

**PUBLIC UTILITY COMMISSION OF OREGON  
INTEROFFICE CORRESPONDENCE**

**DATE:** July 9, 2001

**TO:** Phil Nyegaard, Sam Petrillo, and Clark Jackson

**FROM:** Dave Booth

**SUBJECT:** Docket AR 395  
Proposed revisions to OAR 860-025-0000 through 0027, OAR 860-032-0001(11),  
OAR 860-032-0020, OAR 860-032-0023, OAR 860-032-0035, OAR 860-032-0040,  
OAR 860-032-0080, and OAR 860-032-0200.

**SUMMARY RECOMMENDATION:**

Staff recommends the Commission decline to initiate rulemaking in response to proposals from Qwest Corporation and Verizon Northwest, Inc. to revise OAR 860-025-0000 through 0027, OAR 860-032-0001(11), OAR 860-032-0020, OAR 860-032-0023, OAR 860-032-0035, OAR 860-032-0040, OAR 860-032-0080, and OAR 860-032-0200.

**DISCUSSION:**

In November 2000, the Commission opened docket AR 395 to review its administrative rules as required by ORS 183.545. The Commission invited comments regarding the rules. Qwest Corporation (Qwest) filed comments recommending changes to OAR 860-032-0001(11), OAR 860-032-0020, OAR 860-032-0040, and OAR 860-032-0200(6). Verizon Northwest, Inc. (Verizon) filed comments recommending changes to OAR 860-025-0000 through 0027, OAR 860-032-0035, OAR 860-032-0080, and OAR 860-032-0200. Qwest and Verizon proposed changes to other rules as well, but those proposals are not addressed in this memorandum.

In addition, at the June 15, 2001, public meeting, the Commission referred to docket AR 395 a Verizon proposal in docket AR 398. In the latter docket, Verizon recommended the Commission merge OAR 860-032-0023 (renumbered from OAR 860-032-0210) and OAR 860-032-0035. Verizon also proposed in docket AR 398 that the Commission should add a section to the merged rule dealing with price listing for toll services under ORS 759.030(8). The Commission concluded as follows:

[I]t may make sense to consider merging OAR 860-032-0210 with OAR 860-032-0035 or, alternatively, to consider incorporating the price listing requirements associated with ORS 759.030(8) into OAR 860-032-0035. However, both of these options may raise substantive issues relating to toll service price listing that are beyond the scope of the notice in this proceeding. The notice provides that the Commission will consider housekeeping changes only, not make substantive changes in the applicability of the rules under consideration. Accordingly, Verizon's proposal cannot be considered at this time. (Order No. 01-488, page 3.)

This memorandum addresses Verizon's AR 398 proposal in the section dealing with OAR 860-032-0035.

OAR 860-025-0000 through OAR 860-025-0027

These Division 025 rules govern territory allocation for electric and natural gas utilities, as well as telecommunications utilities with 50,000 or more access lines. Comparable rules in Division 034 (OAR 860-034-0440 through OAR 860-034-0490) govern territory allocation for telecommunications utilities with fewer than 50,000 access lines. Territory allocation is established in Oregon law. ORS 758.400 through ORS 758.475 authorize territory allocation for electric and natural gas utilities. ORS 759.500 through ORS 759.595 authorize territory allocation for telecommunications utilities. Territory allocation permits utilities to enter into contracts, in which neighboring utilities agree to limit their utility service to mutually exclusive service territories. The Commission must approve these contracts.

Verizon filed the following comments under the heading "Division 25. Duplication of Facilities and Allocation of Territory"<sup>1</sup>:

This Division should not apply to any telecommunications provider because of Section 253(a) of the Act. That provision says state laws may not limit or prohibit competitive entry. On its face, a provision such as OAR 860-025-0020 (which appears to establish exclusive serving areas) cannot be squared with Section 253(a). Therefore, it is not appropriate to include telecommunications providers under this Division.

Verizon believes the Commission should eliminate telecommunications utilities from territory allocation rules in Division 025 due to an alleged conflict with Section 253(a) of the Act. Staff disagrees with Verizon's position for two reasons.

First, Verizon fails to recognize that the statutes, not the rules, establish territory allocation for telecommunications utilities. Deleting mention of telecommunications utilities from OAR 860-025-0000 through OAR 860-025-0027 would do nothing to remove territory allocation for telecommunications utilities from Oregon law. It would only confuse matters by eliminating Commission procedures for accomplishing territory allocation. The appropriate venue for Verizon to pursue changing Oregon law is the Oregon legislature, not the Commission. Revisions to the administrative rules cannot resolve Verizon's concerns.

Second, despite the territory allocation statutes, Oregon law permits competitive entry. See ORS 759.020, ORS 759.050, and OAR 860-032-0001 through OAR 860-032-0010. The Commission may certify more than one telecommunications provider in a service territory, even though some or all of the territory has been allocated to a particular telecommunications utility. The Commission has certified hundreds of competitive local service providers. Some of these are telecommunications utilities that have request authority to compete

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<sup>1</sup> In its comments, Verizon refers to Division 025. Division 025 generally deals with territory allocation. However, one rule, OAR 860-025-0030 deals with construction of overhead power lines by electric utilities. Staff assumes that Verizon's comments are limited to OAR 860-025-0000 through OAR 860-025-0027, and exclude OAR 860-025-0030. Verizon's comments do not mention territory allocation rules for small telecommunications utilities in Division 034. Staff assumes that Verizon's comments apply to the relevant Division 034 rules as well.

in territory allocated to other telecommunications utilities. In fact, Verizon is authorized to compete in territory that is allocated to Qwest, CenturyTel of Oregon, and United Telephone Company of the Northwest. Staff agrees that the territory allocation statutes may be outdated given ORS 759.020 and ORS 759.050, but these statutes and the Division 025 rules do not, in actual practice, impose a barrier to entry.

Staff recommends the Commission not initiate rulemaking to revise OAR 860-025-0000 through OAR 860-025-0027.

#### OAR 860-032-0001(11)

This rule defines "telecommunications service." Qwest contends that the definition in the current rule is more expansive than permitted by law. Specifically, Qwest objects to the phrase, "and all services provided in connection with such services." Qwest asserts that the latter phrase goes beyond the scope of telecommunications service as defined in ORS 759.005(2)(g).

Staff disagrees with Qwest's assertion that the rule is more expansive than permitted by law. Qwest's comments ignore another statute, ORS 756.010(8). The latter statute says in relevant part, "except as otherwise specifically provided or unless the context requires otherwise: (8) 'Service' is used in its broadest and most inclusive sense and includes equipment and facilities related to providing the service or the product served." The definition in OAR 860-032-0001(11) is within the scope of the law. It is authorized by ORS 759.005(2)(g) and ORS 756.010(8) in combination.

Staff recommends the Commission not initiate rulemaking to revise OAR 860-032-0001(11). Staff notes that Qwest previously raised the same issue in docket AR 347, the Commission's prior review of administrative rules pursuant to ORS 183.545. In docket AR 347, the Commission agreed with staff's recommendation to not initiate rulemaking in this matter.

#### OAR 860-032-0020

This rule deals with abandonment of service. It requires telecommunications utilities to petition the Commission for approval if they intend to discontinue a regulated service. The rule also requires that the utilities provide notice to affected customers regarding the utility's intent to abandon the service, and the fact that the utility has a petition pending with the Commission. If the Commission does not deny the petition, or set it for hearing within 60 days, the petition is deemed approved. The Commission recently adopted current language in OAR 860-032-0020 in docket AR 365. See Order No. 00-068, February 8, 2000.

Qwest proposes that the Commission change OAR 860-032-0020 so that the petition and notice requirements apply only when utilities intend to discontinue services that are on the list of essential services in OAR 860-032-0200(5). OAR 860-032-0200(5) lists "essential services" for purposes of ORS 759.195. The latter statute allows telecommunications utilities to petition the Commission for an alternative form of regulation (AFOR). Under an AFOR, the utility gains considerable flexibility in pricing its non-essential services. The Commission continues to fully regulate prices for "essential services." ORS 759.195(6) required the Commission to adopt a rule defining essential services for the purpose of implementing ORS

759.195. Hence, the Commission adopted 860-032-0200, including the list of essential services set forth in 860-032-0200(5).

Staff disagrees with the change proposed by Qwest. Staff does not believe that telecommunications utilities should be permitted to discontinue regulated services without notice to customers and without Commission review. The mere fact that a service is not on the list of essential services in OAR 860-032-0200(5) should not create the presumption that a utility can entirely cease offering the service without regulatory oversight. No matter the degree of rate regulation, the Commission should ensure that customers may seek Commission protection if the utility intends to discontinue a regulated service.

Staff recommends the Commission not initiate rulemaking to revise OAR 860-032-0020.

#### OAR 860-032-0035

This rule establishes procedures and standards that implement price listing under ORS 759.030(6). The statute provides that a telecommunications utility may petition the Commission to price list a product or service that is part of local exchange telecommunications services. To obtain permission to price list, the utility must demonstrate that the product or service is either "subject to competition," or "is not an essential product or service." OAR 860-032-0035(6) establishes criteria the Commission will use to determine whether a service is "not essential." The Commission recently adopted the criteria set forth in OAR 860-032-0035(6) in docket AR 365. See Order No. 00-068, February 8, 2000.

Verizon contends that OAR 860-032-0035(6) establishes criteria that are too inflexible. In particular, Verizon believes that the Commission should eliminate from OAR 860-032-0035(6)(d) the requirement that a service be "not essential for all customer classes." Verizon would like the rule to recognize that "a service that is 'essential' in one locale or for one customer class may be 'not essential' in another area or for another customer class." Apparently, Verizon would like the Commission to interpret ORS 759.030(6) as permitting price listing selectively for specific geographic areas and specific customer classes.

ORS 759.030(6) permits price listing of a "product or service." The Commission has consistently interpreted ORS 759.030(6) to mean that an entire service may be price listed, wherever and to whomever the petitioning utility offers the service within its service territory. Verizon would like the Commission to fundamentally change its interpretation of this statute to permit mixed price listing and full regulation for a service. In Verizon's view, a utility should be able to use ORS 759.030(6) to obtain price listing for a service in a portion of the utility's service territory, while leaving the same service fully rate regulated elsewhere. Similarly, Verizon would have the Commission grant price listing of a service for one class of customers, while leaving the same service fully rate regulated for other customer classes.

Staff believes that the Commission is correctly interpreting ORS 759.030(6). The Commission has consistently treated a petition to price list a product or service under this statute as a petition to price list the entire service. The statute clearly contemplates price listing of an entire service, not Verizon's notion of mixed price listing and full rate regulation for the same service. Staff notes that another statute addresses Verizon's

desire for selective geographic price listing. Utilities may gain downward pricing flexibility on an exchange-by-exchange basis under the competitive zone law, ORS 759.050.

In docket AR 398, Verizon recommended that the Commission merge OAR 860-032-0023 (renumbered from OAR 860-032-0210) into OAR 860-032-0035. At the June 15, 2001, public meeting, the Commission referred this proposal by Verizon to docket AR 395. OAR 860-032-0023 sets forth requirements for a petition to price list numerous services as part of an AFOR plan pursuant to ORS 759.195. In other words, OAR 860-032-0023 deals with bulk price listing of numerous services in the context of an overall alternative regulation scheme. In contrast, OAR 860-032-0035 sets forth requirements for petitions to price list a single local exchange product or service under ORS 759.030(6). Verizon thinks these rules should be merged because both have something to do with price listing. Staff agrees that both rules deal with price listing, but staff does not agree that the rules should be merged. A petition for price listing as part of an AFOR is very different from a petition to price list a single product or service under ORS 759.0030(6). The current rules appropriately set forth distinctive requirements in separate rules for each type of price list petition. The distinction should be maintained.

In docket AR 398, Verizon recommended that the Commission add a new part to OAR 860-032-0035 which would address price listing under ORS 759.030(8). The Commission referred this proposal by Verizon to docket AR 395. OAR 860-032-0035 currently addresses petitions to price-list under ORS 759.030(6). Petitions to price-list under ORS 759.030(8) are not covered by OAR 860-032-0035 or any other rule. ORS 759.030(8) deals with price listing for interexchange services, such as long distance toll. ORS 759.030(6) deals with price listing for local exchange services. ORS 759.030(6) and (8) have different standard for granting price listing. ORS 759.030(6) authorizes the Commission to grant price listing for a local exchange service if a utility demonstrates either that the service is subject to competition, or that it is not essential. ORS 759.030(8) authorizes the Commission to grant price listing for an interexchange service if the utility demonstrates that the service is subject to competition. The "not essential" standard applies only to local exchange services, not interexchange services.

Staff agrees with Verizon that no administrative rule currently sets forth requirements that apply to petitions for price listing of interexchange services under ORS 759.030(8). However, there is no requirement that every provision in the statutes have a rule. In staff's view, the statute is sufficiently clear on its face for a utility to file a petition for price listing under this section of law. Verizon's comments do not explain why it believes a rule is needed to implement ORS 759.030(8). Absent such an explanation, staff concludes that the current rules are adequate.

Staff recommends the Commission not initiate rulemaking to revise OAR 860-032-0035.

#### OAR 860-032-0040

This rule addresses the general topic of subsidies for telecommunications services. The Commission adopted OAR 860-032-0040 in 1985 to implement ORS 759.015 and ORS 759.030(9). ORS 759.015 is a statement by the Oregon legislature, that it is "the goal of the State of Oregon to secure and maintain high quality universal telecommunications service at just and reasonable rates for all classes of customers and to

encourage innovation within the industry by a balanced program of regulation and competition." ORS 759.030(9) authorizes the Commission to determine whether a service provided by a telecommunications utility should be subsidized in order to meet legislative goals. If the Commission determines that a subsidy is required, the Commission then must conduct an investigation, and only after hearings determine revenue sources to provide the subsidy as well as the manner of collection and distribution of the fund. OAR 860-032-0040 basically repeats statutory language from ORS 759.015 and ORS 759.030(9).

In its comments, Qwest states:

It is unclear how this rule interacts with requirements for universal service imposed by Section 254 of the federal Telecommunications Act of 1996 (the "Act"). There is only one source for a subsidy to telecommunications service providers – the Universal Service Fund. To the extent this rule is inconsistent with the Act, it should be revised and clarified.

Qwest's comments fail to recognize that if there is a conflict between OAR 860-032-0040 and Section 254 of the Act, the conflict is a matter of statute not rule. OAR 860-032-0040 largely repeats language found in Oregon law. As a result, revisions to the rule cannot resolve Qwest's concerns. Moreover, Staff does not agree that the statutes and the rule necessarily conflict with Section 254 of the Act. OAR 860-032-0040(2) allows any person to petition the Commission to require telecommunications providers in general to subsidize a telecommunications utility's service. The Commission would no doubt consider such a petition in the context of the Act and recent Oregon law creating an Oregon Universal Service (OUS) Fund. See ORS 759.425. The Commission has authority under ORS 759.425 to implement explicit and competitively neutral subsidies for basic telephone service using the Oregon Universal Service (OUS) Fund.

Staff recommends the Commission not initiate rulemaking to revise OAR 860-032-0040. Staff notes that Qwest previously raised the same issue in docket AR 347, the Commission's prior review of administrative rules pursuant to ORS 183.545. In docket AR 347, the Commission agreed with staff's recommendation to not initiate rulemaking in this matter.

#### OAR 860-032-0080

This rule defines "gross retail intrastate revenue" for purposes of the Commission's annual fees payable by telecommunications providers. The rule implements ORS 756.310(6).

Verizon argues that OAR 860-032-0080 should exclude yellow page revenues from the assessment of PUC fees. Staff disagrees. Yellow page revenues have long been assigned to the local jurisdiction and included in the PUC fee assessment base. In its comments in docket AR 395, Verizon has not provided any new reasons as to why the Commission should change the basis of the assessment.

Less than two years ago, in docket AR 362, Qwest Corporation and Verizon presented the same argument to the Commission, and the Commission disagreed with the utilities. According to Order 99-734, pages 4-5:

Commission deems yellow page directories to be an intrastate service. The directories are

distributed locally and are used almost exclusively by intrastate retail customers . . .

In addition, HB 2578 is intended in part to broaden the Commission's funding base to add competitive telecommunications providers to the assessment base and to modify the base accordingly. There is nothing in the legislative history to indicate that the Legislature intended to exclude yellow page revenues . .

Staff recommends the Commission not initiate rulemaking to revise OAR 860-032-0080.

#### OAR 860-032-0200

This rule defines "essential services" for purposes of ORS 759.195. As discussed previously in the context of Qwest's proposals for OAR 860-032-0020, ORS 759.195 authorizes the Commission to approve alternative form of regulation (AFOR) plans. Under an AFOR plan, essential local exchange services are provided greater regulatory rate protection than non-essential services. ORS 759.195 specifically directed the Commission to establish a list of essential services by rule. In December 1988 (Order No. 88-1522), the Commission defined essential services and approved a list of such services in OAR 860-032-0200(5). See docket AR 188. In August 1999 (Order No. 99-497, docket AR 353), the Commission removed Public Coin and Semi-Public Coin from the essential services list. The Commission approved deletion of these services because the Federal Communications Commission (FCC) had recently deregulated public telephone services on a national basis.<sup>2</sup>

Qwest now proposes the Commission delete several more services from the list of essential services in OAR 860-032-0200(5): (1) multi-party services (i.e., Residential Multiparty, and Suburban), (2) Directory Listings (White and Yellow Pages), and (3) Directory Assistance. Verizon also recommends that directory assistance be deleted from the list. (4) In addition, Verizon proposes changes to OAR 860-032-0200 that would allow a service to be defined as essential for specific geographic areas and specific customer classes. In other words, Verizon wants the rule modified so that a service can be essential in one portion of a utility's service territory, and non-essential elsewhere. Similarly, Verizon proposes that a service can be essential for some customer and non-essential for other customers. Verizon proposed the same kind of change to OAR 860-032-0035, as discussed above.

Staff disagrees with the proposals by Qwest and Verizon.

(1) With regard to deleting multi-party services, Qwest argues that services of this type should be removed from the list for several reasons: (a) Qwest no longer offers multi-party service; (b) Providers that are eligible for universal service funding must offer single-party service to all customers; and (c) The Commission did not include multi-party service as a basic telephone service in OAR 860-032-0190 (renumbered from OAR 860-032-0260).

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<sup>2</sup> In docket AR 353, Qwest raised a concern that OAR 860-032-0200 may require Qwest to offer every service on the essential services list. In Order No. 99-497, the Commission clarified that telecommunications utilities are not required to offer all services on the essential services list.

In response to the first argument, Staff does not believe it is appropriate to delete multi-party service from the essential services list simply because Qwest no longer offers this type of service. The rule is not for Qwest alone.<sup>3</sup> The essential services list must accommodate all utilities that may file for an AFOR plan under ORS 759.195. At least some of the telecommunications utilities that could file such a plan are currently offering multi-party service in their tariffs. For example, CenturyTel of Oregon, Inc. offers Residential Two-Party and Residential Suburban Line Service.<sup>4</sup> Staff believes that multi-party service should remain on the list of essential services as long as any of the utilities that could possibly apply for an AFOR plan are offering this type of service.

In response to the second argument, Staff acknowledges that to be eligible for support from the federal and Oregon universal service funds, a carrier must offer single-party service throughout a designated service area. However, single-party service may be very expensive if mileage or line extension charges apply. Some carriers keep multi-party service available as a less expensive option for consumers in rural areas. The Commission should continue to fully regulate rates for multi-party service in an AFOR plan so long as telecommunications utilities continue to make available this type of service.

In response to the third argument, staff does not believe that the definition of essential services in OAR 860-032-0200 should be linked to the definition of basic telephone service in OAR 860-032-0190. Qwest implies that the lists of essential and basic services should be the same. However, Qwest ignores an important distinction between "basic" and "essential" as these terms are employed in Oregon law. The definition of essential services in OAR 860-032-0200 has but one purpose, and that is to identify which services will remain fully rate-regulated under an AFOR. In contrast, the definition of basic telephone service in OAR 860-032-0190 has two purposes. One is to identify which services will remain fully rate regulation when a telecommunications utility elects price cap regulation under ORS 759.410. Staff concedes that in this regard, the basic and essential classifications are conceptually very similar. However, the basic services definition has another purpose that is quite apart from rate regulation. The Commission's definition of basic telephone service is used to identify which services are eligible for support from the Oregon Universal Service (OUS) Fund. See ORS 759.425. The more extensive the Commission makes the list of basic services, the larger the OUS Fund, and the larger the OUS surcharge.

How the Commission defines basic telephone service impacts both the scope of rate regulation and the size of the OUS Fund. Mindful of both considerations, the Commission arrived at a definition of basic telephone service that is considerably more restrictive than the definition of essential services. See Order No. 00-265, docket AR 368. There is a clear difference between basic telephone service and essential services. This distinction should be maintained in the administrative rules.

(2) With regard to deleting Directory Listings (White and Yellow Pages), Qwest merely states that it believes directory listings are not essential. The company offers no explanation or support. Staff believes that

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<sup>3</sup> Indeed, OAR 860-032-0200 does not even apply to Qwest. Qwest has already elected permanent price cap regulation under ORS 759.410, and therefore will not be filing an AFOR plan under ORS 759.195.

<sup>4</sup> See CenturyTel of Oregon, Inc., PUC OR No. 5, First Revised Sheet No. 1.12, Effective November 24, 2000. These services are grandfathered. They are available only to existing customers at their existing locations.

directory listings are as essential today as they were in 1988 when the Commission approved the original rule. A white pages directory listing is still a part of basic local exchange service, just as it was in 1988. A yellow page listing is still a part of basic local exchange service for business customers, just as it was in 1988. Qwest has not presented a convincing argument for changing the Commission's original decision to include directory listings as an essential service.

(3) With regard to deleting Directory Assistance, Qwest states<sup>5</sup>:

According to the Commission's prior orders and OAR 860-032-0260(2)(e), directory assistance itself, which is subject to competition, is neither an essential service nor basic telephone service; rather providing "access to" directory assistance is an essential service or basic telephone service. This section should be changed to reflect that "Access to Directory Assistance" is an essential service.

Verizon addresses deletion of Directory Assistance as follows:

Verizon proposes that directory assistance be deleted from the list all together at this time because the service is not essential. Many alternatives exist to obtaining telephone numbers from this local telephone company service, including listings available on the Internet and from alternative vendors.

Contrary to Qwest's claim, the Commission has not issued an order that concludes Directory Assistance is not an essential service. Perhaps Qwest is confusing essential services with basic telephone service. In docket AR 368, the Commission determined that basic telephone service should include "access to directory assistance," but not Directory Assistance itself. See Order No. 00-265. However, basic telephone service is distinct from essential services, as discussed above. The Commission's definition of basic telephone service in OAR 860-032-0190 should not determine what is essential in OAR 860-032-0200. As for alternatives to Directory Assistance, Staff believes that claims of competition by Qwest and Verizon are not well supported, and are insufficient to justify rulemaking in this matter.

Staff recommends the Commission not initiate rulemaking to revise OAR 860-032-0200. Staff notes that Qwest previously proposed in docket AR 347 that multi-party services (i.e., Residential Multiparty and Suburban), Directory Listings (White and Yellow Pages), and (3) Directory Assistance be deleted from the list of essential services. Docket AR 347 was the Commission's prior review of administrative rules pursuant to ORS 183.545. In docket AR 347, the Commission agreed with staff's recommendation not to initiate rulemaking to delete these services from OAR 860-032-0200(5).

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<sup>5</sup> Qwest refers in its comments to OAR 860-032-0260. This rule was renumbered OAR 860-032-0190 in docket AR 410.

**STAFF RECOMMENDATION:**

Staff recommends the Commission conclude that it should not initiate rulemaking in response to proposals from Qwest Corporation and Verizon Northwest, Inc. to revise OAR 860-025-0000 through 0027, OAR 860-032-0001(11), OAR 860-032-0020, OAR 860-032-0035, OAR 860-032-0040, OAR 860-032-0080, and OAR 860-032-0200.