

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 264

In the Matter of a Rulemaking Concerning Open)
Network Architecture (ONA).) ORDER

DISPOSITION: PROPOSED RULE ADOPTED WITH AMENDMENTS

INTRODUCTION

Subject of Rule

The rules adopted in this order implement a regulatory framework, known as Open Network Architecture (ONA), for the provision of intrastate enhanced services in Oregon. The rules are contained in a new division, Division 35 of Chapter 860 of the Oregon Administrative Rules. The proposed rules originated with the Commission staff (staff).

Local exchange companies (LECs) possess significant monopoly power in the local exchange market. ONA is a regulatory scheme that attempts to moderate the LECs' market power by requiring LECs to provide reasonable access to and interconnection with the LECs' networks to enhanced service providers (ESPs) and other customers.

The proposed rules under consideration in this docket advance two main policy goals: (1) to obtain efficient delivery of enhanced telecommunications services to the public, and (2) to achieve greater competitive equity between providers of telecommunications service.

Procedural History

On July 7, 1992, a Notice of Proposed Rulemaking, with a Statement of Need, Principal Documents Relied Upon, and Economic Impact, was filed with the Secretary of State.

On July 10, 1992, the notice and other documents were served on the persons or entities on the Commission's telecommunications list. The notice announced a prehearing conference to be held August 19, 1992, in Salem, Oregon.

Interested persons were advised in the notice that they could comment on the proposed rules orally at the hearing, or in writing at or before the hearing.

At the prehearing conference, a schedule was adopted providing for opening comments, reply comments, and a hearing.

The following parties actively participated in the docket: Commission staff, U S WEST Communications, Inc. (USWC), GTE Northwest, Inc. (GTE), United Telephone Company of the Northwest (United), Oregon Independent Telephone Association (OITA), Oregon Exchange Carriers Association (OECA), Pacific Telecom, Inc. (PTI), Electric Lightwave, Inc. (ELI), Oregon Newspaper Publishers Association (ONPA), TRACER, AT&T, and MCI Communications, Inc. (MCI).

In late October and early November the majority of the participants in this docket entered into a Revised Stipulation to resolve some issues, including the relationship between this docket and Commission docket UM 351.¹ Pertinent provisions of the stipulation

¹ The Revised Stipulation was signed by AT&T, ELI, GTE, ONPA, PTI, United, USWC, and Commission staff. MCI declined to sign the stipulation but does not oppose its provisions.

have been incorporated in the rules. In addition, the signatories agreed that the following issues would be addressed in Docket UM 351: (1) the level, extent, and implementation of BSA unbundling; (2) ONA pricing; (3) interconnection pricing policies; (4) identification for cost and pricing purposes of all building blocks required for interconnection and collocation. The stipulation is reasonable.

On January 20, 1993, GTE filed a Motion for an Expedited or Interim Rule Regarding Collocation. Staff, ELI, MCI, AT&T, and ONPA opposed the motion. The motion was denied by Order No. 93-204 entered February 12, 1993.

A hearing was held before Simon J. ffitch, a Hearings Officer for the Commission, on February 26, 1993. Following the hearing, at the Hearings Officer's request, participants filed briefs on free speech issues raised at the hearing. Draft final rules were prepared by Hearings Officer ffitch and served on the participants in this docket on May 21, 1993.

On May 27, 1993, the Commission held a special public meeting in Salem, Oregon to consider the draft final rules. The rules were adopted with amendments. *See* Appendix "A."

PURPOSE AND APPLICABILITY

OAR 860-35-010

Need for the Rules

GTE argued that the activity in UM 351 on unbundling and pricing issues, the FCC decisions on collocation, and the activities of the Information Industry Liaison Committee have made it unnecessary to adopt ONA rules at this time.

Disposition. While a number of significant issues will be resolved in UM 351, delaying adoption of ONA rules would not benefit enhanced services customers nor would it improve the competitiveness of the enhanced services market.

Applicability to Small Companies

Small companies, cooperatives, and unincorporated associations have raised concerns about the burdens imposed by the rules. Ideally, OITA would prefer that partially regulated telephone companies be completely exempt from the entire Division, unless ordered to

comply upon petition by an ESP. Staff opposes a complete exemption for the small companies but revised its proposed rules to address many of their concerns. The staff's rules exempt small companies from the unbundling rule, the tariffing rule, equalization of inter- and intraexchange ONA tariffs, deployment projections, and the provision of billing and collection. *See* OAR 860-35-010(2). In addition, staff revised its rule to clarify that the rules apply to cooperatives and unincorporated associations only for services regulated under ORS 759.220 and 759.225 (joint services).

OITA has also requested an exemption from OAR 860-35-090(2), requiring restricted handling of CPNI upon customer request.

Disposition. The Commission will adopt staff's proposed rule² with an additional exemption from CPNI restrictions for small companies (see discussion above under "Access to CPNI").

DEFINITIONS

OAR 860-35-020

Consistency With Federal Definitions

USWC seeks to have Oregon use the FCC definitions for Basic Service Elements, Basic Service Arrangements, Complementary Network Services, Collocation, Joint Marketing, and ONA. Staff argues that while its goal has been to draft rules that are compatible with FCC definitions, Oregon can do so without simply rubber stamping federal requirements. A review of the comments indicates that while staff's rules are not identical, they are compatible with FCC rules. In a number of instances, the FCC definitions proposed by USWC are unnecessarily restrictive.

For example, in the case of "Basic Serving Arrangement" (BSA), the FCC definition limits BSAs to services provided to ESPs. While the primary focus of the Oregon ONA rules is upon ESPs, they are intended to have broader application to all customers of the LEC who wish to purchase services. The FCC definition would incorporate a "use and user" restriction contrary to the overall philosophy of these proposed rules.

² References to staff's proposed rules are to those rules incorporated as Attachments A and B to Staff's Reply Comments of February 9, 1993.

USWC also seeks to have the definition of "ONA Services" limited by deletion of Access Elements, Ancillary Services, and Collocation, terms omitted from the FCC definition. The FCC does not include these services in the definition of ONA because of the FCC's different approach to ONA. "Access Elements" are omitted because the FCC rules do not unbundle BSAs into Access Elements and other components. This unbundling will occur in Oregon in docket UM 351. "Ancillary Services" are omitted by the FCC because it does not regulate them. "Collocation" is omitted because the FCC did not implement a collocation requirement as part of ONA, but in separate rules.

"Ancillary Service" (ANS)

USWC believes that this definition is unworkably vague and should be deleted. At a minimum, billing and collection (B&C) and Operations Support Systems should not be included.

Disposition. The Commission will adopt the definitions contained in staff's proposed rule. USWC concerns are addressed in the discussion of B&C and OSS below under "Availability."

EXTENT OF UNBUNDLING OAR 860-35-030

Implementation

PTI and other LECS expressed concerns about the difficulty of complying with the unbundling requirement in the time allowed. Particular concern was raised with regard to separation of optional features and functions from basic services within six months as required by OAR 860-35-030(2).

Disposition. The proposed rule requires a good faith effort by the LECs to identify, classify and separate services within the time lines included in the rules. Commission staff will be available to assist LECs engaged in this process to meet the requirement of the rules. The rules contemplate that initial unbundling efforts may be subject to further refinement and evolution upon review by the Commission and its staff. Where a company can point to compelling circumstances which will prevent it from complying with OAR 860-35-030(2), the proposed rule has been amended to provide that the Commission may allow LEC requests an extension of time for compliance.

**AVAILABILITY
OAR 860-35-080**

Billing and Collection as an ONA Service

USWC, GTE, and OITA oppose this requirement. They argue that B&C is not a service from which the LECs benefit from a "bottleneck" position because B&C is a highly competitive service available from a variety of providers. GTE is also concerned that it could be required to bill for services with content (e.g obscene material) with which it is uncomfortable. They prefer to offer B&C only at their option. USWC has recently filed a petition to deregulate its B&C service. The petition has been docketed as UX 16.

Disposition. The Commission concludes that the final rules should include B&C as an ONA service. Because of the local exchange monopoly, LECs have a unique ability to bill and collect for enhanced services in conjunction with basic services. This could result in undue competitive advantage. To address the LEC concern, the rule limits the required provision of B&C to situations where an ESP provides enhanced services in direct competition with the LEC. Cooperatives, unincorporated associations, or companies with less than 15,000 lines in Oregon are exempted from the B&C requirement. OAR 860-35-010(2)(a). If an LEC files a petition to deregulate an ONA service, such as B&C, one of the issues to be considered in the deregulation proceeding will be the treatment of that service under these rules if the service is deregulated.

Operation Support Systems (OSS) as an ONA Service

Operation Support Systems are defined as "services which support various network operation functions such as service provision, performance monitoring, and maintenance." OAR 860-35-020(20). This is a very broad category of services. LECs fear that if they are forced to provide OSS they will lose control of a significant portion of their businesses. Their competitors should be required to provide some services themselves. Issues of privacy, practicality, and security arise. The LECs suggest that the rules be amended to treat OSS in the same fashion as software and data base issues, that is, to require Commission review prior to provision of the service. In the alternative, the LECS suggest limiting the requirement to the specific types of OSS services covered in the FCC rules to be issued in the future.

Disposition. Staff's proposed rule has been amended to provide that only OSS services mandated by the FCC rules are subject to the deployment provisions of OAR 860-35-070. Requests for other ONA services are to be treated in the same fashion as

requests for software and data base collocation and must be approved by the Commission. USWC has raised legitimate concerns about the unclear scope of services covered by the term OSS, as well as the uncertain impact on company operations. Staff did not make a case that all OSS services are critical to ONA. The recommended amendment will allow for a more precise approach to the inclusion of OSS services in ONA.

ACCESS TO CPNI OAR 860-34-090

Customer Proprietary Network Information (CPNI) means individual customer data which a LEC accumulates in the course of providing basic services to the customer, including types, quantities, and locations of services, billing amounts, repair information, calling patterns, and usage data. CPNI does not include information pertaining to enhanced or unregulated services.

Basic Outline of CPNI Access/Use

Aggregate CPNI If available to LEC employees, must be available to customers (e.g. ESPs) on same rates, terms, and conditions. **Note:** This is "aggregate" not customer-specific data. OAR 860-35-090 (1)

Indiv. CPNI LEC enhanced service marketers have free access to individual LEC customer CPNI without prior written authorization, unless LEC customer requests restriction. No notice of right to restrict required for customers with less than 20 lines. OAR 860-35-090(2)

20 + Lines LEC must notify customers with more than 20 lines of right to restrict access to LEC personnel not marketing enhanced services. OAR 860-35-090(3)³

³ USWC, as a Bell Operating Company (BOC), is subject to more stringent federal requirements.

BOC personnel with involvement in marketing enhanced service are required to obtain prior authorization in order to have access to CPNI of customers with more than 20 lines. FCC Order No. 91-381, CC Docket No. 90-623, December 20, 1991.

Authorization LEC may not release any CPNI to a third party without authorization. OAR 860-35-090(4)

Use of CPNI Unless authorized by a customer, LECs prohibited from using CPNI to create lists of enhanced services customers for direct sales efforts (e.g. telemarketing). OAR 860-35-100(5).

Equivalent Access for LECs and Competitors .

ELI objects that the rules provide much freer access by LEC personnel to CPNI, when compared with the access afforded ESPs and other customers. CPNI cannot be provided by LECs to third parties without customer authorization, while LEC employees are not required to obtain such authorization. To equalize access, ELI proposes that LECs be required to obtain prior authorization from each customer before LEC personnel could have access to that customer's CPNI.

Staff opposes ELI's proposal on the ground that it would be inconvenient and confusing to LEC customers and burdensome to the LECs. In staff's view, the rules as proposed already place reasonable restraints on LECs' access to and use of CPNI.

Disposition. The Commission will adopt staff's proposed rule. A requirement that the LEC obtain prior authorization before accessing any customer CPNI is too burdensome for the LECs.

Requirement of Prior Authorization for LECs (Customers with Over 20 lines)

ONPA and TRACER propose to amend OAR 860-35-090(2) to require all LECs to obtain prior authorization from customers having 20 or more lines before LEC personnel involved in marketing enhanced services can have access to CPNI.

Disposition. The Commission will adopt staff's proposed rule. The FCC has preempted state regulations which require LECs to obtain prior authorization when such authorization is not required by the FCC rules. FCC Order No. 91-381. Only BOCs are currently required to obtain prior authorization. (See footnote 3).

Exemption for Small LECs

OITA requests that small LECs be exempted from the CPNI restrictions in OAR 860-35-090 on the grounds that the rule would be unworkable for most small companies. In many cases, the same company employee handles all of the customer's business, including both basic and enhanced services. Complying with the restrictions would require such companies to hire additional personnel to handle the functions separately. OITA argues that such an exemption is consistent with the policy goals in ORS 759.040 and 759.045 of reducing the regulatory burden on small companies.

Disposition. The Commission will amend proposed OAR 860-35-010(2)(a) to exempt small telephone companies, unincorporated associations, and cooperatives from the provisions of OAR 860-35-090(2) and (3).

JOINT MARKETING OAR 860-35-100

In general, the joint marketing rule permits LECs to market both enhanced and basic services to its own customers, under specified conditions. The rule represents a compromise between a complete ban on joint marketing, sought by the ESPs, and unfettered joint marketing sought by the LECs. While LECs are allowed to engage in joint marketing, they must let customers know that competitors may offer the same service. Customers have a right to cancel service orders from the LEC within 7 days and LECs may not use CPNI for unsolicited direct sales efforts to their customers.

The most significant issue for discussion under the heading of joint marketing is the question of whether the proposed rule violates the constitutional free speech rights of the LEC by, in effect, forcing the LEC to carry messages to its customers with which it may not agree. OAR 860-35-100(3) requires the LEC to "advise the customer in an unbiased manner that similar enhanced services may be available from other providers." OAR 860-32-100(6) requires LECs who market enhanced services through bill inserts to permit ESPs to do likewise.

USWC, OITA and GTE see significant First Amendment problems with the rule, while ONPA believes the rule as drafted is constitutional.

The LECs argue that utilities have a protected First and Fourteenth Amendment Right to disseminate commercial and political materials through a billing envelope, a right that includes the right not to endorse the speech of others. In support of its position, USWC cites, *inter alia*, a decision of the United States District Court for the District of Oregon holding unconstitutional the state legislation permitting access by the Citizens' Utility Board to utility billing envelopes.⁴ The LECs believe that both the customer advisory and the access to billing envelopes is unconstitutional.

ONPA takes the contrary position. It argues that the advisory in OAR 860-35-100(3) is no different than other advisory requirements imposed by the Commission. In the "Voice Messaging" order, for example, the Commission imposed a virtually identical requirement. Order No. 92-1482; *see also* OAR 860-32-005. ONPA analogizes the requirement to consumer protection advisories imposed in other contexts. *See* ORS 646.611 (door-to-door solicitation). ONPA also argues that OAR 860-35-100(6) does not infringe constitutional free speech rights.

Disposition. Having reviewed the authorities cited by both sides, the Commission concludes that the customer advisory rule, OAR 860-35-100(3), is a permissible requirement. It does not require the LECs to carry the particular message of any individual entity. The provision requiring ESP access to LEC billing envelopes, however, raises serious constitutional questions involving restrictions on protected free speech rights and should be deleted. *See Consolidated Edison Co. v. Public Service Commission*, 447 US 530 (1980); *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 US 557 (1980); *Wooley v. Maynard*, 430 US 705 (1977).

COLLOCATION

OAR 860-35-110

Choice of Physical or Virtual Collocation

Both USWC and GTE want the choice between physical or virtual collocation left to the LEC. USWC wants to be given the flexibility to only provide virtual collocation when they lack space for equipment.

⁴ *Oregon Independent Telephone Association et al. v. Citizens' Utility Board of Oregon et al.*, Civil No. 85-875-PA, Slip Opinion, September 10, 1985, Panner, J.

Disposition. The Commission will adopt staff's proposed rule. Collocation is a key part of network access and interconnection. Virtual collocation may often be inferior from the customer's perspective. Allowing the LEC to choose may allow the LEC to impose an unsatisfactory interconnection arrangement on the customer, a result which is inconsistent with the ONA goal of moderating the monopoly power of the LEC.

Limiting Physical Collocation to Special Access

USWC argues that collocation for switched services should be delayed to avoid jurisdictional inconsistencies with FCC rules.

Staff's position is that such a limitation amounts to a "use and user" restriction inconsistent with the stipulation in this docket signed by USWC. Further, Oregon's collocation decisions should not be "held hostage" by an FCC proceeding. In any event, the jurisdictional problems are vague and undocumented.

Disposition. The Commission will adopt staff's proposed rule. Removing switched access collocation from the rule unduly narrows the rule and limits the usefulness of these rules as a comprehensive approach to ONA. Such a restriction runs afoul of the parties' stipulation to remove use and user restrictions from the collocation rule. The collocation rule can be amended if it is necessary to achieve compatibility with any future FCC rule which may be adopted.

Limitation on Equipment

USWC and GTE are concerned that customers could require them to acquire and operate incompatible equipment, leading to inefficient use of the network and of their own personnel. GTE opposes virtual collocation as currently proposed by staff because the LEC has no ability to limit requests to those it feels it can efficiently provide.

Disposition. The Commission will adopt staff's proposed rule. The LEC concerns are addressed through the ability of the LEC to recover in rates for costs incurred in providing collocation, including safety, security, floor space, power, maintenance and other relevant costs. OAR 860-35-060(3).

In addition, OAR 860-35-080(6) requires that interconnected or interactive facilities not impede the LECs ability to meet service standards. Problems are to be reported to the Commission.

Real Estate Aspects of Physical Collocation.

USWC argues that the rental real estate space used in physical collocation is a real estate transaction, rather than a telecommunications service.

Disposition. The Commission will adopt staff's proposed rule. Physical space is integral to the provision of collocation.

Reduced Interim Interconnection Rate

ELI requests that LECs be required to provide a reduced interim interconnection rate, pending the completion of UM 351.

Disposition. The Commission will not require LECs to adopt an interim interconnection rate. Cost-based interconnection rates will be the outcome of UM 351. Until they are determined, LECs should not be required to offer a reduced rate.

SAFEGUARDS OAR 860-35-120

Burden of Proof

Under staff's proposed rule, if a complaint is filed against a LEC alleging discrimination against competitors, the "LEC shall demonstrate that the allegations in the complaint are unsubstantiated." The LECs object that this is an improper and unfair assignment of the burden of proof to the defendant. Staff argues that, as a practical matter, it is the LEC which will have the information needed by the Commission in ruling on the complaint.

Disposition. Proposed OAR 860-35-120(2) will be amended to remove the language assigning the burden of proof to the accused LEC. The Commission's liberal discovery rules and broad investigatory powers provide a mechanism for parties and staff to obtain information from the LEC. As a practical matter, faced with a complainant's prima

facie showing of discrimination or cost and revenue misallocation, the LEC will have a substantial incentive to present evidence to show that the claims are unsubstantiated. Absent such a showing, the Commission may make its decision on the information available. *See Pacific N.W. Bell v. Sabin*, 21 Or App 200, 214-215, *rev denied* (1975).

DISPUTE RESOLUTION

OAR 860-35-130

"Viability"

If a customer request for an ONA service other than collocation is rejected, an issue may arise as to whether, in the language of the rule, the service is "viable." A service is "viable" for purposes of ONA if the service is "feasible based upon currently available technology and forecasted demand is sufficient to allow the LEC to recover its cost."

OAR 860-35-070(4)(b).

Disposition. Language has been added to OAR 860-35-130(2) to clarify the standard by a cross-reference to the rule where the standard is set out.

Burden of Proof

The LECs object to the fact that the rule assigns the LEC the burden of proof when a complaint is filed challenging the rejection of a request for ONA service.

Disposition. The staff's proposed rule is amended to remove the language assigning the burden of proof to the LEC. For the reasons discussed in the previous section, the complainant should bear the burden.

CONCLUSION

The proposed rules, as set forth in Appendix "A," are reasonable and should be adopted.

ORDER

IT IS ORDERED that OAR 860-35-010 through 860-35-130, as set forth in Appendix "A", are adopted.

Made, entered, and effective JUN 18 1993.

Ron Eachus
Chairman

Joan H. Smith
Commissioner

Roger Hamilton
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A party may appeal this order pursuant to ORS 756.580.

[Order signed by Commissioners Smith, Eachus, & Hamilton. Attachments are available in original hard copy. Contact PUC Hearings at \(503\) 378-5997.](#)