

PUBLIC UTILITY COMMISSION OF OREGON
REDACTED STAFF REPORT
PUBLIC MEETING DATE: March 1, 2016

REGULAR X CONSENT EFFECTIVE DATE March 1, 2016

DATE: February 10, 2016

TO: Public Utility Commission

FROM: ^{MB} Malia Brock, ^{cy} Stephanie Yamada, and ^{SHAY} Stephen Hayes ^{FB}

THROUGH: ^J Jason Eisdorfer, ^{BC} Bryan Conway, and ^B Bruce Hellebuyck

SUBJECT: GOOGLE FIBER OREGON, LLC: (Docket No. UM 1762) Request for Qualified Project Determination.

STAFF RECOMMENDATION:

Staff recommends the Commission determine that Google Fiber Oregon, LLC's (Google's or Company's) project is a qualified project and approve Google's application.

ISSUE:

Whether Google's project is or is not a qualified project.

APPLICABLE LAWS:

In 2015, the legislature adopted Senate Bill 611, later amended by House Bill 2485, ("SB 611") to provide a special tax exemption to a company that offers communications services through a "qualified project." See ORS 308.677. SB 611 provides that a company seeking the exemption granted under the bill must submit an application to the Public Utility Commission, with a copy to the Department of Revenue, on or before January 15 preceding the first property tax year for which the exemption is sought. See ORS 308.677(3)(a).

A project is qualified under SB 611 if:¹

- (a) The project requires capital investment in newly constructed or installed real or tangible personal property constituting infrastructure that enables the company to offer communication services, including the capacity to provide, at least, approximately one gigabit per second

¹ See ORS 308-677(2).

symmetrical service, to a majority of the residential customers of the company's broadband services in Oregon; and

(b) With respect to communication services offered by the company using the infrastructure, the company does not deny access to the communication services to any group of residential customers because of the income level of the residential customers in the local service area in which the residential customers reside.

The application must include a certification that the project meets the requirements of ORS 308.677(2) and the application fee. See ORS 308.677(3)(b). The application review process is specified in ORS 308.677(4).

OAR 860-200-0100 and 860-200-0150² provide the application requirements for a company seeking a qualified project determination under SB 611, including what information to provide in and with the application.

An application for a qualified project determination must include specific and sufficient information and facts that demonstrate the applicant's project includes all of the legally required features of a qualified project. Commission determinations are based on a review of the applicant's project as meeting the requirements set forth in the law and do not include general public interest determinations.

ANALYSIS:

Google submitted its application for a qualified project determination on January 15, 2016. Google requested confirmation that its application was complete on January 15, 2016. Staff informed the Company by letter that the application was complete, containing all information required under OARs 860-200-0100 and 860-200-0150.

Several staff members have reviewed the application and considered Google's responses to eight information requests and supplemental information provided.

As required by OAR 860-200-0150(2), Google submitted a sworn statement, executed by Christopher Levendos, Head of Network Deployment and Operations for Google Fiber Inc., certifying that Google's project meets the requirements for a qualified project under Oregon law. Google submitted a third-party engineering certification from an Oregon licensed professional engineer with its application along with other documentation that the planned project meets the requirements of SB 611.³

² Hist.: PUC 8-2015(Temp), f. & cert. 11-6-15 thru 5-3-16

³ OAR 860-200-0150(10)(c).

Project Summary

Google's project is to construct a fiber optic network in several municipalities in Oregon including Portland, Beaverton, Gresham, Hillsboro, Lake Oswego, and Tigard and in unincorporated portions of Clackamas, Multnomah, and Washington counties. The project will enable Google to offer the qualified service as defined in OAR 860-200-0050(5) to residential customers in these areas.

Staff reviewed the application which included an overall map of the general prospective project area broken into specific areas of key infrastructure investments inside the general project area.

Google's application described in general terms its network project deployment plan. In response to Staff Information Request Number Two, Google states that it is "seeking to deploy the network to as many residential customers as is feasible within the project's design boundaries that have been provided as part of the application." Google's response to Staff Information Request Number One further cautions that other factors can impact its ability to construct in certain areas, such as securing necessary permissions from relevant municipal jurisdictions or unincorporated areas of certain counties, attachment rights from utility pole owners, authorizations from private parties, homeowners associations, topographical constraints, and its ability to serve a sufficient number of households to make the network deployment economically feasible.

Google's response to Staff Information Request Number Two states that it is too early to know the precise methods by which Google Fiber will offer service to residential customers. Google's application and responses to Staff information requests acknowledge that the Company's fiber deployments in other cities differs from traditional network buildouts. Areas of a city are grouped together into a fiberhood. Once enough customers sign up or express interest in service in a designated fiberhood area, Google builds out the fiberhood and the qualified service is offered to those residents.

Staff Consultation with Municipalities

Consultation with any city with which the applicant has entered into a franchise fee agreement to provide services to which the application relates is required under ORS 308.677(4)(b)(B). Google has entered into a franchise fee agreement with the City of Portland to provide services described in the applicant's project. Staff has conferred with representatives of the City of Portland regarding the application.

In addition, on January 25, 2016, Staff contacted representatives of the cities and counties likely to be affected by the project. Staff requested input in the Commission's

review of applications for qualified project determination by February 1, suggesting cities and counties may have data or insights relating to qualified projects of which Staff may not be aware.⁴ Several responders noted that the time available for a reply was insufficient as was the information contained in the non-confidential application posted in this docket. Staff may consider changes in the application process developed for project determinations in light of these concerns, such as within the pending permanent rulemaking in Docket No. AR 594.

Subsequently, Staff asked representatives of the likely affected cities, on February 3, 2016, to answer a five question survey about the applicant's current operations within the city to assist Staff's analysis as to whether residential income levels may have any impact on access to services based on the provision of existing services.⁵ Staff sincerely thanks each city for its very thoughtful and timely responses.

Staff Discussions with Oregon Department of Revenue

Staff met with Oregon Department of Revenue staff on multiple occasions in February 2016 to discuss Google's application for a qualified project determination. In addition, several Staff have reviewed the application and considered Google's responses to eight information requests, including supplemental responses.

Staff's analysis that the application material provided in support of a finding that Google's project meets the requirements of ORS 308.677(2) is provided below.

The requirements that a qualified project must meet are:

I. New Capital Investment - ORS 308.677(2)(a)

As Google's project is considered prospective in that its network does not currently exist in Oregon and will require new capital investment to provide the qualified service, Google's project readily meets the requirement that a project require capital investment in newly constructed or installed infrastructure.

The Applicant's project meets this requirement.

II. One Gigabit Symmetrical Service - ORS 308.677(2)(a)

Staff reviewed the information Google provided in its application. Google applied for the qualified project under OAR 860-200-0150(10)(c), an option that allows a company to

⁴ See Appendix A for generic city letter.

⁵ See Appendix B for generic city questionnaire.

speeds on its 1 Gigabit (Gbps) or 1,000 Megabits (Mbps) service target 912 Mbps download speed and 945 Mbps upload speed, slightly less due to packet loss. These observed speeds in other states indicate that Google's fiber optic network is capable of providing target speeds that currently meet the qualified service definition of offering communication services in Oregon; that provide, at least, approximately one Gbps symmetrical speed.

The Applicant's project meets this requirement.

III. Offer to a Majority of Broadband Customers - ORS 308.677(2)(a)

The statutory test necessary for the applicant to pass in order to obtain a qualified project determination is what Staff refers to as the Majority Offer Test (MOT). The MOT is set forth in ORS 308.677(2)(a) which requires that the project enable the applicant to:

"...offer communications services...to a majority of the residential customers of the company's broadband services."

In Staff's analysis and in information requests, we commonly refer to the number of the Applicant's existing broadband customers as the denominator and the number of those customers to which the company is able to offer communication services as a result of the project as the numerator.

Google offers the qualified service to all its customers in the cities where it currently offers service and plans to do the same with its Oregon project. The prospective network architecture will provide the qualified service. As Google currently has no broadband customers in Oregon, Google's plan to deploy the qualified service and make it available to all its broadband customers meets the majority requirement.

The Applicant did not provide numbers in its application representing the denominator and numerator for the MOT calculation because it does not have any Oregon Broadband customers and it indicates in its application that it will offer the 1 Gigabit symmetrical service to all of its new customers. As soon as it has a customer it is likely to meet the MOT requirement at 100 percent because Google will offer the communications services that include the qualifying service.

Staff reviewed the project footprint information submitted in the application complying with OAR 860-200-0150(4). The project footprint could not be compared to a similar footprint of broadband customers submitted in the Oregon Broadband Mapping project reflecting the service area as of June 30, 2014, because Google would be a new entrant

into the Oregon Broadband market and participation in that project was not applicable to Google.

After reviewing the documentation provided in the Application, responses to information requests, and comparing known information obtained independently from the Application, Staff believes that the Company has adequately demonstrated that it has and or will have infrastructure that enables the company to offer communication services including a capacity of at least, approximately, one gigabit per second symmetrical service to a majority of its residential broadband customers.

The Applicant's project meets this requirement.

IV. No Denial of Access to Services Based on Income Level – ORS 308.677(2)(b)

For the purposes of its analysis, Staff applied the term “access” as referring to a customer’s ability to obtain the Company’s communication services based on 1) the physical shape and location of the Company’s network footprint, and 2) the Company’s practices for extending service to customers within its network footprint.

As noted above, Google submitted a sworn statement from a Company representative certifying that Google’s project meets the requirements for a qualified project under Oregon law. Because Google’s project is entirely prospective and is not yet constructed, Staff was unable to perform a detailed analysis on the network footprint of the proposed project. Instead, in order to verify Google’s compliance with ORS 308.677(2)(b), Staff considered other provisions which prevent the Company from denying access to residential customers within its proposed service territory due to the income level of residential customers.

As required under OAR 860-200-0150(4), Google submitted a paper map of the area to be served by the project in *confidential* Exhibit 3 to its application as well as electronic GIS-compatible mapping files in *confidential* Exhibit 4. Google also submitted a list of the census blocks planned to be served by the project as required under OAR 860-200-0150(7) in *confidential* Exhibit 5 to its application. However, upon further discussion and in response to information requests from Staff to the company, Google clarified that the proposed service area indicated in *confidential* Exhibits 3 and 4 does not necessarily represent the exact final area which will be served by the project.

Rather, as Google states in response to Staff’s Information Request Number Four, the project footprint depicted by Google “shows the geographic area where Google Fiber is exploring the possibility of deploying a fiber optic network in Oregon.” Google further

clarifies that “there are a number of factors that can impact Google Fiber’s ability to construct in a particular area or serve a particular household within the planned network boundaries. While factors such as those will affect Google Fiber’s build-out, Google Fiber will not base its decisions where to build on the income level of residents in any local service area.”

In order to verify compliance of Google’s prospective project with ORS 308.677(2)(b) in the absence of a precise physical siting plan, Staff consulted with the cities which are expected to be affected by Google’s project—Portland, Gresham, Hillsboro, Beaverton, Tigard, and Lake Oswego. Specifically, Staff investigated the extent to which franchise agreements or other provisions require Google to meet the same requirements as those specified under ORS 308.677(2)(b).

Currently, the only city with which Google has finalized a franchise agreement is the City of Portland (Portland). Google’s agreement with Portland contains the following language pertaining to nondiscrimination:

6.1 Non-Discrimination Upon Network activation and during periods in which Grantee is soliciting residential Subscribers within any given defined geographic portion of the Franchise Area, Grantee shall offer Services to all potential residential Subscribers in that portion of the Franchise Area under non-discriminatory rates and reasonable terms and conditions. Consistent with its deployment plans pursuant to Section 4.2, Grantee shall not arbitrarily refuse to provide Services to any Person and shall not discriminate in offering Service to Subscribers on the basis of race, color, religion, age, sex, marital or economic status, national origin, sexual orientation, disability or income.

Furthermore, Google is currently in the process of negotiating similar agreements with the other cities and counties which are expected to be affected by Google’s project. While those agreements have not yet been finalized, Google states in its supplemental response to Information Request Number Two that Google proposed including the following provision in those agreements:

5.1 Non-Discrimination Grantee shall not deny Service, deny access, or otherwise discriminate on the availability, rates, terms or conditions of Services provided to residential Subscribers on the basis of race, color, creed, religion, ancestry, national origin, gender, gender identity, sexual orientation, disability, age, familial status, marital status, or status with regard to public assistance. Grantee shall comply at all times with all applicable Federal, State and local laws and regulations relating to nondiscrimination. Grantee shall not deny or

discriminate against any group of actual or potential residential Subscribers within the City on access to or the rates, terms and conditions of Services because of the income level or other demographics of the local area in which such group may be located.

In addition, Google represents in its Supplemental Response to Staff Information Request Number Two, that, "Google Fiber will design, construct, and offer service over its planned network consistent with these nondiscrimination requirements." Staff has consulted with the relevant cities that are currently in negotiation for agreements with Google, and all cities indicated that they support Google's proposed language.

Staff believes that, once franchise agreements are finalized between any city where Google will deploy its network and the Company, sufficient restrictions will be in place to ensure that Google's project complies with the requirements of 308.677(2)(b). Staff had not identified any grounds to support a finding that Google will deny access because of the income level of residents in a local service area.

CONCLUSION:

Staff concludes from its review of the material provided with and through the application process that Google's project as described in its application is a qualified project under ORS 308.677(2) and Staff recommends the Commission approve the application.

PROPOSED COMMISSION MOTION:

Google's project is a qualified project and that Google's application for a qualified project determination be approved.



Oregon

Kate Brown, Governor

Public Utility Commission

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1/25/2016

Greetings,

The purpose of this letter is to inform you about and request your input in the Oregon Public Utility Commission's (OPUC) review of applications for qualified project determination pursuant to Senate Bill 611, codified in Chapter 23, Section 5, and as amended by Chapter 31, Section 7, Oregon Laws 2015. These laws pertain to a special tax exemption that may be provided to companies that build, maintain, and operate a "qualified project" in Oregon. Status as a qualified project relates to the ability to provide residential communication services with access to gigabit speeds and meeting other requirements. The OPUC is assigned the task of reviewing applications to determine if a project meets the requirements for a "qualified project" according to the law. The specific requirements for status as a qualified project are found in Section 5(2) as shown below:

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

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

(b) With respect to the communication services offered by the company using the infrastructure, the company does not deny access to the communication services to any group of residential customers because of the income level of the residential customers in the local service area in which the residential customers reside.

(Emphasis added). Additional application requirements are listed in OAR 860-200-0150. Staff is also directed to consult with certain cities in SB 611 5(4)(b)(B), which states, "The Commission shall consult with any city with which the company has entered into a franchise fee agreement to provide services to which the application relates."

On [DATE], [COMPANY] filed an application for qualified project determination under SB 611, and your city or county is among those that may be affected by the project. You can review the application by visiting <http://apps.puc.state.or.us/edockets/search.asp> and searching "UM [NUMBER]" in the "Go to Specific Docket" section of the page.

To facilitate a thorough review of the application, OPUC staff respectfully requests your help. Staff believes that individual cities and counties may have data or insights relating to qualified projects in or near their localities that OPUC staff may not be aware of, and encourages you to share any concerns or other pertinent information during this application review process. In particular, Staff requests that you consider whether residential income levels may have any impact on access to services.

You can get in touch with us at the contact information provided below. The OPUC must make a determination regarding each application on or before March 1, 2016; given the short time available to address this filing, your prompt attention to this matter by February 1 would be appreciated.

Sincerely,

Stephanie Yamada

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February 3, 2016

Greetings,

You recently received a letter from Staff of the Oregon Public Utility Commission (OPUC) requesting the input of your city or county in Staff's review of [COMPANY]'s application for qualified project determination. The letter was initially sent on January 25, 2016, and requested your response by February 1, 2016.

OPUC Staff sincerely thanks all cities, counties, and other organizations that have provided comments in response to our letter. Any cities that intend to provide further comments in response to the letter may continue to do so, and Staff will consider these comments as time allows. However, based on the responses that we have received, Staff acknowledges that many cities feel that they are unable to provide useful input relating to the company's application due to 1) the lack of publicly-available application information, and 2) the short timeframe available for providing input.

It is Staff's desire to provide a simpler means for cities to provide input regarding the company's current operations within their city. The short questionnaire below is intended to focus on the applicant's current operations within your city or county rather than the specific requirements of the proposed qualified project. Please reply to the questions below on or before February 10, 2016.

1. A) What services does the company currently provide in your city?

B) Please list the services for which franchise agreements currently exist with the applicant for the offering of communication to the public, including the provisioning of voice, video, text or other electronic form of information.
2. Does any ordinance or current franchise agreement between the city and the company contain provisions to restrict the company's ability to deny access to residential customers based on income levels?

3. Does the city currently have methods in place to receive comments and complaints from customers of the company? If yes, please provide the telephone number and/or email address to which customers may direct comments and complaints.
4. Is the city aware of any previous incidents in which the company denied access to residential customers based on income levels? If so, please describe the incident(s).
5. Going forward, does the city have any specific concerns regarding the company's ability to provide access to the company's services without regard to residential income levels?

Again, OPUC Staff thanks you for your assistance in this matter as we work to review applications for qualified project determination.

Sincerely,

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