

ITEM NO. CA17

PUBLIC UTILITY COMMISSION OF OREGON
AHD REPORT
PUBLIC MEETING DATE: May 3, 2016

REGULAR _____ CONSENT X EFFECTIVE DATE _____ N/A _____

DATE: April 27, 2016

TO: Public Utility Commission

FROM: Diane Davis *dbd*

THROUGH: Michael Grant, *Mh* Ruth Harper *RH*

SUBJECT: OREGON PUBLIC UTILITY COMMISSION ADMINISTRATIVE
HEARINGS DIVISION: (Docket No. AR 594) Adopts Permanent Rules
Implementing Qualified Project Determination per 2015 Senate Bill 611.

AHD RECOMMENDATION:

Adopt the proposed permanent rules as modified in the attached draft order; repeal the temporary rules.

DISCUSSION:

This rulemaking implements Senate Bill 611 (SB 611) passed by the 2015 Legislative Assembly.¹ This bill enacted a property tax exemption for a company subject to central assessment for property tax purposes, if the company invests in providing a certain form of symmetrical gigabit broadband service through a "qualified project." As a first step towards the property tax exemption, a company must seek a qualified project determination from the Commission. The permanent rules establish the process by which a company seeks the Commission's determination of qualification for a project.

A rulemaking hearing was held on February 23, 2016, and comments were received from Commission Staff and stakeholders through March 10, 2016. The comments are discussed in the attached draft order (Attachment A).

¹ SB 611, as amended by House Bill 2485, has now been codified at ORS 308.677 and ORS 308.681.

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PROPOSED COMMISSION MOTION:

Adopt permanent rules 860-200-0005 through 860-200-0150 as set forth in Appendix A of the attached draft order, and repeal the temporary rules.

AR 594 CA17

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 594

In the Matter of
Rulemaking to Implement 2015 Senate
Bill 611: Qualified Project Determination.

ORDER

DISPOSITION: TEMPORARY RULES REPEALED; NEW RULES ADOPTED

I. INTRODUCTION

We opened this rulemaking to implement Senate Bill 611 (SB 611) passed by the 2015 Legislative Assembly.¹ This bill enacted a property tax exemption for a company subject to central assessment for property tax purposes, if the company invests in providing a certain form of symmetrical gigabit broadband service through a “qualified project.” As a first step towards the property tax exemption, a company must seek a qualified project determination from this Commission.² The rules we adopt in this order establish the process by which a company seeks our determination whether its project is qualified.

II. BACKGROUND

After SB 611 took effect on October 5, 2015, we adopted temporary rules in Order No. 15-363 to provide companies with the information they needed to file complete applications for qualified project determination by the January 15, 2016 deadline.³ These temporary rules resulted from collaboration between Commission Staff and a wide range of stakeholders. We used these temporary rules as the starting point for this permanent rulemaking.

On January 15, 2016, we filed a Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact for this rulemaking with the Secretary of State, and we provided notice to all interested persons on the service lists established under OAR 860-001-0030(1)(b) and to legislators specified in ORS 183.335(1)(d). Notice of the rulemaking was published in the

¹ SB 611, as amended by House Bill 2485, has now been codified at ORS 308.677 and ORS 308.681.

² ORS 308.677(2), (3).

³ See *In the Matter of Temporary Rules Implementing 2015 Senate Bill 611 and House Bill 2485 – Qualified Project Determination*, Docket No. AR 592, Order No. 15-363 (Nov 6, 2015) (adopting temporary rules).

February 2016 *Oregon Bulletin*, setting a hearing date of February 23, 2016. The notice established a comment due date of March 10, 2016.

We held a rulemaking hearing on February 23, 2016, which was attended in person by Commission Staff and its counsel, the Oregon Cable Telecommunications Association (OCTA), Google Fiber Oregon, and CenturyLink.⁴ At the hearing, Staff summarized the differences between the current temporary rules and the proposed permanent rules and explained each change. Staff clarified that legislative reporting requirements will be addressed in a separate rulemaking, to be opened later this spring. CenturyLink noted its concern about the statute being interpreted to prevent the only company currently providing gigabit service (CenturyLink) from applying because it currently does not meet the majority threshold. No other participants offered comments at the hearing.

III. COMMENTS

We accepted written comments through March 10, 2016. After the hearing, Staff filed comments supporting adoption of the proposed permanent rules, as well as certain revisions to the rules as originally proposed based on its review of the three applications for qualified project determination under the temporary rules.⁵ OCTA, CenturyLink, the City of Eugene, the City of Portland, and the League of Oregon Cities filed comments responding to Staff's revisions and, in some cases, raising new concerns or suggesting different revisions to the proposed rules. Below we summarize and respond to each suggested revision or general comment.

A. Inclusion of Information Requests in Administrative Record

Staff recommends modifying proposed OAR 860-200-0100(3) to clarify that applicants do not need to file, as part of the administrative record to be reviewed in considering an application, copies of Staff-issued information requests and the responses to those requests. The League of Oregon Cities counters that this information should be filed for public review (even if redacted) to better inform regulators and stakeholders. Staff opposes the League's recommendation, because it fears including this exchange of information in the docket would depart from current practice and inhibit Staff's flexibility in evaluating applications.

Resolution: We agree with Staff that including information requests would depart from current practice and constrain the early information process. We adopt Staff's modification to confirm and maintain the current informal exchange of information.

⁴ A representative of CenturyLink also attended by telephone.

⁵ See Docket Nos. UM 1760, UM 1761, and UM 1762 (reviewing January 2016 qualified project determination applications submitted by Comcast Corporation & Subsidiaries, Frontier Communications Corp., and Google Fiber Oregon, LLC).

B. Notice to Affected Cities and Counties

Acknowledging the cities' frustration during the last round of applications with access to information, Staff recommends directing applicants to notify the cities and counties likely affected by a project within two business days of filing an application and provide "a brief description of the project, and how it may affect the city or county."

OCTA opposes requiring applicants, by rule, to provide an impact statement to cities and counties. It questions whether this exceeds the statutory requirements for making an application.

The League of Oregon Cities, the City of Portland, and the City of Eugene support Staff's proposed modification, but counter that it does not go far enough to address the communication and information-access issues they experienced during the last round of applications. They ask how the Commission can consult with cities if the cities receive only bare bones project descriptions and generalized statements. They suggest expressly requiring the following detailed information in the applicants' notice to cities:

1. Timeframe for the project;
2. Potential impacts of the project;
3. General overview of network architecture, locations of facilities, and available services;
4. Description of newly constructed or installed infrastructure used or contemplated to be used and date such infrastructure was constructed or installed;
5. Specific areas within the cities where service is or will be provided;
6. Percentage of applicant's residential broadband customers who have or will have access to the service;
7. Price of the service; and
8. Minimum speeds.

The City of Portland also objects to the two-day lag between submission of the application and notice to cities and counties, reasoning that local governments need all possible time to review and respond to applications. In addition, the City of Portland suggests that significant new capital investment should be an absolute prerequisite for every qualified project determination.

Staff responds by reiterating that it supports casting a wider net so that it may receive information from all affected cities and counties rather than limiting input to those cities with relevant franchise fee agreements. Staff clarifies, however, that the statute places the duty to review applications solely on the Commission, and city and county information request responses are intended to inform this review, not duplicate the review process.

Resolution: We note that ORS 308.677(4)(b)(B) instructs the Commission to consult with any city with which the company has entered into a franchise fee agreement for services related to

the application. To enable Staff to identify and reach out to cities that may have relevant franchise fee agreements or other pertinent information, proposed OAR 860-200-0150(5) requires that an application include a list of cities and counties where the project will be located and a contact for each city or county. Staff proposes the additional step that applicants notify affected cities and counties upon filing an application—seemingly to respond to the cities’ frustration during the last round of applications with access to information.

We adopt, in principle, Staff’s proposal requiring applicants to send cities and counties notice that they have filed an application, and we adopt the City of Portland’s recommendation that this notice be sent concurrent with the application. We add this language to OAR 860-200-0100 as new section (5).

We do not adopt Staff’s proposed language requiring that applicants provide a “brief description” of the project. We find the term “brief description” too vague and unlikely in any event to elicit much useful information. We also decline to adopt the language asking applicants to describe the impact on cities and counties. We find that expressly requiring applicants to provide cities and counties this analysis is not necessary for the Commission to conduct its review of applications. The statute places the duty to review an application on the Commission—the cities’ role is to provide to Staff any particular information they already possess based on their relationship with the company.⁶ For example, a city could share terms and conditions of a relevant franchise fee agreement, which could aide Staff’s review of the merits of the application material. We recognize that cities do not receive an unredacted copy of the application,⁷ and we are sensitive to the cities’ desire to be more involved in the process; however, we are constrained by the review process and time constraints set forth in the statute.

To the City of Portland’s concern that significant new capital investment should be a prerequisite for a qualified project determination, we are constrained by the language of the statute. ORS 308.677(2)(a) requires capital investment in newly constructed or installed infrastructure without specifying that it must be a *significant* new investment.

C. Revisions Related to Timing of Project Operation

Staff recommends modifying the application requirements in proposed OAR 860-200-0150 to eliminate the distinction between projects using largely existing infrastructure and projects where the applicant plans capital investment to enable it to offer the service. Staff explains it had sought to differentiate between operating and not-yet-operating projects to ensure applicants

⁶ See ORS 308.677(4)(a) (instructing that the Commission shall determine whether a project is a qualified) and ORS 308.677(4)(b) (explaining, while it is making its determination, the Commission may discuss the application with the company and the Oregon Department of Revenue and shall consult with cities with a franchise fee agreement to provide services to which the application relates).

⁷ See ORS 308.677(3)(a) (requiring the applicant provide a copy of the application to the Oregon Department of Revenue but not requiring copies to cities or counties).

submitted the best available documentation but, in practice, has found such distinction unnecessary and confusing. No party indicated they oppose this change and we adopt it.

D. Additional Clarification of Project Description Requirements

To ensure the Commission has sufficient information to determine whether a project is capable of providing the qualified service, the last section of proposed OAR 860-200-0150 sets forth examples of the components of an acceptable project description. These components are company- and project-specific details such as the relevant infrastructure, where it is located, and its technical specifications. Staff recommends adding a sentence to clarify that an applicant may use a method not listed in the examples.

The League of Oregon Cities responds that Staff's proposed addition is redundant and, problematically, introduces a new term "alternate method." In addition, the League questions in general whether the language in this section requiring applicants to provide information "sufficient to allow" the Commission to determine whether a project is capable of providing service will summon the specificity and detail required to consider an application. The League also suggests reorganizing several of the paragraphs of this section.

With regard to the League's first concern, Staff responds that parties were confused during the recent application process, even though the rule already said the examples were non-exclusive. Staff does not respond to the League's second concern. Staff does not support the League's reorganization suggestions, explaining, for example, that retaining the distinction between a project's infrastructure and a project's planned infrastructure is necessary.

Resolution: We adopt Staff's modification in principle but adjust the language to read more clearly as follows: "The information the applicant provides to demonstrate its project's qualifying capabilities may be, but is not limited to, one of the examples in subsections (a) through (d) below." To the League's concern that the phrase "sufficient to allow" is not adequately descriptive, we note it is to applicants' advantage to provide specificity and detail to ensure we are able to determine their project is capable of providing the qualified service. Persuaded by Staff's explanation, we do not adopt the League's other modifications or re-organization suggestions.

E. References to Senate Bill 611

Staff recommends, now that SB 611 has been codified, to make conforming statutory references throughout the rules. No party indicated that they oppose this change and we adopt it.

F. Formula for Determining Percentage of Customers Offered the Service

In its comments, CenturyLink recommends revising proposed OAR 860-200-0050, which defines "qualified service" as "offering * * * one gigabit per second symmetrical service, to a

majority of the residential customers of a company’s broadband services.” CenturyLink recommends that, instead of counting only residences currently subscribed to the company’s broadband service, we count all residences that could subscribe to a company’s broadband service (“homes passed”). CenturyLink explains that using existing subscribers as the metric is bad for competition because it precludes certain competitors, such as CenturyLink. Staff responds that proposed OAR 860-200-0050 defines “qualified service” using the exact language from the underlying statute ORS 308.677(2)(a).

Resolution: ORS 308.677(2)(a) specifies that the denominator for determining whether a company offers services to enough customers to qualify for the tax exemption is “the residential customers of the company’s broadband services.”⁸ We agree with Staff that this language sets the definition of qualified service and we lack the authority to amend the statute through rulemaking. Accordingly, we decline to adopt CenturyLink’s modification.

IV. ORDER

IT IS ORDERED that:

1. The new rules OAR 860-200-0005 through 860-200-0150 are adopted as set forth in Appendix A to this order.
2. The new rules will be effective upon filing with the Secretary of State.
3. Temporary rules OAR 860-200-0005 through 860-200-0150 are repealed on the effective date of these adopted rules.

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.

⁸ ORS 308.677(2)(a) provides: “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*” (emphasis added).

860-200-0005

Applicability and Waiver

(1) These rules apply to a company that is seeking a qualified project determination as set forth in ORS 308.677.

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

Stat. Auth.: ORS 756.040, ORS 308.677

Stats. Implemented: ORS 308.677

Hist.: PUC 8-2015(Temp), f. & cert. 11-6-15 thru 5-3-16 (Order No. 15-363)

860-200-0050

Definitions

For the purposes of Division 200:

(1) “Broadband services” means the provision of data transmission technology that provides two-way data transmission to and from the Internet through other than a dial-up connection.

(2) “City” has the same meaning as that term is defined in ORS 174.100.

(3) “Company” has the same meaning as that term is defined in ORS 308.505.

(4) “Communication” has the same meaning as that term is defined in ORS 308.505.

(5) “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.

(6) “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, ORS 308.677

Stats. Implemented: ORS 308.677

Hist.: PUC 8-2015(Temp), f. & cert. 11-6-15 thru 5-3-16 (Order No. 15-363)

860-200-0100

Application for Qualified Project Determination

(1) A company seeking a qualified project determination under ORS 308.677 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, excluding Commission staff-issued information requests and the responses to those requests, 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 if the Oregon 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) On the same day that it files its application for a qualified project determination, the applicant must notify the representatives of each city and county, identified per OAR 860-200-0150(5), of the application.

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

(7) 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's determination under ORS 308.677(4) shall only determine whether a project is or is not a qualified project.

Stat. Auth.: ORS 756.040, ORS 308.677

Stats. Implemented: ORS 308.677

Hist.: PUC 8-2015(Temp), f. & cert. 11-6-15 thru 5-3-16 (Order No. 15-363)

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 of the company that the applicant's project meets the requirements for a qualified project set forth in ORS 308.677(2). 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 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 cities and counties where the applicant's project is or will be located, including the name and contact information for the representative of each such city and county that the applicant understands is most knowledgeable with respect to the applicant's project. The applicant must highlight the contacts on this list that represent cities with which the applicant has entered into a franchise fee agreement to provide services to which the application relates.

(6) A list, in an Excel-readable spreadsheet format, of the census blocks served or 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 access or planned access to the applicant's communication services that will be enabled by the project, as described in the application; and
- (c) The associated county.

(7) 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.

(8) An electronic version, in Excel-readable spreadsheet format, of the applicant's Federal Communications Commission (FCC) Form 477, most recently filed, if any, with the FCC by the applicant, listing only Oregon-specific broadband subscription data exactly as compiled and submitted for filing, including all filer number and name identifiers including, but not limited to, FRN, Provider Name, and DBA Name. Information identified as confidential in the applicant's filing with the FCC must be identified as confidential consistent with OAR 860-001-0070.

(9) 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 information the applicant provides to demonstrate its project's qualifying capabilities may be, but is not limited to, one of the examples in subsections (a) through (d) below.

(a) 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 that includes an indication where the network's key infrastructure in paragraph (C) of this subsection is utilized;

(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, coaxial cable, copper wire, and 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 including an indication in the description of paragraph (C) of this subsection which network key infrastructure is used at the 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) 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 that includes an indication where the network's key infrastructure in paragraph (C) of this subsection is planned;

(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, coaxial cable, copper wire, and 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 including an indication in the description of paragraph (C) of this subsection of which network key infrastructure is planned at the 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 ORS 308.677(2).

(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, ORS 308.677

Stats. Implemented: ORS 308.677

Hist.: PUC 8-2015(Temp), f. & cert. 11-6-15 thru 5-3-16 (Order No. 15-363)