

ITEM NO. 2

PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: November 3, 2015

REGULAR CONSENT EFFECTIVE DATE Upon Filing with Secretary of State

DATE: October 28, 2015

TO: Public Utility Commission

FROM: Shelley Jones *ST*

THROUGH: Jason Eisdorfer, Bryan Conway, and Bruce Hellebuyck *JE BK BH my BK*

SUBJECT: OREGON PUBLIC UTILITY COMMISSION STAFF: (Docket No. AR 592)
Adopt temporary rules to implement SB 611 as amended by HB 2485 (2015).

STAFF RECOMMENDATION:

Adopt the temporary rules as proposed.

DISCUSSION:

This rulemaking implements 2015 Senate Bill 611 as amended by House Bill 2485, codified in Chapter 23, Section 5, and Chapter 31, Section 7, Oregon Laws 2015. These laws pertain to a special tax exemption that may be provided if a company offers, through a "qualified project," communication services, including a capacity to provide, at least, approximately one gigabit per second symmetrical service to a majority of the residential customers of the company's broadband service. The laws provide that the Commission is responsible for determining if a project is qualified.

The temporary rules are the result of informal collaboration with a wide range of stakeholders. The temporary rules attached to this order provide information about the process to apply for a qualified project determination, including what information to include in and with the application. The temporary rulemaking is needed to accommodate the short time between the laws becoming effective (October 5, 2015) and the due date for an application for a determination (January 15, 2016). Failure to

take this immediate rulemaking action could result in applications that are incomplete and cause projects to be determined to be not qualified.

In the limited time available to develop draft temporary rules, Staff met and had informal discussions with a number of stakeholders, including companies that may submit an application under the temporary rules, the Department of Revenue, and local jurisdictions that may be affected. With this input, Staff believes there is support among the stakeholders for much of the language in the temporary rules. The public will have additional opportunity to comment during the permanent rulemaking.

Stakeholder consensus was not reached for the definition of "broadband service", in the temporary rules. The temporary rules define this term as:

"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).

A definition of broadband service is necessary to the Commission's determination that an applicant's project is a qualified project. Under Section 5(2) of Senate Bill 611, as amended by Section 7 of House Bill 2485, the applicant's infrastructure must have the capacity to provide, at least, approximately one gigabit per second symmetrical service, to a majority of the residential customers of a company's broadband services.

The term "broadband" does not have a universal definition and may be described in many ways. For example:

"Today's common definition of broadband is any circuit significantly faster than a dial-up phone line that tends to be a cable modem circuit from your friendly local cable TV provider, a DSL circuit, a T-1 or an E-1 circuit from your friendly local phone company. In short, the term "broadband" can mean anything you want it to be so long as it's "fast." In short, broadband is now more a marketing than a technical term."

Newton, Harry. Newton's Telecom Dictionary at 226 (27th Ed. 2013). And:

[Broadband means] "of, relating to, or being a high-speed communications network and especially one in which a frequency range is divided into multiple independent channels for simultaneous transmission of signals (as voice, data, or video)."

Merriam-Webster Online Dictionary, accessed at: <http://www.merriam-webster.com/dictionary/broadband>.

Section 706 of the federal Telecommunications Act of 1996 defines “advanced telecommunications capability” as “without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” And, staff has accessed a number of provider websites, which appear to market “broadband” as high-speed internet access.

However, none of the above definitions are exact for purposes of determining whether a project is a qualified project. To identify what “a majority of the residential customers of a company’s broadband services” is, it is necessary to further define what high speed means in the context of broadband services. The Commission has a broad range of discretion in establishing what speed is “high speed”.

Staff gives some consideration to the observations and opinions of the Federal Communications Commission (FCC), which has specific oversight responsibilities for broadband service under the Telecommunications Act of 1996. The FCC¹ updated its broadband benchmark speeds this past January² to 25 megabits per second (Mbps) for downloads based on advances in technology, market offerings by broadband providers and consumer demand. Though the FCC has, for many years, required reporting on broadband connections in lower “speed buckets”, the FCC has increased its benchmark speed for broadband significantly in recent years.

In limited, informal discussions, Staff understood that some stakeholders would like a very broad definition of broadband service, essentially “internet service”, and others support a definition at the current FCC benchmark of a minimum download speed of 25 Mbps. All stakeholders appear to agree that if broadband service is defined as broadly as access to the internet it may be difficult for existing providers of broadband service to meet the criteria for a qualified project.

There is also agreement that defining broadband service using a minimum internet download speed has the potential to make it less difficult for an existing broadband provider to meet the same qualifying provision of the law depending on the minimum download speed used. The conveyed concern with the temporary rule definition is the

¹ The FCC uses Universal Service Fund resources to support the build out of broadband at a minimum of 10 Mbps across the nation.

² In the Matter of Inquiring Concerning the Deployment of Advanced Telecommunications Capability, 2015 Broadband Progress Report and Notice of Inquiry, FCC 15-10, GN Docket No. 12-126, ¶ 3, 91 (February 4, 2015)

potential for companies to eventually obtain a sizeable property tax exemption with what could be a relatively small project.

Staff supports a definition that includes a minimum download speed of 10 Mbps, using the FCC speed “buckets” for reporting purposes. This represents the slowest speed bucket that the majority of residential customers in Oregon were purchasing at year end 2013 from all technologies excluding satellite. Staff assumes that more current data would show an increase in the speeds purchased. As shown below, 69 percent of Oregon customers were receiving internet service at or above 10 Mbps in 2013.

< 200 kbps	0%	
200 - 767.9 kbps	1.0%	
768 kbps - 1.49 mbps	6.3%	
1.5 - 2.9 mbps	7.7%	
3 - 5.9 mbps	10.7%	
6 - 9.9 mbps	5.4%	
10 - 24.9 mbps	20.0%	↓ 68.9%
25 - 99.9 mbps	48.7%	
> 100 mbps	0.2%	

Staff recommends the Commission adopt the temporary rules with the definition of broadband service setting the service download speed as at least 10 Mbps.

Staff plans to begin permanent rulemaking so that permanent rules will be in place before the temporary rules expire. The permanent rules will also include provisions to address reporting requirements, so that the Commission will have the information required for its reports to the Legislature beginning February 2017.

PROPOSED COMMISSION MOTION:

Adopt the temporary rules as set forth in Appendix A of the attached draft order.

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 592

In the Matter of Temporary Rules
Implementing 2015 Senate Bill 611 and
House Bill 2485 – Qualified Project
Determination

ORDER

DISPOSITION: TEMPORARY RULES ADOPTED

I. INTRODUCTION

In this order, we adopt temporary rules to implement Chapter 23, Section 5 and Chapter 31, Section 7, Oregon Laws 2015. These laws pertain to a special tax exemption that may be provided to a company that offers, through a “qualified project,” communication services that include a capacity to provide at least approximately one gigabit per second symmetrical service to a majority of residential customers of the company’s broadband service. These laws provide that we are responsible for determining if a project is qualified.

II. NEED FOR TEMPORARY RULEMAKING

Temporary rulemaking is needed to enable a company seeking a qualified project determination, which is necessary for the Ch. 23, OL 2015 tax exemption, to provide the information needed for us to make that determination within the time specified in the law. The laws took effect on October 5, 2015, and the initial applications for qualified project determination are due no later than January 15, 2016. Absent the temporary rules adopted herein, a company would not have the information it needs to file a complete application, and we would not have the specific information we need to make a determination by the statutory deadline of March 1.

Moreover, these laws were intended to provide a tax incentive that will benefit the public. Failure to develop the rules necessary to the application process may delay the development of such broadband projects in Oregon and would seriously prejudice the public interest. The potential consequences from a project not being pursued range from Oregonians not receiving access to the qualifying service to lost wages or jobs.

III. TEMPORARY RULES

The attached temporary rules are the result of informal collaboration between our staff and a wide range of stakeholders. The temporary rules set out the specific requirements for an application for a qualified project determination, including the application fee and payment information, and the specific information about what is to be included in and with the application. The rules also provide information for processing an application amendment if required. Given the short turnaround time (approximately 6 weeks) between application and determination, if an amendment is required, we will require the extension allowed by law to consider the amended information in our determination.

Our staff informs us that they will begin permanent rulemaking so that permanent applicant rules will be in place before these temporary rules expire. The permanent rules will also establish the annual reporting requirements for companies whose property is granted the tax exemption, which will be used to compile our annual reports to the Legislature beginning February 2017.

IV. ORDER

IT IS ORDERED that:

1. The temporary rules, OAR 860-200-0005 through 860-200-0150, as shown in Appendix A, are adopted.
2. The temporary rules become effective for a maximum of 180 days beginning upon filing with the Secretary of State.

Made, entered, and effective _____.

Susan K. Ackerman
Chair

John Savage
Commissioner

Stephen M. Bloom
Commissioner

A person may petition the Public Utility Commission of Oregon for the amendment or repeal of a rule under ORS 183.390. A person may petition the Oregon Court of Appeals to determine the validity of a rule under ORS 183.400.

860-200-0005

Applicability and Waiver

(1) These rules apply to a company that is seeking a qualified project determination as set forth in Section 5 of Chapter 23, Oregon Laws 2015.

(2) Upon request or its own motion, the Commission may waive any of the Division 200 rules for good cause shown. A request for waiver must be made in writing, unless otherwise allowed by the Commission.

Stat. Auth.: ORS 756.040, Ch. 23, OL 2015

Stats. Implemented: Ch. 23 Sect. 5 OL 2015, Ch.31 Sect. 7 OL 2015

Hist.: NEW

860-200-0050

Definitions

(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).

(2) "Company" has the same meaning as that term is defined in ORS 308.505.

(3) "Communication" has the same meaning as that term is defined in ORS 308.505.

(4) "Communication services" is the offering of communication to the public, including the provisioning of voice, video, text or other electronic form of information using any means of transmission.

(5) "Qualified service" is the offering of communication services, including a capacity to provide, at least, approximately one gigabit per second symmetrical service, to a majority of the residential customers of a company's broadband services.

Stat. Auth.: ORS 756.040, Ch. 23, OL 2015

Stats. Implemented: Ch. 23 Sect. 5 OL 2015, Ch.31 Sect. 7 OL 2015

Hist.: NEW

860-200-0100

Application for Qualified Project Determination

(1) A company seeking a qualified project determination under Oregon Laws 2015, Chapter 23 must submit an application to the Commission.

(2) Each applicant must:

(a) Complete and file an application. As part of the application, the applicant must file an Application Cover Sheet on a form approved by the Commission.

(b) Submit the \$50,000 application fee made payable to the Public Utility Commission of Oregon.

(c) Confirm a copy of the application was sent to the Oregon Department of Revenue at: Valuation Section, Property Tax Division, Oregon Department of Revenue; PO Box 14600, Salem, OR 97309-5075.

(3) The application, any subsequent amendments, and any other submissions related to the application must be filed in the same manner as provided in OAR 860-001-0170.

(4) An applicant must file a complete application.

(a) If an application, in any material respect, lacks required information, if the filing fee is not paid in full, or the Department of Revenue is not provided a copy of the application, the application is incomplete. The Commission will not make a determination regarding an incomplete application. Pending application filings that are incomplete as of March 15 of each year will be closed. Once an application file is closed, the applicant must submit a new application for consideration by the Commission.

(b) An applicant may submit a written request to Commission staff for confirmation regarding the completeness of its application or amended application. Commission staff shall respond to such a written request within five business days from the date the written request is received.

(c) The Commission will not consider amendments to an application filed after February 15, unless the applicant requests an extension of two weeks for the determination.

(5) The Commission will issue a determination on an application in writing.

(6) Upon determination by the Commission that a company has a qualified project, the Commission shall notify the company, the Oregon Department of Revenue and the assessor of each county in which the project is located of the approval.

Stat. Auth.: ORS 756.040, Ch. 23, OL 2015

Stats. Implemented: Ch. 23 Sect. 5 OL 2015, Ch.31 Sect. 7 OL 2015

Hist.: NEW

860-200-0150

Application Requirements

The application must contain all of the following:

(1) The name and mailing address of the applicant and the name, mailing address, telephone number, and electronic mail address of the following: the applicant's representative; an individual authorized to answer technical questions regarding the application, if different from the applicant's representative; and, if applicable, the applicant's legal counsel.

(2) A certification executed by an authorized representative(s) of the company that the applicant's project meets the requirements for a qualified project set forth in Oregon Laws 2015, chapter 23, section 5, subsection (2) as amended by Oregon Laws 2015, chapter 31, section 7. The representative's certification must be a sworn statement under ORS 162.055 attesting to the truth of the certification.

(3) A written commitment by the applicant that when its network depends in part or wholly on a third party to provide the qualified service, the applicant will use commercially reasonable practices to ensure that the use of any third party will not impede the performance of the project's infrastructure in providing the applicant's qualified service.

(4) A paper map and an electronic version with GIS-compatible map layers of the area served or to be served by the project's infrastructure depicting:

- (a) County labels and boundaries; and
- (b) City labels and boundaries.

(5) A list of Oregon municipalities and counties where the applicant's project is or will be located, including the name and contact information for the representative of each such municipality and county that the applicant understands is most knowledgeable with respect to applicant's project.

(6) For an applicant that is operating the project described in its application at the time of the application, a list, in an Excel-readable spreadsheet format, of the census blocks served by the project, and for each census block:

(a) The number of occupied households (using the most current available U.S. Census statistics);

(b) The number of those occupied households with access to the applicant's communication services which will be enabled by the project, as described in the application; and

(c) The associated county.

(7) For an applicant that is not operating the project described in its application at the time of the application, a list, in an Excel-readable spreadsheet format, of the census blocks planned to be served by the project, and for each census block;

(a) The number of occupied households (using the most current available U.S. Census statistics);

(b) The number of those occupied households with planned access to the communication services which will be enabled by the project, as described in the application; and

(c) The associated county.

(8) For an applicant that is providing broadband service to residential customers in Oregon at the time of the application, the number of the applicant's existing residential broadband customers in Oregon and the number of those residential broadband customers with access to the applicant's qualified service and the number of those residential broadband customers with planned access to the qualified service.

(9) An electronic version, in Excel-readable spreadsheet format, of the FCC Form 477 Part 1A and Part 6, most recently filed, if any, with the Federal Communications Commission by the applicant, listing only Oregon-specific data. Information identified as confidential in the applicant's filing with the Federal Communications Commission must be identified as confidential consistent with OAR 860-001-0070.

(10) A description of the project. The applicant must provide information regarding the project sufficient to allow the Commission to make a determination as to whether the project is

capable of providing the qualified service. Subsections (a) through (d) of this section are non-exclusive examples of acceptable information that may be provided. The applicant may make a showing under only one method.

(a) For a project that the applicant is operating at the time of application: A description of the project's infrastructure that enables the applicant to offer the qualified service, a provision for physical observation of key network elements by Commission staff and speed test data of a statistically significant number of customers who receive service that provides, at least, approximately one gigabit per second symmetrical service. The speed test methodology must conform to industry standards. The project's infrastructure description must specifically identify:

(A) The transport medium and basic technology or technologies utilized;

(B) A drawing of the infrastructure topology;

(C) The technical specifications of the network's key infrastructure and equipment directly affecting network capacity including, but not limited to, routers, switches, hubs, and other integral active or passive electronics and transport medium including, but not limited to, fiber;

(D) The capacity provided at the applicant's internet traffic aggregation points; e.g., the engineered throughput ratio of switch or router equipment used at aggregation points;

(E) The tier designation of the applicant's internet backbone provider; and

(F) A copy of a customer service agreement for Oregon customers who receive service that provides, at least, approximately one gigabit per second symmetrical service.

(b) For a project that the applicant is not operating at the time of application, a description of the project's planned infrastructure that will enable the applicant to offer the qualified service. The description must specifically identify:

(A) The transport medium and basic technology or technologies utilized;

(B) A drawing of the infrastructure topology;

(C) The technical specifications of the network's key infrastructure and equipment directly affecting the network capacity including, but not limited to, routers, switches, hubs, and other integral active or passive electronics and transport medium including, but not limited to, fiber;

(D) The capacity provided at the applicant's internet traffic aggregation points; e.g., the engineered throughput ratio of switch or router equipment used at aggregation points;

(E) The tier designation of the applicant's internet backbone provider; and

(F) One of the following:

(i) Documentation that the applicant operates a network in another jurisdiction confirming that the applicant's communication services operating in that jurisdiction are capable of providing, at least, approximately one gigabit per second symmetrical service along with, for comparison purposes, any technical data and network information provided to the referenced jurisdiction by the applicant. Documentation may be provided by the applicant or the referenced jurisdiction. Applicant will also provide a copy of a customer service agreement for customers in the referenced jurisdiction who receive service that provides, at least, approximately one gigabit per second symmetrical service. The applicant must provide contact information for individuals in the referenced jurisdiction for technical questions. Documentation need not be provided if the

applicant is not providing service of, at least, approximately one gigabit per second symmetrical service in another jurisdiction; or

(ii) A copy of all franchise agreements in effect where the applicant intends to provide the qualified service if such agreements require the applicant to provide and operate a project for the qualified service as described in Oregon Laws 2015 chapter 23, Section 5(2) and Oregon Laws 2015 chapter 31, Section 7.

(c) An applicant may provide a third-party engineering certification from an Oregon licensed professional engineer, in good standing, with a report detailing the reviewing engineer's qualifications as an independent evaluator and a description of the methodology used in the third-party's examination of the applicant's infrastructure sufficient to allow the engineer to certify that the applicant's project is capable of providing the qualified service.

(d) An applicant may provide documentation that the applicant participates in a qualified gigabit network certification program from a national organization recognized by the Commission as competent to certify a gigabit network and that the applicant has received a certification that the project identified in the application is capable of providing the qualified service.

Stat. Auth.: ORS 756.040, Ch. 23, OL 2015

Stats. Implemented: Ch. 23 Sect. 5 OL 2015, Ch.31 Sect. 7 OL 2015

Hist.: NEW