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To: Public Utility Commission (Chair Ackerman, Commissioner Savage, and Commissioner Bloom)

From: Wendy Johnson, Intergovernmental Relations Associate, League of Oregon Cities

Date: October 30, 2015

Re: Temporary Rules Implementing SB 611 (Docket No. AR 592)

I. Introduction

The Oregon Public Utility Commission (OPUC) staff memo accompanying the temporary rules acknowledges there was not consensus on the definition of “broadband services.”¹ The League of Oregon Cities indeed strongly objects to the definition in the proposed rules. The League maintains that the PUC staff’s definition is legally invalid as it is not within the meaning of the statute nor the legislative intent of SB 611 and HB 2485. We believe “broadband services” was intended to cover all internet services faster than dial-up access and thus a speed number is neither necessary nor authorized by Oregon statute. Setting a specific and high speed at 10 megabits per second (mbps) as the rules do, excludes a subset of current Oregon residential broadband customers who are receiving broadband services slower than 10 mbps. Thus, the proposed rule changes the property tax exemption bargain in SB 611 and as amended by HB 2485, and sets a lower denominator for the calculations companies must meet. That is, the proposed rule lowers the standards and makes it less of an economic development tool that incentivizes companies to do that which they would not otherwise do. We request an amendment to the proposed rule definition.

In addition to changes to the “broadband services” definition, the League asked for other clarifications, changes, and rule additions, but they were also all rejected by the PUC staff. We will raise those issues again during the permanent public rulemaking process. However, we do request an additional amendment to OAR 860-200-0100(6) at this time to clarify that the OPUC will not be determining the property tax exemption but will only be making a “qualified project” determination. (See Conclusion of this memo.)

¹ See page 2 of staff memo from Shelley Jones, dated October 28, 2015.

II. Discussion:

The phrase “broadband service” is used only once in the legislation that has prompted the OPUC temporary rulemaking. The phrase is very important, however, as it is the section of the law where this phrase is used that sets the threshold for companies to become eligible for a very lucrative property tax exemption that was to be an economic development tool to get gigabit technology throughout the state that would not otherwise occur. The new property tax exemption essentially will exempt the value of intangible property statewide of centrally assessed communications companies from assessment. Thus, it doesn’t matter if your city or county is upgraded to gigabit service, the exemption would apply state-wide if the company gets it, and thus all jurisdictions would receive less property tax revenues as there will be less property that is eligible for taxation with the exemption. This intangible property is valued in the millions of dollars.

The key text of the legislation that the temporary rules are implementing provides as follows:

“(2) A project is qualified under this section if:

(a) **The project** requires capital investment in newly constructed or installed real or tangible personal property constituting infrastructure that **enables the company to offer** communication services, including **the capacity to provide, at least, approximately one gigabit per second symmetrical service, to a majority of the residential customers of the company’s broadband services;**” (bolding and underlining added for emphasis)

The proposed temporary rule at issues provides as follows:

(1) **“Broadband service” means** the provision of **data transmission technology** that provides two-way data transmission to and from the Internet with **a download speed equal to or greater than 10 megabits per second** (Mbps). (OAR 860-200-050, Attachment page 4) (bolding added for emphasis)

The following is a non-exhaustive list of reasons why we believe the rule definition proposed by OPUC staff is invalid, without authority, or represents a poor policy decision:

1. The plain meaning of “broadband services” as used in the legislation does not set a minimum speed nor require a minimum speed for service to be considered broadband. We agree with the statutory interpretation analysis provided by Legislative Counsel in its October 27, 2015, letter opinion to Rep. Phil Barnhart. That opinion references dictionary and FCC definitions that explain what a court would find for the meaning.
2. The OPUC staff’s own changing of the speed number in the broadband service definition throughout the last two months shows there is no speed number that can be ascertained from the

text of the legislation. There is simply no source to arrive at 10 mbps. The OPUC has used the following speeds in various rule drafts, and there may be others that the League is not aware of:

- No number (first draft)
- 3 mbps for download and 1 mbps for upload speed
- 10 mbps for download and 3 mbps for upload speed
- 10 mpbs for download (present draft)
- 25 mbps for download and 3 mbps upload

It has felt like OPUC staff has put themselves into the rulemaking process as negotiator of an “ok” speed and that is an inappropriate role. We believe the OPUC is charged with simply executing the plain text of the law. Note: We are unsure why the OPUC staff dropped the upload number for the rule draft provided to the Commission in Appendix A as all other drafts (that had a number), had both a download and an upload speed.

3. The PUC’s staff memo charts² uses the FCC “buckets” of service speeds to show what speeds Oregon residents are receiving. To LOC, such references also aid the argument that no number should be used as what seems clear is that each bucket is indeed broadband service. The state and federal government all would like the speeds to be faster—but the fact is that many residents receive slower broadband service than “benchmark” desires. More than 30% of Oregon residents are not getting speeds in the top 3 buckets (and the percentages vary by method), but yet the OPUC staff decided to exclude them altogether, arbitrarily deciding that broadband should be defined as the top three “bucket” ranges and determining that covering 68.9% was good enough. These “bucket” ranges come from the FCC’s various reports, including their “Measuring Broadband Services in America” reports. Said another way, if 10 mbps is “broadband” as the proposed rules provide, then what is someone with 3 – 5.9 mbps or 6-9.9 mbps speed ranges getting? What is it-- if it is not broadband service, albeit at a slower speed? The new law requires gigabit access to a majority of the residential customers, but with the proposed rule, it would effectively require only 50% plus 1 of 68.9% of customers rather than 50% plus one of 100% of customers.

4. Broadband services is reasonably used interchangeably with high speed internet service in this bill. In fact, the OPUC has done so at times. See for example, the staff minutes from their August 24, 2015, meeting with industry representatives. We agree with Legislative Revenue Office’s analysis³ as well that supports this same conclusion. In addition, the ODOR and the Governor’s policy advisor that worked on this bill, agree that no speed was intended and no customers were to be excluded from the majority of residential customers requirement.

² See page 4 of staff memo from Shelley Jones, dated October 28, 2015.

³ See SB 611 (2015)- PUC Rule Implementation document providing Legislative Revenue Office’s analysis of the implications of the definition of “broadband”, submitted by Rep. Phil Barnhart to the PUC on November 1, 2015.

5. It is inappropriate for the OPUC to pick a number out of the air to use to limit the definition of broadband. The legislature could have expressly delegated to the OPUC to set a number for which speeds of “broadband services” were to be covered/not covered, but it did not do so. The legislature knows how to set speed numbers and in fact did so in this bill—it set the speed for which companies must get to—1 gigabit. The number of customers with access to gig speed is the numerator in the calculations. The legislature set a 1 gigabit speed in the very sentence that the term “broadband services” is used. That is, the legislature, expressly did not set the speed for threshold services for the denominator, instead the legislature used the generic term of “broadband services.” The legislature did not seem to care what speeds companies were at presently, but instead treated them all the same. The legislature in fact recognized that companies use various methods to provide broadband service and did not want to exclude any method from one day being eligible for this exemption. For example, broadband services can be provided by fiber, DSL, cable, wireless, and satellite. Some of these methods are at slower services than others due to technology.

The FCC explains that broadband services by wireless companies have speeds that are not generally even up to megabit yet:

“Mobile wireless broadband services are also becoming available from mobile telephone service providers and others. These services are generally appropriate for highly-mobile customers and require a special PC card with a built in antenna that plugs into a user’s laptop computer. Generally, they provide lower speeds, in the range of several hundred Kbps.”⁴

6. There is no emergency now and thus the better policy choice is to go with no speed number now. This would allow time for the legislature to decide if some Oregon broadband customers should indeed be excluded from the definition as the staff rule proposes. Local government and school dollars are at stake and it is important to get this rule right. Those budget needs should be considered and not just the industry desires to take advantage of a lower threshold. When asked what the revenue loss is for the 10 mbps decision, OPUC staff has had no answer. This is inappropriate.

7. While these rules are “temporary,” they may have a permanent effect as the exemption is presently indefinite. The exemption “shall be granted for the period during which an owner maintains and operates the qualified project.” HB 2485, Sec. 7 (5)(b). Thus, once an exemption is granted, it is potentially indefinite in duration. The proposed rules are not clear on how long the “qualified project” determination by the OPUC is valid. We recognize that the OPUC determination is but one step in the process as the DOR must also make findings. However, putting this 10 mbps speed in rule, though temporary, causes concern as to its long term impact since the determinations apply to prospective projects as well as operating projects. The questions seem to promote unnecessary and costly litigation.

8. Recently the Oregon Supreme Court explained the meaning of “data transmission service” in the Comcast v. Department of Revenue case.⁵ The opinion concludes that internet services are data transmission services and thus subject to central assessment for purposes of

⁴ See <https://www.fcc.gov/encyclopedia/types-broadband-connections>

⁵ 356 Or 282, 333 (2014).

property tax determinations. The court explained that how the data has been converted did not matter—“bits are bits.” We maintain the same logic is true here, whether it is kilobits, megabits or gigabit speeds, the text and context make it clear that the service is still broadband. Bits are bits.

9. Faster internet speed is obviously better than slower speed service, but practically speaking, what do differences in speed mean to Oregonians? Is there a reason to exclude up to 30% or more of customers of a company? We believe that answer is no, because of the practicalities as well. The FCC’s speed guide lists what broadband speed is required to conduct various internet activities.⁶ Most activities—web browsing, email, job searching, phone calls, interactive web pages, standard video streaming, etc. can all be done on the internet with speeds of 1.5 mbps or less. Only HD movie watching, HD video conferencing and two-way gaming in HD require a higher speed and those activities require 4 mbps. Nothing requires a 10 mgps speed in the list. In short, we posit that Oregonians believe they have broadband when they have any speed as it is providing them internet that is fast enough to do the desired job.

10. Lastly, we must touch upon the context of this gigabit exemption which was but one component of a very complicated central assessment tax reform bill. The bill, SB 611, was one of the key jobs and economic development bills of the 2015 session. Hearings and amendments went on for weeks to carefully craft the terms of the bargain to create jobs and provide fairness to centrally assessed companies, while balancing property tax revenue losses to school districts, cities, counties, and special districts. Specifically, the same companies at issue now with this gigabit exemption also received a new cap on intangible property, a new exemption for the value of their franchise agreements and exemption clarification of data centers in SB 611. Indeed, data centers today are continuing to bring key jobs and economic hope to central Oregon and other parts of the state due to this bill. Adjustments were made throughout the legislative process to both lower the revenue loss and even the playing field amongst the communications companies so that companies were not discriminated against based upon their method of service. For example, cable companies received the new franchise agreement exemption as wireless companies have long had an exemption from the value of the FCC license; these two were rough equivalents.

The gigabit exemption was originally placed to provide an incentive to bring new high speed fiber to Oregon as without it, fiber companies with very high percentages of intangible property, like Google, would not otherwise build. To provide a rough equivalent and incentivize existing companies using other methods to upgrade speeds too, rather than focusing only on the Portland metro area (where new fiber technology is expected to center), the bill was crafted to also give existing companies an exemption on their currently taxed intangible property if they upgrade a majority of their existing broadband customers to gig speed. Such an incentive would assist the entire state with economic development as companies have different service areas. It would be a perverse result if companies are able to exclude customers with slow speeds from the calculations, as this would not only make the lucrative exemption easier to get but would also disincentivize companies from upgrading slower speeds from where they are at now to even 10 mbps, let alone getting them to 1 gig speed. In addition, these areas would see a reduction in their property tax revenues because the exemption applies statewide, even if there is no increased

⁶ <https://www.fcc.gov/guides/broadband-speed-guide> (This FCC guide demonstrates again that the plain meaning of broadband service is inclusive of all speeds faster than dialup.)

speed benefit to the taxing jurisdiction. These perverse results will occur with the OPUC staff proposed rule. In addition, the careful balance will also be all but erased if the OPUC rule stands. That is, the other new exemptions will be less meaningful as the gig exemption will become the focus. Customers to be excluded if you adopt the staff recommendation are presumably in more rural areas of the state, but the whole premise of the bill was economic development of the whole state, not more urban/rural division. Indeed, the end product of SB 611 was one the League supported as it benefited all of Oregon's 242 cities.⁷ However, the present rules would upset the bargain and intent of the bill and harm our member cities. We ask the OPUC to amend the rules.

Conclusion and Request:

1. The League of Oregon Cities respectfully requests that the Commission amend the temporary rules provided by OPUC staff as Appendix A before adopting them. Specifically we request a motion to 860-200-0050(1) to amend the definition of broadband service to provide as follows:

(1) "Broadband service" means the provision of data transmission technology that provides two-way data transmission to and from the Internet and is faster than traditional dial-up access.

2. The League also requests that the Commission amend 860-200-0100(6) to clarify that the OPUC will not be determining the actual property tax exemption (the Oregon Department of Revenue will do that). At the beginning of this rulemaking process, stakeholders expected the OPUC to take on a larger role with the property tax determination, annual review, etc. but in the end, OPUC staff has passed much of the execution of SB 611 on to ODOR. The OPUC will only be determining if a project or potential project is "qualified." The League's recommended rule addition would simply clear up the vagueness in the rules. We request amendment as follows:

(6) Upon determination by the Commission that a company has a qualified project, the Commission shall forward the approval determination to the company, the Oregon Department of Revenue and the assessor of each county in which the project is located. The Commission will not determine the property tax exemption including eligibility and amount, if any, for the application year nor make the annual determinations thereafter.

⁷ http://www.oregonlive.com/silicon-forest/index.ssf/2015/03/oregon_house_passes_tech_tax_b.html