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Via Electronic Delivery

December 6, 2013

Ms. Diane Davis
Public Utility Commission of Oregon
3930 Fairview Industrial Dr SE
Salem, Oregon 97302-1166

RE: In the Matter of the Oregon Telecommunications Association Petition to Amend
OAR 860-032-0190 Definition of Basic Telephone Service, Docket No. AR 577

Dear Ms. Davis:

Pursuant to the Public Utility Commission of Oregon's November 6, 2013 *Invitation to Comment* in the above-referenced matter, enclosed are the *Comments of the Northwest Telecommunications Association*.

Questions may be directed to the undersigned.

Sincerely,

MILLER ISAR, INC.

A handwritten signature in blue ink that reads "Andrew O. Isar". The signature is fluid and cursive, with the first name being the most prominent.

Andrew O. Isar

Regulatory Consultants to the
Northwest Telecommunications Association.

Enclosure

cc: AR 577 Service List (via electronic delivery)
NWTAs Members (via electronic delivery)

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

In the Matter of)
)
THE OREGON)
TELECOMMUNICATIONS) Docket No. AR 577
ASSOCIATION)
)
Petition to Amend)
OAR 860-032-0190 Definition of Basic)
Telephone Service)

COMMENTS OF
THE NORTHWEST TELECOMMUNICATIONS ASSOCIATION

Pursuant to the Public Utility Commission of Oregon’s (“Commission”) November 6, 2013 *Invitation to Comment* in the above-captioned proceeding, the Northwest Telecommunications Association (“NwTA”) submits these comments in opposition of the Oregon Telecommunications Association’s (OTA”) *Petition to Amend the Definition of Basic Telephone Service in OAR 860-032-0190 to Include Access to Broadband*.¹ OTA’s Petition raises serious jurisdictional and competitive issues and should be rejected. OTA effectively asks the Commission to incorporate an information service into a telecommunications service definition, likely exceeding the Commission’s statutory authority. Further, incorporation of broadband access to into the definition of Basic Telephone Service would “carve out” immediate commercial benefits and continued universal service fund subsidies for incumbent carriers and a limited number of existing eligible telecommunications carriers unavailable to other broadband access providers contrary to Oregon law. If granted, OTA’s proposal will undermine competitive choice for broadband services and ultimately fail to promote broadband development in Oregon, as OTA maintains.

¹ See, *Petition to Amend the Definition of Basic Telephone Service in OAR 860-032-0190 to Include Access to Broadband*, Oregon Telecommunications Association, Docket No. AR 577 (November 4, 2013) [*Petition*].

I. INTRODUCTION

NWTA is a regional industry association representing more than 15 predominantly competitive local exchange carrier member companies serving the Pacific Northwest states of Oregon, Washington, and Idaho. NWTA members provide a variety of telecommunications services and information services, including broadband access, through nearly 6,000 route miles of member company-owned fiber-based networks. More than 275,000 businesses and 200,000 residences in more than 549 largely rural Pacific Northwest communities have access to NWTA member company networks. NWTA member companies provide service to nearly 1,000 schools, government facilities, libraries, public safety centers, hospitals, clinics, and churches, many of which are located in underserved rural areas as well as to residential and commercial subscribers. NWTA members have invested more than \$32M in infrastructure and capital projects in 2013 alone and employ more than 300 full time individuals, a testament to member companies' commitment to this region. A majority of NWTA member company subscribers rely on member companies' non-subsidized broadband and broadband access services to meet their communications and data requirements.

OTA has petitioned the Commission to include "access to broadband" under the definition of "basic telephone service" in OAR 860-032-0190. OTA maintains *inter alia* that changes in technology particularly with regard to broadband services since OAR 860-032-0190 was first promulgated in 2001 necessitate amendment of the rule. Moreover, OTA argues that incorporation of broadband access in Oregon's basic telephone service definition is critical to promote broadband deployment throughout Oregon and will result in economic benefits associated with broadband services, consistent with federal and state policy. OTA supports its request with statistical data reflecting the need for broadband networks, and by implication, the need for broadband access.

Yet OTA's outwardly persuasive arguments and data obfuscate critical factors that militate against its request. Among them, that broadband access is an information service which may not likely be incorporated as a basic local telephone (telecommunications) service under Oregon law; that OTA's proposal immediately benefits incumbent carriers and perpetuates their market dominance to the exclusion of virtually all other new entrants; that OTA's proposal would result in a discriminatory implicit USF subsidy contrary to Oregon law; and that OTA's proposal ultimately undermines the very promotion of broadband service deployment which OTA touts as a key factor behind its request by creating competitive barriers to entry. For the reasons stated herein, NWTa urges the Commission to reject OTA's *Petition*.

II. BROADBAND ACCESS IS AN INFORMATION SERVICE THAT HAS NO PLACE IN A BASIC TELEPHONE (TELECOMMUNICATIONS) SERVICE DEFINITION.

OTA cites to OAR 860-032-0190(2) defining "basic telephone service" as a "retail *telecommunications* service..."² Though OTA makes clear that its request is confined to broadband access and does not include interexchange service or broadband services provided by Internet Service Providers,³ OTA fails to mention that the broadband access it addresses is an information rather than telecommunications service. As such, it has no place in a telecommunications service definition.

Indeed what OTA characterizes as "broadband access" is in reality *e.g.* broadband *Internet* access, which the Federal Communications Commission ("FCC") has no less than twice concluded to be an information service.⁴

² OTA *Petition* at page 2, emphasis supplied.

³ *Id* at page 3.

⁴ Whether by design or oversight, OTA excludes the word "Internet" when describing the broadband access it seeks be incorporated into the basic telephone service definition. While arguably a distinction could be made between broadband access and broadband Internet access, to do so in this instance would be a distinction without a difference. Broadband access can indeed be used specifically to access broadband services that do not contain an Internet access component, such as in the case of access to commercial special – dedicated – private line access

Pursuant to Section 153(20) of the Communications Act of 1934 as amended,⁵

The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

In 2005 the FCC ruled that wireline broadband Internet access service is an “information service.”⁶ The FCC explained,

Applying the definitions of “information service,” “telecommunications,” and “telecommunications service,” we conclude that wireline broadband Internet access service provided over a provider’s own facilities is appropriately classified as an information service because its providers offer a single, integrated service (*i.e.*, Internet access) to end users. That is, like cable modem service (which is usually provided over the provider’s own facilities), wireline broadband Internet access service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications (*e.g.*, e-mail, web pages, and newsgroups). These applications encompass the capability for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” and taken together constitute an information service as defined by the Act.⁷

Again in 2007, the FCC ruled that wireless broadband Internet access service is a jurisdictionally *interstate* information service.⁸

facilities. Yet this is not the type of broadband access OTA suggests when it focuses discussion on the economic benefits of the broadband access it seeks be incorporated into the basic telephone service definition. OTA’s references to the number of broadband connections in Oregon and in the U.S. (*Petition* at page 5), references to Google and social media (*Petition* at pages 5 and 6), among others, necessarily suggest that OTA’s request pertains specifically to broadband *Internet* access. This is a key distinction. To suggest that OTA is confining its request to broadband access without Internet access would undermine the very foundation on which OTA’s economic arguments are predicated.

⁵ [47 U.S.C. § 153\(20\)](#)

⁶ See, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, CC Docket No. 02-33 *et al.*, *Report and Order and Notice of Proposed Rulemaking*, [FCC 05-150](#) (Rel. September 23, 2005), “we affirm our tentative conclusion ‘that wireline broadband Internet access service provided over a provider’s own facilities is an information service.’ This classification is consistent both with the Commission’s classification of cable modem service, as affirmed by the Supreme Court in *Brand X*, and with the Commission’s earlier determination in its Report to Congress that Internet access service is an information service.” *Id.* at para 12, footnotes in original omitted.

⁷ *Id.* at para. 14.

⁸ See, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, *Declaratory Ruling*, [FCC 07-30](#) (March 23, 2007). “We determine that the transmission component of wireless broadband Internet access service is properly classified as ‘telecommunications’ and not

Notwithstanding OTA's public policy arguments for inclusion of broadband access to the definition of basic telephone service, OTA's request raises serious concerns over whether a non-jurisdictional information service can be included in Oregon's telecommunications service definition under Oregon law. OTA is in effect asking the Commission to for the first time include an information service, and one with a potentially significant interstate component, into a definition applicable exclusively to an intrastate telecommunications service. Though it is unclear if the Commission maintains statutory authority to include information services in the definition of basic telephone service – a telecommunications service – an intermingling of information service with telephone service raises serious questions that go well beyond OTA seemingly straight forward request.⁹

On this basis alone, OTA's request is problematic, if not misplaced. The proposed inclusion of broadband Internet access to the basic telephone service adds to the current rule's complexity¹⁰ in light of federal pronouncements, potentially conflicts with FCC declarations,¹¹ and raises important questions as to whether OTA's request is legally supportable,

'telecommunications service.' That is, we find that the transmission component of wireless broadband Internet access service is telecommunications and the offering of this telecommunications transmission component as part of a functionally integrated, finished Internet access service offering is not 'telecommunications service' under section 3 of the Act." *Id.* at para. 29, footnotes in original omitted. Unlike the *Declaratory Ruling*, the Commission's wireline broadband Internet access ruling did not explicitly conclude that this service was jurisdictionally interstate. Nevertheless, the jurisdictional nature of all broadband Internet access further clouds the issue of whether the Commission could include even a jurisdictionally mixed service in the definition of basic telephone service.

⁹ OTA itself notes that the Commission has discretion under ORS 759.400(1) to "periodically review and evaluate the status of telecommunications services in Oregon. OTA *Petition* at page 3. Despite such discretion to evaluate telecommunications services, Commission discretion to include information services in telecommunications service definitions is unclear, and to the NWT's knowledge untested.

¹⁰ Despite OTA's assertions to the contrary. *See, Petition* at page 13 addressing the requirements of OAR 137-001-0070(2)(c)..

¹¹ OTA's maintains that its proposal is consistent with federal policy of promoting broadband deployment but ignores that its request is inconsistent with established FCC findings regarding broadband Internet access.

which are not ripe for deliberation under this proceeding.¹² These issues by themselves raise sufficient cause for rejection of the relief OTA seeks.

III. ADOPTION OF OTA’S PROPOSAL IS NOT COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY, CONTRARY TO STATE LAW.

OTA states that inclusion of broadband access in the definition of basic telephone service will have no “adverse effect” on Oregon’s universal service fund (“USF”), but rather will be a “recognition that telecommunications networks provide both voice service and access to broadband service”¹³ Even if presuming *arguendo* that OTA’s request would not increase USF funding as OTA claims, inclusion of broadband access as an implicitly USF subsidized service is not competitively neutral, is discriminatory, and is contrary to the stated directives in Oregon law.

A. Supplemental USF Funding of Broadband Access Accords a Distinct Immediate Competitive Advantage to Incumbents and Eligible Telecommunications Carriers Unavailable to New Market Entrants.

By seeking to incorporate broadband access into the basic telephone service definition, OTA asks the Commission to create a *de facto* USF subsidy for what is otherwise a component of a competitive service in an emerging broadband market. Though OTA seeks to include only broadband access in the definition of basic telephone service, the competitive advantages accorded by subsidized broadband access would not be confined to access, but would extend to the incumbents’ and eligible telecommunications carriers’ (“ETC”) own broadband services, and create a competitive entry barrier for competitors.

Broadband access and broadband services are inseparable and not typically offered independently. Though it is certainly possible for subscribers to elect broadband access from one provider and broadband services from another, in practice subscribers would likely opt

¹² Indeed, O.R.S. §[756.060](#) accords the Commission authority to “amend reasonable and proper rules and regulations relative to all statutes administered by the commission.” Yet OTA has not established that such broad authority extends to the inclusion of non-jurisdictional information services.

¹³ *Petition* at 9, 10.

for the convenience of combined broadband access and broadband service from a single provider. This would be particularly the case if broadband access were included as a basic telephone service component. Incumbents and ETCs could keep broadband service rates artificially low to account for cost savings associated with subsidized broadband access, providing a further incentive for subscribers to elect incumbent and ETC broadband services before meaningful competitive alternatives are available. This would create a significant entry barrier for competitors who seek to recoup the significant costs of deploying their own networks, and represent an inherent competitive disadvantage to non-USF recipients, contrary to Oregon law.¹⁴

B. Oregon Law Establishes that the USF is to be Implemented in a Competitively Neutral and Nondiscriminatory Manner

O.R.S. [§759.425](#) (1) explicitly directs the Commission to “establish and implement a competitively neutral and nondiscriminatory universal service fund.”¹⁵ The inclusion of broadband access as a USF supported basic telephone service is inconsistent with this requirement.

OTA suggests that basic telephone service access to long distance service and access to broadband service are equivalent services.¹⁶ The comparison is misleading. The virtual inseparability of broadband access from broadband services creates a distinction that does not exist for basic dial tone – basic telephone – service, particularly in an emerging broadband market. Basic telephone service, as currently defined, is a discrete service that functions independently of any other service. Access to interexchange services does not compel

¹⁴ Competitive carriers could apply for ETC status to realize the benefits of subsidized broadband access that would be accorded to incumbents and existing ETCs under OTA’s request. Nevertheless, their decision to apply would come at significant cost, effort, and risk, motivated by the necessity of maintaining competitive parity more than a desire to serve as a carrier of last resort. Clearly this is not the intent of an ETC designation. And even if ETC designation were ultimately granted, adoption of OTA’s request would already give incumbents and existing ETCs a competitive head start advantage.

¹⁵ O.R.S. [§759.425](#) (1). O.R.S. §759.425 is specifically directed to telecommunications services, again giving rise to whether an information service can lawfully be included under the auspices of the USF.

¹⁶ *Petition* at 3.

subscribers to obtain interexchange services. If subscribers elect to access interexchange services, they have a variety of well-established competitive alternatives to choose from. In contrast, broadband access must be interconnected to a broadband service to serve its intended purpose. To offer broadband access alone would constitute be a “highway to nowhere,” particularly when the stated aim is to promote broadband deployment. It would be illogical to otherwise provide broadband access unless broadband services were also available.

Under OTA’s proposal, incumbent and ETC broadband services would, from a consumer’s perspective, be a natural extension of the subsidized broadband access included in the consumer’s basic telephone service. Incumbent broadband services would be the only option if competitive broadband services are unavailable. Arguably consumers could select broadband services from other providers if available. Yet the propensity to bundle broadband and local services, or offer other broadband service discounts made possible through incumbent and ETC savings realized through subsidized broadband access, would make the incumbents’ or ETC’s broadband services a logically more desirable subscriber choice to the detriment of competitive alternatives.

Unlike access to competitive interexchange services, inclusion of broadband access as a USF subsidized service gives incumbents a head start on broadband network deployment and a distinct competitive advantage in emerging broadband markets. These competitive advantages are in direct contradiction with the explicit requirement in O.R.S. §759.425 to make the USF competitively neutral and nondiscriminatory.

IV. ADOPTION OF OTA’S PROPOSAL WOULD LIMIT, IF NOT UNDERMINE, BROADBAND DEPLOYMENT, CONTRARY TO OTA’S STATED INTENT.

OTA stresses that its proposal is consistent with federal and state policy to promote broadband deployment as a key element to economic development. Indeed, the facts OTA presents in support of the benefits of broadband deployment are indisputable. Less

apparent under OTA's proposal is that a Commission-directed inclusion of USF subsidized broadband access would promote *incumbent* broadband deployment, thus limiting competitive alternatives while placing broadband network deployment on an incumbent dictated timeframe.

The FCC has clearly acknowledged the impediments to broadband deployment, key among them cost:

Building out new networks on Tribal lands and in rural areas is costly as infrastructure often must be built over long distances, and lower population density and generally lower incomes present fewer revenue-generating opportunities for service providers.¹⁷

The FCC has also recognized the importance of competition in lowering broadband costs:

Efforts of network operators are also helpful in making broadband affordable. The Commission's efforts to speed deployment and free spectrum may lead to more competitive offerings and help bring down the cost of broadband for many Americans.¹⁸

It is the promotion of broadband competition rather than policies that will limit competition, which should be pursued.

The finding of the strong link between broadband use and state-level employment has important policy implications, both on the demand-side and the supply-side. In particular, these results suggest that all levels of government should follow policies that encourage broadband competition, which will lead to lower prices and hence greater use. It should be noted, however, that increased use will require an expansion of supply, specifically greater investment by service providers in broadband infrastructure, which already is facing capacity constraints as new applications, such as video streaming, become ever more popular. It is critical, therefore, that new regulatory policies not reduce investment incentives for these carriers.¹⁹

¹⁷ See, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, *Eight Broadband Progress Report*, [FCC 12-90](#) (August 21, 2012) at para. 141 (footnote in original omitted).

¹⁸ *Id.* at para. 151 (footnotes in original omitted).

¹⁹ See [The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data](#), Study by Robert Crandall, William Lehr and Robert Litan. Senior Fellows in the Economic Studies Program at the Brookings Institution. William Lehr is a Research Associate with the Communications Futures Program at MIT. See also, [Broadband & Internet Policy](#), TechNet; "Broadband policy should encourage innovation and government should not pick winners and losers. Competition and the marketplace should drive the deployment of a range of broadband technologies and services to consumers, and the government should not pick technology winners and losers."

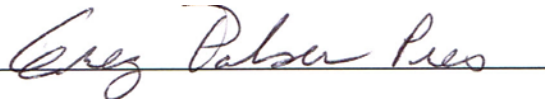
OTA is essentially seeking Commission involvement through a seemingly innocuous proposal, to give incumbents and ETCs a head start and incentives to deploy broadband services. In so doing the Commission inadvertently stands to undermine competitive entry and slow – rather than promote and accelerate – broadband deployment. The inherent competitive advantages accorded to incumbent carriers through subsidized broadband access will simply perpetuate incumbent market dominance in an emerging broadband market. These competitive advantages would create economic disincentives for competitive entry – whether NWTAs members, Google, or other prospective broadband providers – who would be less prone to assume the significant costs and risks of deploying broadband networks in incumbent-dominated markets. The Commission’s appropriate role is to promote broadband competition rather than perpetuate the *status quo* by rejecting OTA’s proposal.

V. CONCLUSION

OTA seeks Commission-directed USF subsidized broadband Internet access under the guise of promoting broadband deployment. OTA effectively asks the Commission to for the first time incorporate a non-jurisdictional information service into the definition of a telecommunications service. In so doing, OTA’s proposal accords incumbent carriers and ETC initial market entry and pricing advantages unavailable to competitors in an emerging broadband market. These competitive advantages are in direct contradiction to the explicit competitively neutral and nondiscriminatory USF tenants under Oregon law. OTA’s request raises complex legal, competitive, and public policy issues that transcend OTA’s seemingly simple proposal, which are not ripe for deliberation in this matter. In light of the foregoing, NWTAs urges the Commission to reject OTA’s Petition.

Respectfully submitted this 6th day of December, 2013.

The Northwest Telecommunications Association

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CERTIFICATE OF SERVICE

I, Andrew O. Isar, do hereby certify that, on this 6th day of December, 2013, I served the *Comments of the Northwest Telecommunications Association* in docket AR 577 upon following parties to this proceeding contained in the Oregon Public Utilities Commission Service List by electronic delivery and upon the Commission by electronic delivery.

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