

ORDER NO. 16 409

ENTERED OCT 25 2016

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 597

In the Matter of
Reporting Rules for Companies with a
Qualified Project Determination from the
Public Utility Commission.

ORDER

DISPOSITION: NEW RULES ADOPTED

I. INTRODUCTION

We opened this rulemaking to facilitate the reporting requirements set out in Senate Bill 611 (SB 611), passed by the 2015 Legislative Assembly and codified in ORS 308.677 to ORS 308.681. This bill enacted a property tax exemption for a company, subject to central assessment for property tax purposes, if the company invests in offering communication services, including Gigabit service,¹ to a majority of its residential broadband services customers through a “qualified project” as determined by the Commission.² The exemption continues so long as the company maintains and operates the qualified project.

This rulemaking addresses reporting requirements set forth in ORS 308.681. This provision requires that we report annually to the legislature the companies granted an exemption and their capital investment, whether the companies have met the requirements for service capacity and offering service to residential customers, who is served and how by the relevant communication infrastructure, and any other information we consider necessary for a thorough analysis of the exemption.

The rules we adopt in this order establish an annual reporting requirement for a company that has received a determination from the Commission that its project is a qualified project. The rules were developed through a joint effort among Staff and the stakeholders. We will use the information provided by the companies to produce our annual report to the legislature.

¹ At least, approximately one gigabit per second symmetrical services.

² ORS 308.677(2), (3).

II. BACKGROUND

On July 12, 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 August 2016 *Oregon Bulletin*, setting a hearing date of August 16, 2016. The notice established a comment due date of September 9, 2016. We accepted written comments through September 9, 2016.

We held a rulemaking hearing on August 16, 2016. At the hearing, Staff summarized the legislative requirements for the annual report and presented an overview of the informal process it followed to develop the proposed rules with considerable input from the stakeholders. Staff explained that it developed the proposed rules with the intent to gather and present meaningful information for the legislative report while recognizing concerns that sensitive market and customer data is held as confidential by the reporting companies. No other person in attendance at the hearing offered oral comments.

Although the proposed rules were the result of a collaborative effort, we received written comments from Comcast Corporation and Subsidiaries (Comcast), Google Fiber Oregon, LLC (Google Fiber), the League of Oregon Cities (League), and the Department of Revenue (DOR).

Comcast supports the proposed rules “as is.” Comcast urges that they reflect the good-faith efforts of Staff and stakeholders to arrive at a set of requirements that provide the Commission with the needed information and yet protect the reporting entities’ highly-sensitive and confidential information.

Google Fiber is willing to support the proposed rules, but questions whether they require companies to report more information than the Commission is required by law to include in the annual report. Google Fiber cautions that were we to require increased granularity in the rules regarding the actual services companies are providing to customers, it would need to reconsider its support. Google Fiber commends Staff for balancing the requirements of the statute and the issues raised by stakeholders in the workshops and concludes that the proposed rules will assist the Commission but not unduly interfere with the fair operation of a competitive market.

The League largely supports the proposed rules, but proposes several revisions that it believes would improve the usefulness of the information given to the legislature. These revisions seek to increase the specificity of the information provided by the companies.

Although it did not participate in the workshops leading up to the rulemaking, the DOR proposed several revisions, similar to the League’s revisions, seeking to increase the specificity of the information provided by the companies. The DOR emphasizes that we are required to report not

just items identified by the legislature, but also any other information we consider necessary for a thorough analysis of the exemption.

III. RESOLUTION

We find the proposed rules satisfy the general statutory requirements in ORS 308.681(2) and adopt them without modification. Staff reported at the hearing that the issues raised by participants were discussed over the course of four informal workshops and the resulting proposed rules reflect consensus to the degree achievable. Although new issues were raised at the close of the comment period, other stakeholders had no opportunity to respond to these new suggestions.

Comcast supports the proposed rules and Google Fiber states it is willing to support the proposed rules. Google Fiber expresses concern that the proposed rules require information beyond the statutory requirements but concedes it is willing to support the proposed rules because they adequately balance the requirement to provide information and the concern for protecting competitively-sensitive information.

The changes submitted by the League and the DOR would require more granular information from the companies for inclusion in our legislative report. These changes seek far more detailed information than we are required by law to include in our report and could alter the current balance in the proposed rules between providing information and protecting company data.

We find the proposed rules meet the letter of the law and provide useful information to the legislature. At this point in time, we are disinclined to make the changes recommended by the League and the DOR as the proposed rules reflect the consensus reached between Staff and participating companies over the course of the workshops.

IV. COMMENTS

Although we adopt the proposed rules without modification, for the reasons outlined above, in the following section we address and respond to specific written comments and recommendations offered by Google Fiber, the League, and the DOR.

A. Obligation to Report

Proposed OAR 860-200-0200 requires a company to submit an annual report if it received a qualified project determination from the Commission and it offered the qualified service the previous year.

The League comments that “offered” seems vague and suggests requiring instead that all companies that applied to the DOR for an exemption the previous year are subject to the reporting requirements.

We do not adopt the League's recommendation. ORS 308.677 instructs companies to submit an application to the Commission, with a copy to the DOR. The text of the statute contains no further requirement or procedure for companies with approved projects to then apply to the DOR for the exemption.

B. On-Site Review of Form 477 Data

Proposed OAR 860-200-0200(5) provides for Staff on-site review of a company's most recent Form 477 broadband subscription data (submitted to the Federal Communications Commission).

Google Fiber objects that Form 477 contains highly-confidential information that is not needed to prepare the legislative report.

ORS 308.681(2)(b)(B) requires us to report whether a company has met the requirement for offering service to residential customers. Staff's confidential review is necessary to independently confirm the percentage of the company's residential broadband customers in Oregon with access to Gigabit service. The proposed rule includes the safeguard that Staff will work with the company to protect this data from disclosure and specifies that the data will not be included in the public report.

C. Amount of Capital Investment

Proposed OAR 860-200-0250(2) requires that companies report the amount of capital investment made the previous year in Oregon in newly constructed or installed real or tangible personal property constituting communication infrastructure that enables the company to offer the qualified service.

The DOR requests that costs relating exclusively to the qualified project be stated separately from costs for property shared with non-qualifying services like video, phone, business internet, and lower-tier broadband services. This will help the legislature, it reasons, more effectively analyze whether the exemption has succeeded.

The proposed rule is already more narrowly-focused than our statutory requirement. ORS 308.681(2)(b)(A) broadly requires that we report a company's new capital investment in Oregon constituting communication infrastructure. The proposed rule asks companies to report their costs relating exclusively to qualified service.³ The DOR's reference to non-qualifying services and their costs was offered at the close of the comment period without the benefit of response from the reporting companies, and it is not clear if or how further distinguishing Gigabit-only costs provides more useful information. We will not override the proposed rule.

³ A review of the definitions of qualified project and qualified service relative to network investment are identical.

ORDER NO.

The League questions whether these quartiles are too large to be useful to the legislature. They suggest using a decile percentage basis or requiring a percentage report indicating if the company met the majority requirement.

ORS 308.681(2)(b)(B) requires us to report to the legislature whether a company has met the requirement for offering service to residential customers. The statutory requirement is offering Gigabit service to “a majority” of the residential customers of the company’s broadband services.⁶ The proposed rule already seeks more information than required by statute—asking companies to indicate an approximate percentage. The quartiles provide useful information without compromising market share. Further, Staff confirms the actual percentage through its on-site review of each company’s Form 477 data.

F. Broadband Customers’ Subscription Speed

Both proposed OAR 860-200-0250(6) and (7) use the same download speed tiers as used in section (4) of the rule, which are as follows:

Up to and including 100 Mbps
Greater than 100 Mbps up to and including 500 Mbps
Greater than 500 Mbps

OAR 860-200-0250(6) requires that companies report the percentage of their Oregon residential broadband services customers with access to the company’s qualified service who subscribe to broadband service at these speed levels.

As a comparison, OAR 860-200-0250(7) broadens the scope of inquiry by requiring that companies report the percentage of their Oregon residential broadband services customers who subscribe to broadband service at these speed levels regardless of their access to Gigabit service.

Google Fiber objects that this requires more information than required by the statute. It explains that this information relates to levels of success in the market and customer acceptance, which is not germane to capacity to offer service.

The League suggests revising the tiers to include a tier for Gigabit speed, contending that the number of subscribers to a company’s Gigabit service each year is important information in evaluating the exemption. Gigabit speed, it reasons, is the focus of the new exemption so data on subscribers to that level of service is crucial. The DOR similarly suggests including a tier for Gigabit speed, noting that 500 Mbps is only half the speed required for the exemption. The clear purpose of SB 611, the DOR comments, was to incent development of Gigabit service. Accordingly, the DOR reasons, separating out subscribers of Gigabit service will help the legislature determine whether SB 611 has incentivized the higher speeds as intended.

⁶ ORS 308.677(2)(a).

D. Broadband Subscribership Map

Proposed OAR 860-200-0250(4) requires that companies provide a map depicting subscribership by the following download speed tiers for each census block:

Up to and including 100 Megabits per second (Mbps)
Greater than 100 Mbps up to and including 500 Mbps
Greater than 500 Mbps

Google Fiber objects that this detailed information has the potential to reveal a company's level of success in the market as well as consumer acceptance of different types of service offerings. This information, it explains, could affect competition by influencing the behavior of other market participants. Google Fiber contends that this information is not required for the Commission's report because it is not relevant to the criteria for granting or evaluating the exemption, which relate to the company's capacity to provide a certain level of service.

The DOR suggests including an additional tier showing subscribership for Gigabit speed, reasoning that this will help the legislature determine whether SB 611 has incited development of Gigabit service.

Consistent with our rulings in prior SB 611 proceedings, we look to the intent of the statute,⁴ and find the intent of SB 611 is to incent company investment in Gigabit networks and not the public's purchase of Gigabit service. Our mandate is to report "[w]ho is served by the communication infrastructure and how they are served."⁵ Staff and the stakeholders devised these speed tiers as a way to report how the public uses the infrastructure year after year, without requiring companies to reveal competitive data not specially required by statute.

E. Broadband Customers with Access to Gigabit Service

Proposed OAR 860-200-0250(5) requires that companies report the quartile containing the percentage of the company's residential broadband services customers in Oregon that have access to the company's Gigabit service. The quartiles are as follows:

0 to 25 percent
26 to 50 percent
51 to 75 percent
Greater than 75 percent

⁴ See Docket No. AR 592 (adopting temporary rules for qualified project determination applications); Docket No. AR 594 (adopting final rules for qualified project determination applications); Docket Nos. UM 1760, UM 1761, and UM 1762 (reviewing qualified project determination applications of Comcast, Frontier Communications Corp., and Google Fiber).

⁵ ORS 308.681(2)(b)(C).

The DOR also suggests that companies report these percentages to two decimal places (0.01 percent) rather than rounding up to a whole percent. The number of Gigabit subscribers could be far less than one percent, the DOR explains, thus rounding more precisely would distinguish whether a company is reporting tens or thousands of Gigabit subscribers.

The League and the DOR additionally suggest requiring companies to report the actual number of Gigabit subscribers. With this information, the DOR notes, the legislature could calculate how many dollars of taxes have been forgone per actual subscriber of Gigabit service.

We find no requirement in SB 611 for a minimum number of Gigabit subscribers. Again, we note that Staff and the stakeholders constructed these speed tiers as a way to report how the public uses the infrastructure year after year, without requiring companies to reveal competitive data not specially required by statute. We are not prepared at this point in our rulemaking process to interpret the legislative mandate as requiring the actual number of subscribers as suggested by the League and the DOR. To avoid confusion in interpreting these results we ask Staff to make clear in its report that these numbers are rounded up to a whole percent.

G. Product Description and Customer Service Agreement Form

Proposed OAR 860-200-0250(8) requires that companies provide a product description and a copy of the company's customer service agreement form for each qualified service offering.

The League urges that knowing all the costs of subscription to a company's Gigabit service is important for the legislature and suggests requiring companies to include a rate sheet that includes the monthly rate along with installation costs, cancellation costs, and disconnection fees. The League reasons that service cannot be truly "accessed" if fees are cost-prohibitive.

Based on the legislative history of SB 611, any contemplated cost or price criteria were not included by the legislature in the final version of the bill. As enacted, the criteria for a qualified project determination and subsequent reporting relate to a company's capacity to offer a certain level of service, not the price it charges.

V. ORDER

IT IS ORDERED that:

1. The new rules OAR 860-200-0200 through 860-200-0250 are adopted as set forth in Appendix A to this order.

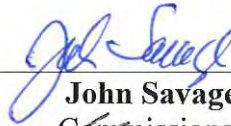
2. The new rules will be effective upon filing with the Secretary of State.

Made, entered, and effective OCT 25 2016.



Lisa Hardie
Chair





John Savage
Commissioner



Stephen M. Bloom
Commissioner

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

860-200-0200Report to Commission

(1) A company that has received a determination under ORS 308.677(4) that its project is a qualified project must submit a report to the Commission on or before November 1 each year. The information reported may be included in a report prepared by the Commission for the Legislative Assembly.

(2) A company submitting a report per section (1) must include a completed efilng Report Cover Sheet form found on the Commission website at www.puc.state.or.us/Pages/efiling/Reports.aspx.

(3) A company submitting a report per section (1) that offered the qualified service in Oregon during the preceding calendar year must report the information required to be reported in OAR 860-200-0250.

(4) A company submitting a report per section (1) that did not offer the qualified service in Oregon during the preceding calendar year shall submit a declaration of a company representative that the company did not offer the qualified service during the preceding calendar year.

(5) Each company submitting a report under section (3) will arrange for an on-site review by Staff prior to December 31 of the current reporting year of the company's most recent Form 477 Oregon-specific broadband subscription data submitted to the Federal Communications Commission, in an electronic format acceptable to Staff, at a location convenient to Staff. Form 477 subscription data reviewed by Staff will not be included in the Commission's report to the Legislative Assembly. The company and Staff will coordinate on measures to protect Form 477 subscription data from disclosure as a result of Staff's review.

Stat. Auth.: ORS 308.681, 756.040, 756.060

Stats. Implemented: ORS 308.681

Hist.: NEW

860-200-0250Report Requirements

A company submitting a report required under OAR 860-200-0200(3) must include all of the following in the report. A company must report information that is accurate and complete as of June 30 of the year of submission unless otherwise stated in these rules.

(1) A certification executed by an authorized representative of the company in which the representative affirms that the company has met the requirements for service capacity and offering service to residential customers specified in ORS 308.677(2). The representative must further affirm that all of the information in the company's report is accurate and complete. The representative's certification must be a sworn statement under ORS 162.055 attesting to the truth of the certification.

(2) The amount of capital investment made in the previous calendar year by the company in Oregon in newly constructed or installed real or tangible personal property constituting communication infrastructure that enables the company to offer the qualified service.

(3) A general description of how the company is providing the qualified service.

(4) A map, including county and city designations, depicting the area where the company offers qualified service and identifying, using census blocks, where residential customers of the company subscribe to broadband services indicating the highest of the following download speed tiers for each census block in which it has customers:

- (a) Up to and including 100 Megabits per second (Mbps);
- (b) Greater than 100 Mbps up to and including 500 Mbps; and
- (c) Greater than 500 Mbps.

(d) The company may submit information regarding speed tiers in addition to those shown above. As an example, a company may choose to also submit information regarding download speed of 1 gigabit per second (Gbps) or greater.

(5) The quartile containing the percentage of the company's residential broadband services customers in Oregon that have access to the company's at least, approximately one gigabit per second symmetrical service.

- (a) Quartile 1 – 0 percent to 25 percent;
- (b) Quartile 2 – 26 percent to 50 percent;
- (c) Quartile 3 - 51 percent to 75 percent;
- (d) Quartile 4 – greater than 75 percent.

(6) The percentage, rounded up to a whole percent, of the company's residential broadband services customers with access to the company's qualified service that subscribe to broadband service in the following download speed tiers:

- (a) Up to and including 100 Mbps;
- (b) Greater than 100 Mbps up to and including 500 Mbps; and
- (c) Greater than 500 Mbps.

(d) The company may submit information regarding speed tiers in addition to those shown above. As an example, a company may choose to also submit information regarding download speed of 1 gigabit per second (Gbps) or greater.

(7) The percentage, rounded up to a whole percent, of the company's residential broadband services customers in Oregon that subscribe to broadband service in the following download speed tiers:

- (a) Up to and including 100 Mbps;
- (b) Greater than 100 Mbps up to and including 500 Mbps; and
- (c) Greater than 500 Mbps.

(d) The company may also submit information regarding speed tiers in addition to those shown above. As an example, a company may choose to also submit information regarding download speed of 1 gigabit per second (Gbps) or greater.

(8) A product description and a copy of the company's customer service agreement form for each qualified service offering.

(9) The network speed test methods, data, and results from a sample of tests conducted within six months of the date of the report, using industry-standard testing methodology, for the company's broadband service that provides at least, approximately one gigabit per second symmetrical service.

(10) In the previous calendar year, the percentage of households to whom the company offers its qualified service who properly placed an order requesting the equivalent of at least, approximately one gigabit per second symmetrical service and were denied that service by the company.

(11) In the previous calendar year, the number of complaints the company received that the company had denied access to its qualified service to a group of residential customers because of the income level of the residential customers in the local service area in which the residential customers reside, and a description of how each complaint was resolved.

(12) Any additional information the company wishes to report regarding benefits of any tax exemption granted to the company under ORS 308.677.

Stat. Auth.: ORS 308.681, 756.040, 756.060

Stats. Implemented: ORS 308.681

Hist.: NEW