

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JAN - 8 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition of Lincoln County, Oregon, and)
the Economic Development Alliance of)
Lincoln County, a non-profit)
corporation, for Declaratory Ruling and)
Preemption Pursuant to Section 253 of)
the Communications Act of 1934 of)
Certain Provisions of the Oregon)
Telecommunications Utility Law)

CC Docket No. 97-241

TO: The Commission

COMMENTS OF UTC

Jeffrey L. Sheldon
General Counsel

UTC
1140 Connecticut Ave., N.W.
Suite 1140
Washington, D.C. 20554
202-872-0030

Dated: January 8, 1998

No. of Copies rec'd 0812
List A B C D E

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	2
II. Background	2
III. Comments	3
A. It is Impermissible for a State to Condition Certification of a Service Provider on State Approval of its Underlying Facilities Provider	3
B. Lease of Dark Fiber is Not a “Telecommunications Service”	7
C. A State May Not Prohibit or Regulate the Leasing of Dark Fiber on a Private Carrier Basis if the Facilities Could Be Used for Interstate Communications	10
IV. Conclusion	15

SUMMARY

The FCC should preempt, pursuant to Section 253 of the Communications Act of 1934, as amended, a determination by the Oregon Public Utility Commission (OPUC) that a communications service provider in the state of Oregon may only be certificated if it uses facilities that are obtained from a previously-certificated communications provider, or if the new entrant purchases and holds title to all elements in its communications network. This restriction is unnecessary to any permissible state policy, as enumerated in Section 253(b), and serves as a barrier to entry.

In addition, the OPUC’s interpretation and application of state law impermissibly intrudes on the FCC’s exclusive jurisdiction over interstate communications by effectively prohibiting the use of facilities that are suitable for transmission of interstate communications unless those facilities are owned by the service provider or acquired from another certified telecommunications provider in the state of Oregon.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Lincoln County, Oregon, and)	
the Economic Development Alliance of)	
Lincoln County, a non-profit)	CC Docket No. 97-241
corporation, for Declaratory Ruling and)	
Preemption Pursuant to Section 253 of)	
the Communications Act of 1934 of)	
Certain Provisions of the Oregon)	
Telecommunications Utility Law)	

TO: The Commission

COMMENTS OF UTC

UTC, The Telecommunications Association (UTC),¹ hereby submits its comments in support of the above-captioned petition of Lincoln County, Oregon, and the Economic Development Alliance of Lincoln County (collectively referred to herein as “Lincoln County”) for preemption, pursuant to Section 253 of the Communications Act of 1934, as amended, of certain provisions of Oregon law as interpreted and applied by the Oregon Public Utility Commission (OPUC).² As explained herein, the OPUC’s interpretation of state law erects an impermissible barrier to entry under Section 253,

¹ UTC was formerly known as the Utilities Telecommunications Council.

² Comments were invited in Lincoln County’s petition by Public Notice, DA 97-2577, released December 9, 1997.

and impermissibly intrudes on the Federal Communications Commission's (FCC) exclusive jurisdiction over interstate communications.

I. Introduction

UTC is the national representative on communications matters for the nation's electric, gas and water utilities and natural gas pipelines. UTC's membership includes all forms of utility ownership: investor-owned utilities, rural electric cooperatives, and federal-, state- and municipally-owned systems. All utilities rely on communications technologies and services in providing their public utility services, and many have installed fiber optic systems and other privately-owned communications systems. In addition, many utilities are exploring opportunities in telecommunications, whether as providers of underlying facilities for use by telecommunications carriers or as direct providers of telecommunications services. UTC is therefore pleased to have the opportunity to comment on Lincoln County's petition.

II. Background

Lincoln County requests preemption of a decision by the OPUC finding that the type of service to be provided by Lincoln County requires a Certificate of Authority under Oregon state law, and that Lincoln County may obtain such a Certificate only if it provides service using the facilities of another Certificated telecommunications provider

or holds title to all facilities used in providing its communications service.³ Lincoln County proposes to offer service using “dark fiber” to be leased from Central Lincoln Peoples’ Utility District (CLPUD), a publicly owned electric utility. The OPUC determined that the leasing of dark fiber is a telecommunications service under state law, and that because CLPUD does not have a Certificate of Authority to provide telecommunications service, it would not be in the public interest to grant a Certificate to Lincoln County.

III. Comments

A. It is Impermissible for a State to Condition Certification of a Service Provider on State Approval of its Underlying Facilities Provider

Significantly, OPUC has not suggested that Lincoln County itself is unqualified or ineligible for a Certificate; rather, the OPUC determined that “[i]t is not in the public interest to grant an application which will involve purchase of a service from an unauthorized seller.”⁴ The practical effect of the OPUC’s decision is to limit competitive entry in Oregon to entities that hold title to their own transmission facilities or who lease services or facilities from other certificated telecommunications providers.

³ Lincoln County’s opening argument to the OPUC was that its proposed high speed data service will not constitute a telecommunications service for which a Certificate is required under state law. UTC’s comments herein are limited to addressing OPUC’s decision to deny Lincoln County a Certificate, without addressing the initial question of whether Lincoln County even needs a Certificate for its proposed service.

⁴ OPUC Order No. 97-373, p. 10.

This restriction imposes an unreasonable barrier to entry to those entities who choose to lease transmission services or facilities from other sources.

A requirement that new carriers may only use facilities/services of previously-certified providers, or must purchase outright all equipment used in providing telecommunications service, impermissibly perpetuates the dominant market position of the incumbent local exchange carrier and deters new facilities-based competition. As will be discussed below, this requirement flows from OPUC's overly-broad interpretation of what constitutes a telecommunications service provider in the state of Oregon.

In its recent decision addressing various challenges to the Texas Public Utility Regulatory Act of 1995, the Commission specifically found that it is a barrier to entry for a state to limit the services or facilities which an entity may use to provide telecommunications service. In preempting enforcement of provisions of PURA95 that compelled carriers to meet minimum facilities build-out requirements and limited their right to resell services of the incumbent local exchange carrier, the Commission stated:

74. In reaching this decision, we find that section 253(a) bars state and local requirements that restrict the means or facilities through which a party is permitted to provide service. i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options. In section 253(a), Congress decreed that no state or local statute or regulation may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The statutory definition of "telecommunications service" provides, in relevant part, that a telecommunications service is "the offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used.*" Thus, these two provisions, read together, provide that no state or local

requirement may prohibit or have the effect of prohibiting any entity from providing any offering of telecommunications directly to the public for a fee regardless of the facilities used. A state may not, therefore, require that an entity provide telecommunications services via its own facilities and limit the entity's ability to resell incumbent LEC services or restrict the use of unbundled network elements provided by the incumbent.⁵

In the present case, the OPUC has provided that a telecommunications service provider may only use its own facilities, or lease facilities or services from a certificated provider, but may not use any other service or equipment financing options.

In New England Public Communications Council, the Commission preempted a state requirement that an independent payphone operator would have to be certified as a local exchange carrier if it simply wanted to provide competitive payphone services in the state.⁶ The Commission found that a certification requirement that compels new entrants to incur significant costs or burdens will deter the entry of potential competitors, and must be preempted.⁷ In the case at hand, the OPUC's decision effectively limits telecommunications service providers to: (1) purchasing and holding title in fee to all facilities to be used in providing telecommunications service to the public, or (2) reselling services offered by a previously-certificated provider. This

⁵ The Public Utility Commission of Texas, FCC 97-346, released October 1, 1997 (footnotes omitted; *emphasis in the original*).

⁶ The New England Public Communications Council Petition for Preemption Pursuant to Section 253, FCC 96-470, released December 10, 1996, para. 20; *recon. denied Memorandum Opinion and Order*, FCC 97-142, released April 18, 1997.

⁷ In addition to the broad preemptive authority conveyed on the FCC through Section 253, the FCC has clear authority to prevent a direct effort by a state to impose costs on interstate service that the FCC believes are unwarranted, Public Service Commission of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990).

requirement unnecessarily increases the costs and other burdens of providing telecommunications services, and acts as an effective deterrent to entry of potential competitors.⁸

In its Order, the OPUC defended its interpretation of state law as a valid exercise of its continuing authority under Section 253(b) of the 1996 Act, stating that the certification statutes and regulations meet the conditions of Section 253(b):

. . . Those [state] statutes and regulations protect the public safety and welfare and ensure the quality of the service. They are also designed to protect the rights of consumers and to further our goal of ensuring universal service, the subject of section 254 of the Act.

The OPUC's Order cannot be shielded from preemption pursuant to Section 253(b) since the OPUC has failed to demonstrate that its certification requirements are necessary to meet the specific regulatory purposes listed in Section 253(b).⁹ A mere recitation that a statute or regulation is intended to serve these purposes hardly meets the requirements under Section 253(b). Moreover, it is difficult to conceive how state certification of an entity leasing dark fiber is necessary to advance any of these purposes. To the extent the state retains authority to certify or regulate the entity who will actually provide intrastate telecommunications services to the public, UTC can see

⁸ The OPUC's policy as applied to Lincoln County is more than a deterrent: it is an absolute barrier, since Lincoln County proposes to lease facilities from CLPUD, which Lincoln County claims is ineligible under state law to even secure certification as a telecommunications service provider. UTC expresses no opinion on this interpretation of Oregon law, nor on the issue of whether such an impediment would itself be subject to preemption under Section 253. It is unnecessary to reach this question since, as explained herein, CLPUD is not providing a service that should be subject to a state certification requirement.

⁹ See New England Public Communications Council, at paras. 21-25.

no compelling reason how certification of a network facilities provider is necessary to fulfill any legitimate purpose.

B. Lease of Dark Fiber is Not a “Telecommunications Service”

The OPUC determined that Lincoln County could not be granted a Certificate of Authority because it would be using facilities leased from CLPUD, which does not hold a Certificate of Authority to provide telecommunications services. Even though CLPUD would only be leasing dark fiber to Lincoln County on a private contract basis, the OPUC concluded that the leasing of dark fiber is a “telecommunications service” as defined by Oregon state law. Section 759.020(1) of Oregon Revised Statutes provides as follows:

“Telecommunications service” means two-way switched access and transport of voice communications but does not include:

- (A) Services provided by radio common carrier.
- (B) One-way transmission of television signals.
- (C) Surveying.
- (D) Private telecommunications networks.
- (E) Communications of the customer which take place on the customer side of on-premises equipment.

The leasing arrangement between CLPUD and Lincoln County would not involve CLPUD providing either “switched access” or “transport” of voice communications; merely the physical fiber media that would be used by Lincoln County to offer data transmission service to the public. Nevertheless, the OPUC interpreted this statute as granting it authority to require certification of anyone providing facilities “for remuneration of some sort” and that “have the capability of voice transmission,

regardless of their actual use.”¹⁰ The net result of the OPUC’s interpretation is that any leasing of communications equipment in the state of Oregon which *might* be used for voice communications is unlawful unless the equipment lessor first obtains a Certificate of Authority from the OPUC.

The Telecommunications Act of 1996 defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.”¹¹ The Act further defines the term “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”¹² The lessor of dark fiber does not provide any “transmission” of information; to the contrary, the lessee must acquire and assemble the other active network elements necessary for the transmission of information.

In its recent clarification of the Universal Service rules, the Commission confirmed that the lease of “bare” satellite transponder capacity -- *i.e.*, an arrangement by which the satellite owner merely provides its customer with the right to transmit to a specified piece of hardware on the satellite -- is not the offering of a “telecommunications service” as defined in Section 153(46) because the satellite owner

¹⁰ OPUC Opinion 97-373, pp. 6-8.

¹¹ 47 U.S.C. §153(46).

¹² 47 U.S.C. §153(43).

does not transmit information.¹³ Similarly, the lease of dark fiber does not, standing alone, provide for the transmission of information, and therefore cannot be considered a telecommunications service under the 1996 Act.¹⁴ Significantly, the lease of a bare satellite transponder involves more than the owner simply providing access to a piece of physical equipment, as in the case of dark fiber. A satellite transponder contains electronics that are maintained by the satellite owner and which actively convert the uplinked signal to a different frequency for retransmission to earth. By contrast, the lessee of dark fiber provides and operates all active components necessary to make the transmission medium a communications pathway.

The OPUC has essentially equated “network elements” with “telecommunications services.” Once again, however, the 1996 Act makes clear that a “network element” is a “facility or equipment used in the provision of a telecommunications service.”¹⁵ Regardless of whether OPUC has determined that incumbent local exchange carriers must provide dark fiber as a “network element,” this does not transform dark fiber into a “telecommunications service” itself. To the

¹³ Fourth Order on Reconsideration in CC Docket No. 96-45, FCC 97-420, released December 30, 1997, paras. 290-91.

¹⁴ In Southwestern Bell Telephone Company v. FCC, 19 F.3d 1475 (D.C. Cir. 1994), the Court of Appeals remanded to the Commission a series of orders in which the Commission had concluded that dark fiber offerings of the Bell Operating Companies constituted a common carrier service because they were offered by common carriers and the rates for dark fiber had, at one time, been filed in the carriers’ tariffs. The remand proceeding remains pending before the agency.

¹⁵ 47 U.S.C. §153(29). OPUC refers to such unbundled facilities as “building blocks.” In the First Report and Order in CC Docket No. 96-98, 11 FCC Rcd 15499, 15722 (1996) *aff’d in part and vacated in part sub. nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), the Commission declined to classify dark fiber as a network element.

contrary, the very definition of “network element” draws a very clear distinction between “facilities” and “services,” and dark fiber is clearly a facility.

C. A State May Not Prohibit or Regulate the Leasing of Dark Fiber on a Private Carrier Basis if the Facilities Could Be Used for Interstate Communications.

The OPUC has concluded that CLPUD may not lease dark fiber -- regardless of the lessee’s intended or ultimate use of that fiber, without first obtaining a Certificate of Authority. According to the OPUC’s Order, the fiber leased to Lincoln County will be used in conjunction with other facilities and services in a high speed data communications service to be offered to public entities, businesses and resellers to encourage economic development in Lincoln County. In short, there is nothing in the record to support the notion that the dark fiber in question can or will be used solely to provide intrastate communications service. To the contrary, it would appear, and on information and belief UTC avers, that the facilities to be leased by CLPUD to Lincoln County could, and likely will, be used by Lincoln County to provide interstate as well as intrastate communications. To the extent the facilities will or could be used for interstate communications, the OPUC’s decision to forbid the sale or lease of these facilities without state certification is a barrier to interstate communications, over which the Commission has exclusive jurisdiction.

For purposes of this analysis, it matters not whether Lincoln County will use CLPUD’s facilities for intrastate communications. Presumably, Lincoln County intends

to use the facilities to provide at least some intrastate service and has, under protest, requested a Certificate of Authority from the OPUC. However, the OPUC's effective prohibition on the CLPUD's leasing of dark fiber, absent OPUC approval, stands as a barrier to use of these facilities for any purpose, including transmission of interstate communications.

Even assuming, for the sake of argument, that the leasing of dark fiber constitutes a communications "service," a state may not prohibit or regulate this activity if the facilities will, or could, be used by the lessee for interstate communications. It is well-settled that Title I of the Communications Act grants the Commission exclusive jurisdiction over interstate communications, while Section 2(b) of the Act preserves states' authority to regulate intrastate communications service. Where a facility can be used for either interstate or intrastate communications, and it is not possible to separate the interstate and intrastate components of the Commission's regulation of those facilities, the Act sanctions federal regulation of the entire subject matter, including preemption if necessary to fulfill a valid federal regulatory objective.¹⁶

In Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (1989), the Court upheld the FCC's preemption of a state restriction on the use of a private microwave system by the Atlantic Richfield Company (ARCO) to interconnect ARCO's offices to

¹⁶ Illinois Bell v. FCC, 883 F.2d 104 (D.C. Cir. 1989) (The FCC could preempt state regulation of Centrex marketing because it does not appear capable of being severed into interstate and intrastate components.)

the public interstate telephone network at a location of ARCO's own choosing. The Texas PUC had issued an order prohibiting ARCO's preferred carrier from interconnecting with its private microwave network due to the PUC's determination that this arrangement would allow ARCO's preferred carrier to provide intrastate telephone service in an area of the state for which another LEC held the monopoly franchise. Because ARCO intended to use the microwave network to initiate and terminate both interstate and intrastate traffic, the FCC concluded that the PUC's prohibition impermissibly interfered with ARCO's federal right to interconnect with the interstate telephone network. On appeal, the Court agreed that the PUC made no attempt to distinguish the interstate and intrastate service that could be provided over the system, and its decision to deny ARCO the right to interconnect with its preferred carrier for all purposes "threw out the interstate baby with the intrastate bath water."

In the present case, by denying CLPUD the right to lease dark fiber, the OPUC is also throwing the interstate baby out with the intrastate bath water. Neither Lincoln County, nor any other provider of interstate communications service, may offer interstate communications using CLPUD's facilities. Even if it were possible to differentiate Lincoln County's "intrastate" traffic from its "interstate" traffic (which UTC in no way concedes), there is no conceivable way that CLPUD could differentiate its "interstate" dark fiber from its "intrastate" dark fiber. Lincoln County will lease from CLPUD a unified piece of equipment capable of use in both interstate and intrastate communications, much as a telephone subscriber may lease or purchase

customer premises equipment that is usable for either purpose.¹⁷ It would be practically and economically impossible for lessees of CLPUD's dark fiber to separately procure and install network infrastructure depending on whether the traffic through that equipment is wholly intrastate or wholly interstate (again, assuming it is even possible to differentiate such traffic on a high speed data communications network such as that proposed by Lincoln County).

Moreover, the fiber leasing arrangement between CLPUD and Lincoln County does not involve a generalized offering by CLPUD of fiber optic facilities or services to the public; rather, it is clear that this arrangement involves CLPUD's individualized decision to enter a long-term contract with Lincoln County for the lease of facilities, and that it is not under any legal compulsion to offer these facilities to the public. If the leasing arrangement were considered a communications "service," it would also be considered a "private carrier" service as defined in National Association of Regulatory Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.) *cert. denied* 425 U.S. 992 (1976), and its progeny.

Indeed, the Commission has preempted state regulations that interfere with an entity's right to engage in interstate communications on a private carrier basis. In

¹⁷ See North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir.) *cert denied* 434 U.S. 874 (1977) (upholding FCC preemption of state restrictions on interconnection of customer-supplied terminal equipment due to practical and economic impossibility of requiring customers to use separate equipment for interstate and intrastate service.)

NorLight, the Commission preempted a state's attempt to restrict an electric utility from leasing capacity, on a private carrier basis, on an interstate fiber optic network.¹⁸ The Commission found that the state's attempt to condition the utility's use of the fiber system would pose a barrier to interstate communications, and would impinge on the Commission's exclusive jurisdiction over interstate private communications services. Similarly, in Public Service Co. of Oklahoma,¹⁹ the Chief of the Private Radio Bureau issued a Declaratory Ruling confirming that capacity on a hybrid fiber/private microwave network may be leased on a private carrier basis free of state entry and rate regulation, pursuant to the policies adopted by the Commission in the First Report and Order in PR Docket No. 83-426.²⁰

Therefore, even assuming that CLPUD's lease of dark fiber constitutes a "service," it is at best provided only on a private carrier basis, and to the extent a lessee of that fiber will or could use these facilities for interstate communications, the OPUC's decision impermissibly intrudes on the FCC's exclusive jurisdiction over interstate communications.

¹⁸ NorLight, 2 FCC Rcd 132 (1987), *recon. denied* 2 FCC Rcd 5167 (1987). See also LightNet, 58 RR 2d 182 (1985) (Fiber optic capacity on an interstate network may be sold or leased on a private carrier basis).

¹⁹ Public Service Co. of Oklahoma, 3 FCC Rcd 2327 (Priv. Radio Bur. 1988).

²⁰ First Report and Order in PR Docket No. 83-426, 50 Fed. Reg. 13338 (April 4, 1985). Lincoln County described CLPUD's network to the OPUC as "an extensive fiber optic and microwave network in Lincoln County and parts of a number of other counties." OPUC Order No. 97-373, p. 3. On information and belief, Lincoln County will lease both microwave capacity and dark fiber from CLPUD.

IV. Conclusion

The OPUC's denial of a Certificate of Authority to Lincoln County, and its interpretation and application of state law, should be preempted because it creates an impermissible barrier to entry and intrudes on the Commission's exclusive jurisdiction over interstate communications.

WHEREFORE, THE PREMISES CONSIDERED, UTC respectfully requests the Commission to take action in this matter consistent with the views expressed herein.

Respectfully submitted,

**UTC, The Telecommunications
Association**

By:



Jeffrey L. Sheldon
General Counsel

UTC
1140 Connecticut Ave., N.W.
Suite 1140
Washington, D.C. 20554
202-872-0030

Dated: January 8, 1998

CERTIFICATE OF SERVICE

I, Melissa Muscio, hereby certify that I have caused to be sent, by first-class mail, postage prepaid, a copy of the foregoing "Comments of UTC," this 8th day of January, 1998, to each of the following persons:

Rob Bovett, Esq.
Assistant County Counsel
Lincoln County
225 West Olive Street, Room 110
Newport, OR 97365

Mark Trincherro, Esq.
Davis Wright Termaine, LLP
1300 SW 5th Ave., Suite 2300
Portland, OR 97201
Counsel for Economic Development Alliance

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. Room 544
Washington, D.C. 20554

International Transcription Services
1231-20th Street, N.W.
Washington, D.C. 20036



Melissa Muscio