes that the FCC has categorized access to broadband an information service, not a telecommunications service, and has concluded that access to broadband is an interstate, rather than intrastate, service.³⁵

Verizon also argues that OTA’s assertion that “access to broadband” fits “neatly with the current structure” is incorrect. They point out that the other services on the list have historically been associated with voice telecommunications services and that OTA’s proposal is at direct odds with the “current” structure.³⁶

Verizon asserts the granting of this petition to be an inappropriate circumvention of the Commission’s multi-phased investigation of the OUSF in UM 1481³⁷ and does not see the need of a state broadband fund at this time.³⁸ AT&T also sees the possibility of

³¹ Verizon’s Comments 2-5.

³² Verizon’s Comments 2-4.

³³ Verizon’s Comments 3.

³⁴ Verizon’s Comments 5-7.

³⁵ Verizon’s Comments 6-8.

³⁶ Verizon’s Comments 12.

³⁷ Verizon’s Comments 23.

³⁸ Verizon’s Comments 15-20.

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unintended and impermissible consequences of including access to broadband in the definition of basic telephone service.³⁹

Oregon Cable Telecommunications Association (OCTA)

The OCTA contends that the Commission does not have authority to include access to broadband in the list of basic telephone service because the Commission may only include "local exchange telecommunications service," and access to broadband is an information service under decisions by the FCC and federal courts.⁴⁰

OCTA also notes that the 1999 statute ORS 759.445 established the Connecting Oregon Communities Fund (COCF) and other funds to provide access to advanced telecommunications technology in the K-12 school system and universities. This statute was written in the same general time as ORS 759.425.⁴¹ OCTA concludes that the fact the legislature adopted both statutes establishes that the legislature obviously did not intend that "basic telephone service" would include "advanced telecommunications."⁴² OCTA also cited the changes that were made to ORS 759.425, first in 2009 and subsequently in 2011, as an indication that the legislature did not want to expand the scope of the fund to include broadband.⁴³ Finally, OCTA relies on legislative changes to the definitions of telecommunications in ORS 759.005 to support its argument the legislature intended to exclude access to broadband from basic telephone service.⁴⁴

OCTA also asserts that the Commission does not have statutory authority to regulate an information service, which it would do if it designated it as basic telephone service.⁴⁵ Opening the rulemaking would disrupt the Commission's ongoing investigation of the OUSF in docket UM 1481.⁴⁶ OCTA also asserts that making OCTA's proposed change would be bad policy since the potential ramifications of the proposed change are "legion."⁴⁷

tw telecom

tw telecom supports the comments of OCTA opposing OCTA's petition.⁴⁸

³⁹ Verizon's Comment 20-23.

⁴⁰ OCTA Comments 3-6.

⁴¹ OCTA Comments 7-9.

⁴² OCTA Comments 9.

⁴³ OCTA Comments 13-16.

⁴⁴ OCTA Comments 12-13.

⁴⁵ OCTA Comments 16-18.

⁴⁶ OCTA Comments 20-22.

⁴⁷ OCTA Comments 2.

⁴⁸ tw telecom Comments.

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AT&T

AT&T also asserts that the Commission does not have authority to categorize access to broadband as basic telephone service because access to broadband is not a telecommunication service.⁴⁹ AT&T also relies on the Oregon Legislature's 2009 and 2011 amendments to ORS 759.245 including and then removing broadband deployment as eligible for the OUSF as proof that the legislature did not intend to authorize the Commission to include access to broadband as a basic telephone service.⁵⁰ AT&T also disagrees with OTA's assertion that including access to broadband will fit neatly within the current OUSF framework noting that historically, the OUSF has supported voice telecommunications service.⁵¹

AT&T argues that there is no reason to expand the OUSF to support broadband given the significant federal resources targeted at expanding the availability of broadband.⁵² Finally, AT&T notes that categorizing access to broadband as a basic telephone service would have unintended and impermissible consequences.⁵³

Oregon Telecommunications Ratepayers Association for Cost-based and Equitable Rates (TRACER)

TRACER concurs with the legal arguments made by OCTA, Verizon, and AT&T and the policy arguments raised by OCTA and Verizon.⁵⁴

TRACER notes that even if there was no statutory bar, OTA's proposal is inconsistent with the Commission's ongoing review of OUSF, would interject additional and unnecessary complexity into the administration of the fund, and could result in an increase in the size of the fund.⁵⁵ TRACER further notes that the cost of changing and enhancing the network should not be treated as a cost of providing basic telephone service.⁵⁶

⁴⁹ AT&T Comments 2-5.

⁵⁰ AT&T Comments 5-7.

⁵¹ AT&T Comments 7-8.

⁵² AT&T Comments 8-9.

⁵³ AT&T Comments 9-10.

⁵⁴ Comments of Tracer 1.

⁵⁵ Comments of Tracer 1-2.

⁵⁶ Comments of Tracer 3.

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Northwest Telecommunications Association (NTA)

NTA opposes the OTA petition because it unlawfully incorporates an information service into a telecommunications service definition.⁵⁷ NTA asserts that this classification gives an immediate commercial benefit to the present fund recipients, which is not available to other broadband access providers.⁵⁸ NTA asserts that the subsidy would undermine competitive choice for broadband services. If broadband access were included as a basic telephone service component, incumbents and eligible telecommunications providers could keep broadband service rates artificially low as a result of the subsidy they are receiving from the OUSF.⁵⁹

Frontier

Frontier asserts that if the Commission grants OTA's petition, it must make sure that broadband is not subject to OPUC regulations regarding deployment, pricing, or terms and conditions.⁶⁰

The Citizens' Utility Board of Oregon (CUB)

In order to determine whether OTA's proposed amendment is necessary, CUB recommends that the Commission open rulemaking proceedings to explore the issues raised by OTA's petition.⁶¹

Staff

Staff pointed out in its comments that the change that OTA proposes is not technically feasible because OAR 860-032-0190 does not specify the facilities needed to transmit at broadband speeds.⁶² Staff commented that if it is the intent of the OTA proposal to make network facilities capable of broadband speeds as a standard, it may be appropriate to open a rulemaking to address this item as well as other items that need to be updated in the rule.⁶³ There have been a large number of changes in technology since the rule was adopted and the way telecommunications service is used has changed substantially.

⁵⁷ NNTA Comments 3-6.

⁵⁸ NNTA Comments 6-8.

⁵⁹ NNTA Comments 8-9.

⁶⁰ Comments of Frontier 2.

⁶¹ Comments of CUB 1.

⁶² Staff Comments 1.

⁶³ Staff Comments 1.