



November 6, 2018

Via eFiling Only

Oregon Public Utility Commission
Filing Center
P.O. Box 1088
Salem, OR 97308-1088
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Re: Docket No. AR 618 - Comments

Dear Commission:

CenturyLink submits these comments in response to the Commission's September 21, 2018 Notice of Proposed Rulemaking (hereafter "NPRM"). The NPRM seeks comment regarding certain proposed additions to the Commission's rules to implement Oregon Laws 2018, Chapter 88.

CenturyLink highly values its relationship with the state of Oregon and currently provides a variety of services to the state. CenturyLink has always adhered to core net neutrality ("NN") principles and will continue to do so. However, it is widely believed that Oregon Laws 2018, Chapter 88, like similar initiatives in other states is vulnerable to legal challenge. While CenturyLink understands the Commission is simply taking direction from the legislature to implement the law, CenturyLink hopes that Oregon will reconsider this path which will result in an expenditure of time and resources when it is possible, and even likely, that the law will be overturned.

However, absent a reversal in direction, and in the event the Commission adopts rules to implement Oregon Laws 2018, Chapter 88, Centurylink urges the Commission to make clear that the law cannot be interpreted as imposing NN obligations exceeding

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those imposed by the Federal Communications Commission under its recently repealed 2015 Title-II based Open Internet regulations.

Even if it were to adopt the clarification that the obligations do not exceed those in the 2015 Title-II based Open Internet regulations, the requirements imposed by Oregon Laws 2018, Chapter 88 would carry with them significant uncertainty and vagueness as to the scope of the requirements. Because of this, CenturyLink also proposes additional rule amendments that would establish an appropriate dispute resolution process for parties to work toward a reasonable understanding of the scope of the requirements and to resolve any disputes about their scope. These requirements would also establish that, at the end of the day, the state’s sole remedy for any purported violations of the NN requirements would be termination of the relevant contract.¹

A. Oregon Laws 2018, Chapter 88 Is Unlawful As It Is Preempted By Federal Law

In 2015, the FCC adopted the Open Internet Order (*FCC 2015 Open Internet Order*) that established three bright-line rule prohibitions and an Internet Conduct standard along the lines of the NN requirements contained in Oregon Laws 2018, Chapter 88.² In 2017, the FCC adopted the Restoring Internet Freedom Order (*FCC 2017 RIF Order*) in which those rules established by the *FCC 2015 Open Internet Order* were repealed.³ The *FCC 2017 RIF Order*, like the *FCC 2015 Open Internet Order* contained a broad preemption against state NN regulation. Specifically, it stated that:

We conclude that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather

¹ Nothing in these comments should be construed to imply or to indicate in any way that CenturyLink believes that Oregon Laws 2018, Chapter 88 or the proposed means of implementing or interpreting that law in the NPRM is lawful. CenturyLink expressly preserves its right to challenge the lawfulness of Oregon Laws 2018, Chapter 88 and any Commission order arising out of this proceeding.

² *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015), *aff’d sub nom.*, *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh’g denied*, 2017 U.S. App. LEXIS 7712 (D.C. Cir. May 1, 2017) (Nos. 15-1063, *et al.*), *petitions for cert. pending* (filed Sep. 27, 2017) (Nos. 17-498, *et al.*) (“*FCC 2015 Open Internet Order*”).

³ *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018), *appeals pending sub nom.*, *Mozilla Corp., et al. v. FCC*, Nos. 18-1051, *et al.* (D.C. Cir. pet. for rev. filed Feb. 22, 2018) (“*FCC 2017 RIF Order*”).

than by a patchwork that includes separate state and local requirements. Our order today establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act. Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here. Federal courts have uniformly held that an affirmative federal policy of *deregulation* is entitled to the same preemptive effect as a federal policy of regulation.[] In addition, allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates. Just as the *Title II Order* promised to “exercise our preemption authority to preclude states from imposing regulations on broadband service that are inconsistent” with the federal regulatory scheme, we conclude that we should exercise our authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today....We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order. Among other things, we thereby preempt any so-called “economic” or “public utility-type” regulations, including common-carriage requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach we adopt today.⁴

The NN requirements imposed by Oregon Laws 2018, Chapter 88 constitute an attempt by Oregon to impose regulations essentially equivalent to those imposed by the

⁴ *FCC 2017 RIF Order*, 33 FCC Rcd at 426-28 ¶¶ 194-95 (emphasis in original; footnotes omitted).

now-repealed *FCC 2015 Open Internet Order*. As such, they are preempted by federal law.

Nor are the Oregon NN requirements, as is sometimes suggested, justified by the market participant doctrine. The United States Supreme Court (“USSC”) has found that when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action may not constitute regulation subject to preemption.⁵ At the same time, the USSC, and lower courts enforcing its precedents, have also been careful to delineate other contexts where state agencies are acting as regulators rather than as market participants – contexts, where states are clearly preempted. In doing so, they typically apply the following test:

... when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption. When, however, a state attempts to use its spending power in a manner "tantamount to regulation," such behavior is still subject to preemption.⁶

The recent state net neutrality actions have as their manifest purpose and inevitable effect to establish strong net neutrality regulations. These initiatives are not narrow and focused activities based on legitimate market participant incentives, which makes them unlawful.⁷

⁵ See e.g., *Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993)(state conduct not preempted where state agency was acting as a market participant - i.e. just as a private entity would - to address legitimate needs - ensuring efficiency - of a single project); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983) (Massachusetts municipality's requirement that fifty percent of workers on City-funded construction project be residents of City not preempted).

⁶ *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 692 (5th Cir. 1999).

⁷ See e.g., *Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 291 (1986)(Wisconsin state law prohibiting state procurement agents from purchasing "any product known to be manufactured or sold by any person or firm included on the list of labor law violators" not permissible under market participant doctrine – since “manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA”); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1339, (D.C.Cir. 1996)(executive order barring contracts with companies that permanently replaced striking workers was preempted by the NLRA because it “[sought] to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers”); *Van-Go Transport Co., Inc. v. New York City Bd. of Education*, 53 F.Supp.2d 278, 288 (E.D.N.Y. 1999)(state policy of refusing to conditionally certify replacement workers applied to all of a state agency’s student transport contracts preempted under the NLRA); *Aeroground, Inc. v. City & County of San*

They are also unwise as a policy matter. Broadband Internet access (“BIA”) services, the services at issue here, are interstate services that, by their very nature, rely upon supporting network topographies and traffic flows that extend across state boundaries. Moreover, more onerous versions of Net Neutrality regulation like that reflected in the Oregon NN requirements and the *FCC 2015 Open Internet Order*, by their nature, are designed to be developed and applied over time on a case-by-case basis. Because of this, the FCC concluded, in both the *FCC 2017 RIF Order* and the *FCC 2015 Open Internet Order* before it, that any Net Neutrality regulation should be governed by a single set of federal regulations rather than a patchwork of state and local requirements. The latter would inevitably lead to inconsistency and confusion. In this context, state NN regulation like the Oregon NN Requirements are clearly harmful as a policy matter – in addition to being unlawful.

B. The Amendments to the Commission’s Rules Should Include Language Limiting The State’s Ultimate Remedy In The Event of a Dispute About the NN Requirements.

In addition to the legal infirmities discussed above, the NN requirements imposed by Oregon Laws 2018, Chapter 88 would carry with them significant uncertainty and vagueness as to the scope of the requirements. Indeed, the NN requirements reflect language largely borrowed from the requirements imposed by the *FCC 2015 Open Internet Order*. By design, those requirements were crafted to be high level principles to be applied over time on a case-by-case basis.

Last, while CenturyLink is hopeful that no disputes would arise under the Oregon NN principles, there is some potential for good faith disagreements to arise. Because of this concern, CenturyLink proposes two specific changes to the proposed rules. First, CenturyLink proposes that language be added making clear that Oregon

Francisco, 170 F. Supp. 2d 950, 956 (N.D. Cal. 2001)(card check rule applying to all employers at an airport effectively operated as a licensing scheme and was preempted by NLRA and other federal statutes); *Healthcare Ass’n of New York State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006)(statute prohibiting use of state funds for purposes of encouraging or discouraging union organization was regulatory and preempted by NLRA); *Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence*, 108 F. Supp. 2d 73, 81 (D.R.I. 2000)(City’s grant of favorable tax treatment in exchange for use of a project labor agreement was regulatory and preempted by NLRA); *Ohio State Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cnty. Bd. of Commissioners*, 98 Ohio St. 3d 214, 2002 Ohio 7213, 781 N.E.2d 951 (Ohio 2002)(Ohio statute prohibiting public authorities from entering into or enforcing project labor agreements on public construction projects was regulatory and preempted by the NLRA).

Laws 2018, Chapter 88 cannot be interpreted as imposing NN obligations exceeding those imposed by the Federal Communications Commission under its recently repealed 2015 Title-II based Open Internet regulations. Second, CenturyLink proposes that language be added to the rules that would establish an appropriate dispute resolution process for parties to work toward a reasonable understanding of the scope of the requirements and to resolve any disputes about their scope. These dispute resolution procedures would also establish that, at the end of the day, the state's sole remedy for any purported violations of the NN requirements would be termination of the relevant contract. Accordingly, CenturyLink urges the Commission to adopt the proposed redlined language, which is attached as Appendix A to these comments.

CenturyLink appreciates the opportunity to comment in this docket and would be pleased to offer more explanation or detail on any of the proposed changes.

If you have any questions, please do not hesitate to contact me.

Sincerely,



William E. Hendricks
Director of Government Affairs and Senior Counsel

Attachment

OFFICE OF THE SECRETARY OF STATE
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ARCHIVES DIVISION
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**NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT**

**CHAPTER 860
PUBLIC UTILITY COMMISSION**

FILED

09/21/2018 1:57 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Disclosures and Procedures for Broadband Internet Access Service Providers Contracting with Public Bodies.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 11/06/2018 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business

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Rules Coordinator

HEARING (S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 10/30/2018

TIME: 1:00 PM

OFFICER: Traci Kirkpatrick

**ADDRESS: Public Utility Commission
201 High Street SE - Hearing Room
Salem, OR 97301**

NEED FOR THE RULE(S):

The Legislature recently passed legislation, Oregon Laws 2018, Chapter 88, which requires among other things, that the Oregon Public Utility Commission (PUC) specify by rule the form and manner of certain broadband-related disclosure requirements. It also assigns to the PUC the responsibility to make certain determinations. The new law becomes operative on January 1, 2019, and authorizes the PUC to adopt rules before that date to exercise the powers and functions conferred on it by the new law. These proposed rules specify the form and manner of the relevant disclosures and the process and procedures that will govern PUC proceedings to make the relevant determinations.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

- 1) Oregon Laws 2018, Chapter 88, available at https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2018orlaw0088.pdf;
- 2) ORS 756.500 through ORS 756.610 available at https://www.oregonlegislature.gov/bills_laws/ors/ors756.html
- 3) ORS Chapter 183 available at https://www.oregonlegislature.gov/bills_laws/ors/ors183.html
- 4) OAR Chapter 860, Division 1 available at <https://secure.sosstate.or.us/oard/displayDivisionRules.action?selectedDivision=4027>
- 5) 47 C.F.R. §8.11(a) available at <https://www.gpo.gov/fdsys/pkg/CFR-2012-title47-vol1/pdf/CFR-2012-title47-vol1-sec8-1.pdf>
- 6) Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd

311(2018) available at <https://www.federalregister.gov/documents/2018/02/22/2018-03464/restoring-internet-freedom> and <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order> ;

7)The Federal Communications Commission's (FCC) Instructions for Internet Service Providers, available at <https://www.fcc.gov/disclosure-instructions-isps>.

FISCAL AND ECONOMIC IMPACT:

Most of the fiscal and economic impact resulting from these rules is the result of the changes to the laws reflected in Chapter 88 Oregon Laws 2018 (H B 4155). The legislature's impact statements may be found online at <https://olis.leg.state.or.us/liz/2018R1/Measures/Analysis/H B4155>. There will be no additional fiscal or economic impact of the rules specifying the form and manner of the relevant disclosures because all BIAS providers must already comply with the relevant parallel federal disclosures on which those rules are based. The rules specifying the process and procedures that will govern PUC proceedings may have some economic effect on participants in the relevant proceedings, but as many providers involved in workshops indicated they had previously complied with relevant FCC rules that used to be in effect, PUC Staff does not anticipate that the effect will be significant. However, because the individual circumstances of BIAS providers and any relevant contracts with public bodies vary widely, the potential magnitude of these costs cannot be determined at this time.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1)As noted above, most of the fiscal and economic impact resulting from these rules is the result of the changes to the laws reflected in Chapter 88 Oregon Laws 2018 (H B 4155). The legislature's impact statements may be found online at <https://olis.leg.state.or.us/liz/2018R1/Measures/Analysis/H B4155>. All public bodies, as defined in ORS 174.109, may potentially be affected by the rules if they participate in proceedings governed by the rules or are called on to provide information about procurement proposals in the course of proceedings governed by the rules. Depending on the magnitude of the effects on such public bodies, those effects could also be felt indirectly by members of the public. Additionally, the PUC will be affected by these rules in that it is the agency to administer those proceedings. The magnitude of that impact will depend on the number and complexity of the proceedings that are initiated as a result of the proposed rules, as well as the timeline sought by the participants in such proceedings. Because the quantity of these proceedings and their complexity may vary, the potential magnitude of these effects cannot be determined at this time.

(2)(a) The PUC has extremely limited information regarding the number of small businesses who engage in the provision of BIAS in Oregon and the number of such providers who contract or seek to contract with public bodies for BIAS, but there could be many. To the extent that such businesses seek to contract with public bodies after January 1, 2019, or modify or renew contracts with public bodies after that date, they would be subject to these rules.

(b) Only BIAS providers who seek to contract with public bodies will be affected by the proposed rules. Those providers would not have additional disclosure obligations beyond those already imposed by federal law. Those providers that seek an exemption or other kind of determination under the new law would incur costs associated with participating in contested cases or rulemakings at the PUC. Because the quantity of these proceedings and their complexity may vary, the potential magnitude of these costs cannot be determined at this time.

(c) The estimated costs of professional services, equipment, supplies, labor and increased administration required to comply with the proposed rules will vary considerably depending on any given BIAS provider's practices. PUC Staff do not understand any provider to be required to contract with public bodies in Oregon, so none of these costs would be mandatory. A BIAS provider whose practices do not necessitate a PUC determination in order to contract with a public body would incur only minor costs to monitor its own practices. A BIAS provider whose practices necessitate a PUC determination would incur more costs as a result of the associated participation in PUC proceedings. Because the individual circumstances of BIAS providers and any relevant contracts with public bodies vary widely, the potential magnitude of these costs, if a provider chooses to contract with a public body, cannot be determined at this time.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Draft rules and workshop notices were sent by e-mail to the service lists in PUC Docket Nos. AR 618 and 619, and calendared on the PUC's website. The service lists included more than forty stakeholders that had expressed interest in the rulemaking, including but not limited to BIAS providers and industry associations whose memberships PUC Staff understands to include some BIAS providers that are small businesses.

Staff held three workshops to solicit stakeholder input on rule development. The first workshop, on July 9, 2018, focused on assessing the overlap of the existing federal disclosure rules for BIAS providers with the new Oregon statute to inform the development of rules specifying the form and manner of the relevant disclosures. The second workshop, on July 30, 2018, focused on soliciting and discussing stakeholder feedback on draft disclosure rules. The third workshop, on August 15, 2018, focused on soliciting and discussing stakeholder feedback on draft procedural rules to govern PUC proceedings to make the relevant determinations under the new law and on soliciting final input on draft disclosure rules. This workshop also included general discussion of the PUC's procedural rules and discussion of public procurement processes. Workshop participants included industry associations, including those whose memberships PUC Staff understands to include some BIAS providers that are small businesses.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

Stakeholder input was sought through a series of workshops and by seeking feedback on draft rules from a service list of more than forty interested stakeholders.

RULES PROPOSED:

860-250-0005, 860-250-0010, 860-250-0015, 860-250-0020, 860-250-0030, 860-250-0035, 860-250-0040, 860-250-0045, 860-250-0050

ADOPT: 860-250-0005

RULE SUMMARY: This rule explains to whom the rules apply, states the effective date, and sets forth a waiver provision.

CHANGES TO RULE:

860-250-0005

Applicability and Waiver

(1) These rules apply to broadband Internet access service providers engaged in the provision of broadband Internet access service to a public body, as set forth in Oregon Laws 2018, Chapter 88, Section 1(5), and any participant in a proceeding involving a determination made by the Commission under Oregon Laws 2018, Chapter 88, Section 1. These rules become effective on January 1, 2019.11

(2) Upon request or its own motion, the Commission may waive any Division 250 rule for good cause shown. A request for waiver must be made in writing, unless otherwise allowed by the Commission.

Statutory/Other Authority: ORS Ch. 183. 756. 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88. Sect. 1

ADOPT: 860-250-0010

RULE SUMMARY: This section defines terms used in these rules. These definitions mirror the definitions set forth in the law.

CHANGES TO RULE:

860-250-0010

Definitions

For the purposes of Division 250:5

(1) "Broadband Internet access service" or "BIAS" has the same meaning as defined in Oregon Laws 2018, Chapter 88, Section 1(1)(a).11

(2) "Broadband Internet access service provider" or "BIAS provider" has the same meaning as defined in Oregon Laws 2018, Chapter 88, Section 1(1)(b).11

(3) "Covered broadband Internet access service provider" or "covered BIAS provider" means a broadband Internet access service provider engaged in the provision of broadband Internet access service to a public body under Oregon Laws 2018, Chapter 88, Section 1(5)(a).11

(4) "End user" has the same meaning as defined in Oregon Laws 2018, Chapter 88, Section 1(1)(e).11

(5) "Functionally equivalent service" or "functional equivalent" means a service that the Commission finds is providing a service that is the functional equivalent of the service described in Oregon Laws 2018, Chapter 88, Section 1(1)(a)(A)0.11

(6) "Paid prioritization" has the same meaning as defined in Oregon Laws 2018, Chapter 88, Section 1(1)(i).11

(7) "Public body" means a public body, as defined in ORS 174.109, in the State of Oregon.

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1

ADOPT: 860-250-0015

RULE SUMMARY: This rule states that nothing in these rules changes existing consumer protection obligations providers or others may have under other sources of law, including but not limited to rules restricting the use of Customer Proprietary Network Information (CPNI).

CHANGES TO RULE:

860-250-0015

No Effect on Customer Proprietary Network Information and Related Obligations

No Effect on Customer Proprietary Network Information and Related Obligations

Nothing in OAR chapter 860, division 250 relieves any carrier of the requirements imposed by the Commission regarding Customer Proprietary Network Information in OAR 860-032-0510: by the Federal Communications Commission (FCC) regarding Customer Proprietary Network Information in 47 Code of Federal Regulations (CFR), Part 64, 064.2001 through 064.2011: by Section 222 of the Communications Act of 1934, as amended (47 USC 222): or by any other consumer protection law or rule in effect. Participants in proceedings under this division should, as needed: obtain appropriate releases regarding CPNI or customer information: make use of appropriate confidentiality or protective order procedures set forth in OAR chapter 860, division 001: and communicate with Commission Staff in advance of filings regarding potential CPNI or other customer information issues.

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1

ADOPT: 860-250-0020

RULE SUMMARY: This rule fulfills the Commission's obligation under Oregon Laws 2018, Chapter 88, Section 1(5Xb) to specify the manner and form of disclosures that must be made by BIAS providers that engage in the provision of BIAS to Oregon public bodies. It states that disclosures made in a manner and form that comply with existing parallel federal disclosure requirements presumptively satisfy the disclosure requirements under this statute, too.

If the federal disclosure requirements change, this rule provides 180 days for the Commission to determine whether the state rules also need to change.

CHANGES TO RULE:

860-250-0020

Required Public Disclosures by Covered BIAS Providers

(1) Disclosures Consistent with Federal Law. Covered broadband Internet access service providers' disclosures made in a form and manner that complies with 47 C.F.R. CI 8.1(a): Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018); and the FCC's Instructions for Internet Service Providers, located at <https://www.fcc.gov/disclosure-instructions-isps>, presumptively satisfy the requirement that such providers publicly disclose information regarding their network management practices, performance characteristics, and commercial terms of their broadband Internet access service sufficient for end users to verify that the service is provided in compliance with Oregon Laws 2018, Chapter 88, Sections 1(3) and 1(4).11

(2) Changes to Applicable Federal Law. If the requirements for broadband Internet access service providers' disclosures change under any federal law, rule, or guidance cited in section (1) of this rule, the Commission will determine within 180 days of that change whether it is necessary or appropriate to modify the Commission's rules as a result of that change.

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1(5)(b)

ADOPT: 860-250-0030

RULE SUMMARY: The rule specifies that the PUC's contested case rules will govern proceedings to determine functionally equivalent services. The rule requires a petition or responsive pleading to describe the service and why it is or is not a functional equivalent to mass-market retail Internet access service provided by wire or radio that enables a person to transmit data to or receive data between the person's customer premises equipment, including mobile devices, and all, or substantially all, Internet endpoints, and prompts for relevant explanations.

CHANGES TO RULE:

860-250-0030

Functionally Equivalent Service Determinations

(1) A petition requesting that the Commission make a determination regarding whether a service is a functional equivalent as provided for in Oregon Laws 2018, Chapter 88, Section 1(1)(a)(A)(ii) will be governed by ORS 756.500 to 756.610 and the generally applicable filing, contested case, discovery, and protective order procedures contained in OAR chapter 860, division 001, and the requirements set forth in this rule.11

(2) A petition under section (1) of this rule must conform with the requirements of OAR 860-001-0400(1) and (2) and must include the following additional information to the extent relevant information is available to the petitioning party:11

(a) A detailed description of the service at issue.11

(b) A detailed explanation of why the service at issue is or is not a functional equivalent of the service described in Oregon Laws 2018, Chapter 88, Section 1(1)(a)(A)(i). To the extent possible, this explanation should include the following:11

(A) a description of the technical differences between the service at issue and the service described in Oregon Laws 2018, Chapter 88, Section 1(1)(a)(A)(i):11

(B) a description of or examples of how the service at issue is marketed to customers, including available marketing materials:11

(C) a description of or examples of how the service at issue is described to or by other third parties, such as standards bodies: and

(D) a description or copy of an example customer service agreement for the service at issue.11

(c) Any public body, contract, or request for proposal (RFP) to which the petition relates. If applicable, the petition should include contact information for any public body identified and a description of the current status of and timeline for the affected contract or RFP. If the pleading relates to a procurement or contracting dispute, the petition should also identify any negative determination made by the relevant public body and indicate whether any applicable procurement appeal process was utilized.11

(d) Any parallel or related proceedings pending in any forum, if known.11

(e) A request for an appropriate protective order, as needed.11

(3) A response to a petition filed under sections (1) and (2) of this rule must conform with the requirements of OAR 860-001-0400(3) and (4)(a) and must respond to or supplement the information identified in section (2) of this rule to the extent relevant information is available to the responding party.

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1(1)(a)(A)(ii)

ADOPT: 860-250-0035

RULE SUMMARY: The rule specifies that either the PUC's contested case rules or the Oregon Administrative Procedures Act will govern proceedings to determine by rule whether a device is nonharmful to BIAS, depending on how the proceedings are initiated. The rule requires a petition or responsive pleading to describe the device, how it works, why it is or is not harmful, and other relevant information.

CHANGES TO RULE:

860-250-0035

Nonharmful Device Determinations

(1) A petition requesting that the Commission determine by rule whether a device is nonharmful under Oregon Laws 2018, Chapter 88, Section 1(1)(h) will be governed by the requirements set forth in this rule and either of the following:

(a) ORS 756.500 to 756.610 and the generally applicable filing, contested case, discovery, and protective order procedures contained in OAR chapter 860, division 001: oril

(b) the Oregon Administrative Procedures Act and the generally applicable filing, rulemaking, and confidentiality procedures contained in OAR chapter 860, division 001.5

(2) A contested case petition under section (1) of this rule must conform with OAR 860-001-0400(1) and (2) and a petition for adopting, amending, or repealing a rule under section (1) of this rule must conform with OAR 860-0010250. Either type of filing must also include the following additional information to the extent relevant information is available to the petitioning party:ll

(a) A detailed description of the device at issue. At a minimum, this description should include:

(A) The name, manufacturer, and distributor of the device:

(B) The purpose of the device (e.g., personal communication, medical monitoring):

(C) A description of how the device works, including whether it alters, intercepts, diverts, or otherwise interferes with end user traffic or end user information: and

(D) Any relevant determinations regarding the device made by other bodies, including the FCC.

(b) A detailed explanation of why the device at issue is or is not a nonharmful device under Oregon Laws 2018, Chapter 88, Section 1(1)(h).

(c) Any public body, contract, or request for proposal (RFP) to which the petition relates. If applicable, the petition should include contact information for any public body identified and a description of the current status of and timeline for the affected contract or RFP. If the pleading relates to a procurement or contracting dispute, the petition should also identify any negative determination made by the relevant public body and indicate whether any applicable procurement appeal process was utilized.

(d) Any parallel or related proceedings pending in any forum, if known.

(e) A request for an appropriate protective order, as needed, if a contested case petition.

(3) A response to a contested case petition filed under sections (1) and (2) of this rule must conform with the requirements of OAR 860-001-0400(3) and (4)(a) and must respond to or supplement the information identified in section (2) of this rule to the extent relevant information is available to the responding party.

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1(1)(h)

ADOPT: 860-250-0040

RULE SUMMARY: The rule specifies that the PUC's contested case rules will govern proceedings to determine whether paid prioritization provides significant public interest benefits and does not harm the open nature of the provided BIAS. The rule requires a petition or responsive pleading to describe the paid prioritization and provide other relevant information, including an explanation of why a PUC determination is sought if an exception that does not require PUC action applies.

CHANGES TO RULE:

860-250-0040

Excepted Paid Prioritization Determinations

(1) A petition requesting that the Commission make a determination regarding whether certain paid prioritization meets the standard set forth in Oregon Laws 2018, Chapter 88, Section 1(4)(c) will be governed by ORS 756.500 to 756.610 and the generally applicable filing, contested case, discovery, and protective order procedures contained in OAR chapter 860, division 001, and the requirements set forth in this rule.

(2) A petition under section (1) of this rule must conform with the requirements of OAR 860-001-0400(1) and (2) and must include the following additional information to the extent relevant information is available to the petitioning party:

(a) A detailed description of the paid prioritization at issue.

(b) A detailed explanation of why the paid prioritization at issue does or does not provide significant public interest benefits and does or does not harm the open nature of the provided broadband Internet access service under Oregon Laws 2018, Chapter 88, Section 1(4)(c).

(c) Any public body, contract, or request for proposal (RFP) to which the petition relates. If applicable, the petition should include contact information for any public body identified and a description of the current status of and timeline for the affected contract or RFP. If the pleading relates to a procurement or contracting dispute, the petition should also identify any negative determination made by the relevant public body and indicate whether any applicable procurement appeal process was utilized.

(d) Whether Oregon Laws 2018, Chapter 88, Section 1(4)(a) applies to the contract(s) or RFP(s) identified under subsection (2)(c) of this rule. If it applies, the petition should also explain why a determination under Oregon Laws 2018, Chapter 88, Section 1(4)(c) is sought.

(e) Whether Oregon Laws 2018, Chapter 88, Section 1(4)(b) applies to the paid prioritization at issue in the initiating pleading. If it applies, the petition should also explain why a determination under Oregon Laws 2018, Chapter 88, Section 1(4)(c) is sought.

(f) Any parallel or related proceedings pending in any forum, if known.

(g) A request for an appropriate protective order, as needed.

(3) A response to a petition filed under sections (1) and (2) of this rule must conform with the requirements of OAR 860-001-0400(3) and (4)(a) and must respond to or supplement the information identified in section (2) of this rule to the extent relevant information is available to the responding party.

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1(4)(c)

ADOPT: 860-250-0045

RULE SUMMARY: The rule specifies that the PUC's contested case rules will govern proceedings to determine whether a BIAS provider's practices fall within the statutory exception for reasonable network management, which requires the PUC to determine the practice (a) has a technical network management justification; (b) does not include other business practices; and (c) is narrowly tailored to achieve a legitimate network management purpose, taking into account the particular network architecture and technology. The rule requires a petition or responsive pleading to describe the practice and provide other relevant information, including an explanation of why a PUC determination is sought if an exception that does not require PUC action applies.

CHANGES TO RULE:

860-250-0045

Reasonable Network Management Determinations

(1) A petition requesting that the Commission make a determination regarding whether certain activity constitutes reasonable network management under Oregon Laws 2018, Chapter 88, Section 1(4)(d) will be governed by ORS 756.500 to 756.610 and the generally applicable filing, contested case, discovery, and protective order procedures contained in OAR chapter 860, division 001, and the requirements set forth in this rule.1T

(2) A petition under section (1) of this rule must conform with the requirements of OAR 860-001-0400(1) and (2) and must include the following additional information to the extent relevant information is available to the petitioning party:

(a) A detailed description of the activity at issue.

(b) A detailed explanation of why the activity at issue is or is not reasonable network management under Oregon Laws 2018, Chapter 88, Section 1(4)(d). At a minimum, the explanation must address:

(A) the technical network management justification for the activity, if any;

(B) the other business practices included in the activity, if any; and

(C) whether and how the activity is narrowly tailored to achieve a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

(c) Any public body, contract, or request for proposal (RFP) to which the petition relates. If applicable, the petition should include contact information for any public body identified and a description of the current status of and timeline for the affected contract or RFP. If the pleading relates to a procurement or contracting dispute, the petition should also identify any negative determination made by the relevant public body and indicate whether any applicable procurement appeal process was utilized.

(d) Whether Oregon Laws 2018, Chapter 88, Section 1(4)(a) applies to the contract(s) or RFP(s) identified under subsection (2)(c) of this rule. If it applies, the petition should also explain why a determination under Oregon Laws 2018, Chapter 88, Section 1(4)(d) is sought.

(e) Whether Oregon Laws 2018, Chapter 88, Section 1(4)(b) applies to the activity at issue in the initiating pleading. If it applies, the petition should also explain why a determination under Oregon Laws 2018, Chapter 88, Section 1(4)(d) is sought.

(f) Any parallel or related proceedings pending in any forum, if known.

(g) A request for an appropriate protective order, as needed.

(3) A response to a petition filed under sections (1) and (2) of this rule must conform with the requirements of OAR 860-001-0400(3) and (4)(a) and must respond to or supplement the information identified in section (2) of this rule to the extent relevant information is available to the responding party.

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1(4)(d)

ADOPT: 860-250-0050

RULE SUMMARY: The rule specifies that the PUC's contested case rules will govern proceedings to determine whether allowing a public body to contract with a particular BIAS provider provides significant public interest benefits. The rule provides the path back to contracting eligibility for a BIAS provider who engages in practices after January 1, 2019, that would otherwise have prevented a public body from contracting with that provider under the new law. The rule requires a petition or responsive pleading to provide the provider's certification and other relevant information, including an explanation of why a PUC determination is sought if an exception that does not require PUC action applies.

CHANGES TO RULE:

860-250-0050

Determinations Regarding Newly Compliant BIAS Providers

(1) A petition requesting that the Commission make a determination regarding whether a particular provider meets the standard set forth in Oregon Laws 2018, Chapter 88, Section 1(4)(e) will be governed by ORS

756.500 to 756.610 and the generally applicable filing, contested case, discovery, and protective order procedures contained in OAR chapter 860, division 001, and the requirements set forth in this rule.

(2) A petition under section (1) of this rule must conform with the requirements of OAR 860-001-0400(1) and (2) and must include the following additional information to the extent relevant information is available to the petitioning party:

(a) The provider at issue and that provider's certification under Oregon Laws 2018, Chapter 88, Section 1(4)(e) (A).

(b) A detailed explanation of why Oregon Laws 2018, Chapter 88, Section 1(4)(e) applies to the provider at issue. At a minimum, the explanation must address:

(A) which of the activities described in Oregon Laws 2018, Chapter 88, Section 1(3) that the provider engaged in after January 1, 2019, and the basis for this assertion:

(B) the date or dates on which the provider ceased engaging in the activities identified in section (2)(b)(i) of this rule: and

(C) the reason or reasons that allowing a public body to contract with the broadband Internet access service provider provides significant public interest benefits.1T

(c) Any public body, contract, or request for proposal (RFP) to which the petition relates. If applicable, the petition should include contact information for any public body identified and a description of the current status of and timeline for the affected contract or RFP. If the pleading relates to a procurement or contracting dispute, the petition should also identify any negative determination made by the relevant public body and indicate whether any applicable procurement appeal process was utilized.

(d) Whether Oregon Laws 2018, Chapter 88, Section 1(4)(a) applies to the contract(s) or RFP(s) identified under subsection (2)(c) of this rule. If it applies, the petition should also explain why a determination under Oregon Laws 2018, Chapter 88, Section 1(4)(e) is sought.1T

(e) Whether Oregon Laws 2018, Chapter 88, Section 1(4)(b) applies to the activity described in section (2)(b)(a) of this rule. If it applies, the petition should also explain why a determination under Oregon Laws 2018, Chapter 88, Section 1(4)(e) is sought.1T

(f) Any parallel or related proceedings pending in any forum, if known.

(g) A request for an appropriate protective order, as needed.

(3) A response to a petition filed under sections (1) and (2) of this rule must conform with the requirements of OAR 860-001-0400(3) and (4)(a) and must respond to or supplement the information identified in section (2) of this rule to the extent relevant information is available to the responding party.

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1(4)(e)

CENTURYLINK ADDITION:

RULE SUMMARY: This rule states that practices that comply with previous federal law which served as a model for the Oregon requirements presumptively satisfy the substantive requirements under this statute, too.

CHANGES TO RULE:

860-250-0055

Prohibited/Permitted Practices of Covered BIAS Providers

(1) Practices Consistent with Previous Federal Law. Covered broadband Internet access service providers' practices consistent with previous Federal Law as reflected in "In the Matter of Protecting and Promoting the Open Internet," WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) presumptively satisfy the requirements of Oregon Laws 2018, Chapter 88, Sections 1(3) and 1(4).

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1((3) and 1(4)

RULE SUMMARY: This rule prescribes an exclusive dispute resolution process to be followed in the event of a contract dispute regarding Internet Neutrality Principles.

CHANGES TO RULE:

860-250-0060

Dispute resolution Process; Actions in Event of Contract Disputes Regarding Internet Neutrality Principles.

In the event of any disagreement, dispute, claim or controversy arising out of or relating to the Internet Neutrality principles described herein or in Oregon Laws 2018, Chapter 88, including but not limited to the perceived violation, threatened breach or actual breach thereof (collectively, an "Internet Neutrality Dispute"), the following procedures shall apply. In the event of an Internet Neutrality Dispute, the parties will attempt to resolve the Internet Neutrality Dispute through good faith negotiations conducted by the representatives designated by each party. The party asserting the Internet Neutrality Dispute will give prompt written notice to the other party describing the Internet Neutrality Dispute in reasonable detail. If the designated representatives are unable to resolve the Internet Neutrality Dispute within 45 business day(s) (or such other period agreed upon by the parties), the parties shall refer the Internet Neutrality Dispute to their respective senior management. If senior management is unable to resolve the Internet Neutrality Dispute within the subsequent 45 business days (or such other period agreed upon by the parties), then either party may terminate the Contract without liability, except for obligations unrelated to the Internet Neutrality Requirements in Oregon Laws 2018, Chapter 88, including and arising prior to the date of termination. For the avoidance of doubt, termination of the Contract shall be the parties' sole and exclusive remedy for an Internet Neutrality Dispute.

Statutory/Other Authority: ORS Ch. 183, 756, 2018 OL Ch. 88

Statutes/Other Implemented: 2018 OL Ch. 88, Sect. 1((3) and 1(4)