

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 618 and AR 619

In the Matters of

Rulemaking for Information Disclosures by
Broadband Internet Access Service Providers
Contracting with Public Bodies (AR 618),

And

Rulemaking Regarding Procedures for
Commission Determinations Set forth in
HB 4155, Oregon Laws 2018, Chapter 88
(AR 619).

ORDER

DISPOSITION: STAFF'S RECOMMENDATION ADOPTED

This order memorializes our decision, made and effective at our September 11, 2018 Regular Public Meeting, to adopt Staff's recommendation in this matter. The Staff Report with the recommendation is attached as Appendix A.

Dated this 11 day of September, 2018, at Salem, Oregon.

COMMISSIONER DECKER WAS
UNAVAILABLE FOR SIGNATURE

Megan W. Decker
Chair



A handwritten signature in blue ink, appearing to read "S. Bloom".

Stephen M. Bloom
Commissioner

A handwritten signature in blue ink, appearing to read "Letha Tawney".

Letha Tawney
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.

ORDER NO. **18 338**

ITEM NO. RM 1 and 2

**PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: September 11, 2018**

REGULAR X CONSENT EFFECTIVE DATE NA

DATE: August 20, 2018

TO: Public Utility Commission

FROM: Stephen Hayes 

THROUGH: Jason Eisdorfer, Bryan Conway, Bruce Hellebuyck 

SUBJECT: OREGON PUBLIC UTILITY COMMISSION STAFF:
(Docket No. AR 618 and Docket No. AR 619) Request to initiate formal
rulemaking and adopt proposed rules related to Oregon Laws 2018,
Chapter 88 (HB 4155).

STAFF RECOMMENDATION:

Staff recommends that the Commission consolidate Docket Nos. AR 618 and 619 and approve issuance of a notice of proposed rulemaking on broadband Internet access service disclosures and Commission determinations under Oregon Laws 2018, Chapter 88, as set forth in Attachment 1.

DISCUSSION:

Issue

Whether the Commission should consolidate Docket Nos. AR 618 and 619 and approve issuance of a notice of proposed rulemaking on broadband Internet access service disclosures and Commission determinations under Oregon Laws 2018, Chapter 88, as set forth in Attachment 1.

Applicable Rule or Law

Newly enacted legislation prohibits public bodies in Oregon from contracting with a broadband Internet access service provider unless the provider abides by certain "net

Docket Nos. AR 618 and 619
August 30, 2018
Page 2

neutrality” practices.¹ The law takes effect on January 1, 2019, though it applies only to contracts entered into, renewed, or extended on or after that date.²

Specifically, public bodies may not contract with broadband Internet access (BIAS) providers that engage in paid prioritization; block lawful content, applications or services or nonharmful devices; discriminate against or favor certain Internet content, applications or services or devices by impairing or degrading lawful traffic; or unreasonably interfere with or disadvantage an end user’s ability to select, access and use, or an edge provider’s ability to make available, lawful Internet content, applications, services, or devices.³ The statute allows a public body to contract with a provider notwithstanding these prohibitions if one of five exceptions apply.⁴ Three of these five exceptions involve determinations to be made by the Commission; the other two do not.

The statute does not impose utility-style rate or service regulation on BIAS providers; require the Commission to develop a list of pre-approved BIAS providers; or require the Commission to regulate the public procurement process for BIAS in Oregon. But the statute does assign the below specific new responsibilities to the Commission.

Specifying Manner and Form of Required Information Disclosures. First, section 1(5)(a) of the statute requires any BIAS provider “engaged in the provision of broadband Internet access service to a public body” to “publicly disclose information regarding the provider’s network management practices and performance characteristics and the commercial terms of the provider’s broadband Internet access service sufficient for end users to verify that the service is provided in compliance with” the above restrictions and the applicable exceptions. Section 1(5)(b) requires the Commission to specify by rule the manner and form in which these disclosures are made.

Making Determinations. The statute also designates a role for the Commission to make specific determinations under various parts of the statute. Those determinations are:

1. that a service is providing a “functional equivalent” of BIAS (and therefore is providing BIAS) under Oregon Laws 2018, chapter 88, section 1(1)(a)(A)(ii);
2. that a device is “nonharmful” to BIAS under Oregon Laws 2018, chapter 88, section 1(1)(h);
3. that certain paid prioritization provides “significant public interest benefits and does not harm the open nature” of the service under the exception described in Oregon Laws 2018, chapter 88, section 1(4)(c);

¹ Oregon Laws 2018, chapter 88, section 1.

² Oregon Laws 2018, chapter 88, sections 2, 3(1).

³ Oregon Laws 2018, chapter 88, section 1(3).

⁴ Oregon Laws 2018, chapter 88, section 1(4).

Docket Nos. AR 618 and 619
August 30, 2018
Page 3

4. that certain activities constitute "reasonable network management" under the exception described in Oregon Laws 2018, chapter 88, section 1(4)(d); and
5. that allowing a public body to contract with a provider that has engaged in activity described in section 1(3) of the statute after its effective date, but that certifies it has ceased doing so, provides "significant public interest benefits" under the exception described in Oregon Laws 2018, chapter 88, section 1(4)(e)(B).

Other than stating that a nonharmful device determination is to be made "by rule,"⁵ the statute does not specify how the Commission is to make each of these types of determinations. The Commission is authorized under the statute to adopt rules and take any action before January 1, 2019, that is necessary to enable it to exercise all of the powers and functions conferred on it by section 1 of the statute.⁶

Analysis

Background

At its May 29, 2018 public meeting, the Commission opened a rulemaking docket (Docket No. AR 618) to specify the manner and form of the information disclosures that must be made by BIAS providers engaged in the provision of service to public bodies.⁷

At its June 19, 2018 public meeting, the Commission opened a rulemaking docket (Docket No. AR 619) to identify the processes and procedures the Commission will use to make the determinations assigned to it under the statute.⁸ Within the scope of Docket No. AR 619 are: the types of proceedings in which the Commission will use; pleading requirements; timelines; discovery procedures; and identifying the key information relevant to those proceedings. Outside the scope of that docket are any substantive determinations themselves.

Staff held three workshops to solicit stakeholder input on rule development:

- A workshop on July 9, 2018, focused on assessing the overlap of the existing federal disclosure rules for BIAS providers⁹ with the new Oregon statute to inform Staff's recommendation regarding whether and how much the rules developed in Docket No. AR 618 need to depart from existing federal disclosure obligations.
- A workshop on July 30, 2018, focused on soliciting and discussing stakeholder feedback on staff's draft disclosure rules in Docket No. AR 618.

⁵ Oregon Laws 2018, chapter 88, section 1(1)(h).

⁶ Oregon Laws 2018, chapter 88, section 3(2).

⁷ Order No. 18-197 (May 29, 2018).

⁸ Order No. 18-231 (June 19, 2018).

⁹ See 47 C.F.R. § 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>.

Docket Nos. AR 618 and 619
August 30, 2018
Page 4

- A workshop on August 15, 2018, focused on soliciting and discussing stakeholder feedback on staff's draft procedural rules in Docket No. AR 619 and on soliciting final input on staff's draft disclosure rules in Docket No. AR 618. This workshop also included general discussion of the Commission's Division 1 rules and a stakeholder-driven discussion of how public procurement will work.

Workshop participants included industry associations; wireless and terrestrial BIAS providers; consumer advocacy groups; and state procurement staff. Staff acknowledges and appreciates the investment of time made by and constructive input offered by all participants.

Summary and Discussion of Proposed Draft Rules

Staff drafted the attached proposed draft rules with this stakeholder input in mind. The proposed draft rules are consistent with legislative intent and also represent the least intrusive approach to the Commission's obligations under the statute. Staff recommends that the Commission consolidate Docket Nos. AR 618 and 619 and issue notice of the attached combined set of proposed rules. Each rule is summarized below, along with discussion of issues raised and addressed as a result of the workshops.

Applicability and Waiver (OAR 860-250-0005)

This rule explains to whom the rules apply. It also states the rules' effective date and, consistent with other Commission rules, provides for some ability to waive the rules.

Definitions (OAR 860-250-0010)

This section defines terms for the purposes of these rules. These definitions mirror the definitions set forth in the statute.

Existing Consumer Protection Obligations (OAR 860-250-0015)

This rule makes clear that nothing in the proposed rules changes existing 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). This provision is similar to an existing Commission rule that applies in another context.¹⁰

At least one workshop participant raised concerns about referring to CPNI rules here on the basis that those rules do not apply to BIAS providers. To address this concern, Staff proposes language that also refers more generally to other consumer protection laws. Additionally, Staff notes that the rule does not impose any additional obligations beyond those that already apply under existing law. Any given provider (or other

¹⁰ See OAR 860-032-0510(1) (explaining that the state CPNI rule does not relieve telecommunications carriers of requirements imposed by certain federal laws and rules).

Docket Nos. AR 618 and 619
August 30, 2018
Page 5

participant) is in the best position to determine its existing obligations. This includes providers who may be subject to CPNI rules by virtue of other services they provide.

Required Disclosures by Covered BIAS Providers (OAR 860-250-0020)

This rule fulfills the Commission's obligation under Oregon Laws 2018, Chapter 88, Section 1(5)(b) 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. BIAS providers must already disclose network management practices, performance characteristics, and commercial terms of their broadband Internet access service at a level of detail that Staff believes tracks and satisfies the state statute.¹¹ No workshop participants objected to taking this general approach to this rule.

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

Some workshop participants questioned whether the Commission has authority to prescribe the contents of disclosures, under the theory that the "form and manner" of disclosures cannot be understood to include the contents of the disclosures. Workshop participants also questioned the relevance of certain specific federal disclosures to the state statute.¹² As the proposed rules do not depart from the federal disclosure obligations, the answers to these questions will not change what providers disclose. Staff believes it would be most efficient to address such questions only if it becomes necessary to do so (e.g., in the event of a change in federal disclosure requirements).

General Notes on Rules for Commission Determinations (OAR 860-250-0030 to -0050)

Rules for the five types of Commission determinations identified in the statute and listed above are described in each of these rules. Each rule has three subsections: the first describes the procedural rules that will govern that type of proceeding; the second describes the required contents of an initiating pleading, which Staff proposes to call a petition; and the third describes the required contents of responses.

Consistent with ORS 759.518, the rules provide for contested case procedures to be used for proceedings to make each of these five types of determinations. Staff views

¹¹ For example, the FCC's Substantive Disclosure Submission instructions for BIAS providers require disclosure of the following under the heading of "network management practices": blocking, throttling, affiliated prioritization, paid prioritization, congestion management, application-specific behavior, device attachment rules, and security practices. Federal Communications Commission, *Instructions for Internet Service Providers*, located at <https://www.fcc.gov/disclosure-instructions-isps> (updated June 13, 2018).

¹² For example, the federal rules require providers to disclose prices, fees, and redress options for resolving complaints and questions from consumers, entrepreneurs, and other small businesses.

Docket Nos. AR 618 and 619
August 30, 2018
Page 6

this approach as preferable as a matter of policy because the determinations will be bound to the specific facts of a case and because this approach may avoid unnecessary dockets and determinations in the absence of actual disputes. The rules provide, though, for a petition for rulemaking to be used to initiate a proceeding to determine that a device is nonharmful because the statute states such a determination is to be made "by rule."¹³

In workshops, some stakeholders raised the question of whether a non-provider petitioner would have the information needed to inform the Commission's consideration of a petition. One workshop participant suggested that petitions are most likely to be filed by parties who have a willing contracting partner, which may aid in fostering the availability of information. To the extent that does not turn out to be the case, the proposed rules require that either petitions or responses provide the key information. Beyond that, in a contested case, discovery would provide the opportunity to acquire necessary information. As Staff is an original party to contested case proceedings,¹⁴ Staff would use discovery procedures to obtain information necessary to make a recommendation to the Commission, like Staff does in any other contested case.

Functionally Equivalent Service Determinations (OAR 860-250-0030)

The Commission's task in this type of proceeding is to determine whether a service is functionally equivalent to a "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."¹⁵ This helps make the statute technology-neutral and prevents circumvention of the statute by characterization of BIAS-like services as something else.

The rule specifies that contested case rules will govern these proceedings, which means that, if needed, the Commission could initiate such a proceeding on its own.¹⁶ The rule requires a petition or responsive pleading to describe the service and why it is or is not a functional equivalent, and prompts for explanations Staff views as relevant.

Nonharmful Device Determinations (OAR 860-250-0035)

The Commission's task in this type of proceeding is to determine by rule whether a device is nonharmful to broadband Internet access services.¹⁷ This determination helps identify whether a BIAS provider's blocking, impairment, or degradation of traffic to certain devices should disqualify the provider from new public contracts in Oregon.

¹³ Oregon Laws 2018, chapter 88, section 1(1)(h).

¹⁴ OAR 860-001-0300(3).

¹⁵ Oregon Laws 2018, Chapter 88, Section 1(1)(a)(A)(i)-(ii).

¹⁶ See ORS 756.500(1) (authorizing Commission to initiate a complaint proceeding on its own initiative).

¹⁷ Oregon Laws 2018, Chapter 88, Section 1(1)(h).

Docket Nos. AR 618 and 619
August 30, 2018
Page 7

The rule specifies that either contested case rules or the Oregon Administrative Procedures Act will govern these proceedings, depending on how they are initiated, consistent with the statutory directive to make this determination "by rule." The rule also requires description of the device, how it works, and why it is or is not harmful.

Excepted Paid Prioritization Determinations (OAR 860-250-0040)

The Commission's task in this type of proceeding is to determine whether certain paid prioritization provides significant public interest benefits and does not harm the open nature of the provided service.¹⁸

This is relevant to the issue of whether one of the five exceptions noted above applies. As this exception involves a determination by the Commission, the rule requires information regarding the applicability of the two exceptions that do not require Commission action. If they apply, this rule requires an explanation of why this determination is sought.

Reasonable Network Management Determinations (OAR 860-250-0045)

The Commission's task in this type of proceeding is to determine whether specific practices of a BIAS provider that, under section 1(3)(b) to (d) of the statute, might make a public body unable to contract with that provider, instead fall under the exception of reasonable network management.¹⁹ To fall within the statutory exception for reasonable network management exception, the Commission must determine an activity (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.

Again, as this exception involves a determination by the Commission, the rule requires information regarding the applicability of the two exceptions that do not require Commission action. If they apply, this rule requires an explanation of why this determination is sought.

Workshop participants raised an additional issue relating to reasonable network management determinations that Staff believes requires further consideration and follow up at a future public meeting. That issue is discussed in more detail below.

Determinations Regarding Newly Certified Providers (OAR 860-250-0050)

The Commission's task in this type of proceeding is to determine whether it provides a significant public interest benefit to allow a public body to contract with a BIAS provider

¹⁸ Oregon Laws 2018, Chapter 88, Section 1(4)(c).

¹⁹ Oregon Laws 2018, Chapter 88, Section 1(4)(d).

Docket Nos. AR 618 and 619
August 30, 2018
Page 8

that, after January 1, 2019, engages in practices that would prevent a public body from contracting with it and subsequently certifies it has ceased doing so.²⁰ This provides the path back to contracting eligibility for a BIAS provider who engages in practices covered by the statute after its effective date. This path would begin with a certification by a BIAS provider that they have ceased engaging in the prohibited activities and ends with a Commission determination. Again, this rule requires an explanation of why this determination is sought if an exception that does not require Commission action applies.

Other Issues Discussed in Workshops

The following issues were also discussed or raised by participants during workshops:

- *Validity of the Statute.* During the workshops, some participants expressed the view that the statute is preempted by an order of the Federal Communications Commission (FCC) or is otherwise inconsistent with federal law. Those questions are not before this Commission, which is obligated to perform its role under the statute. Staff also notes that the Attorney General testified in support of its legality. Staff believes the proposed rules are appropriate, given the Commission's responsibilities under the statute, and that they do not exacerbate any of the overall objections raised by workshop participants about the statute.
- *Declaratory Rulings.* Staff considered whether to promote use of the declaratory ruling process or to emphasize contested cases. Consistent with the factually intensive nature of the determinations under this statute, the proposed rules anticipate contested cases in most instances. But they do not prohibit a petitioner from seeking a declaratory ruling under ORS 756.450. Staff takes no position now on whether doing so would be advisable in any particular instance and notes that associations or other groups of providers are in the best position to assess whether they could utilize such a process efficiently and effectively.
- *Timelines.* Some workshop participants raised concerns about the potential interaction of procurement timelines and the time it would take to complete a contested case. Unlike in some statutes, the legislature did not require that the Commission complete its determinations on a particular timeline. Additionally, Staff notes that these rules will only have a practical effect on new or renewed contracts, which will likely mean some lag time exists between the January 1, 2019 rule effective date and specific contracting opportunities for which determinations may be necessary. Beyond that, given the nascent experience of the Commission with these proceedings, it would not be advisable to incorporate faster or more specific timelines for cases under these rules. Instead, Staff proposes rules that require pleadings to contain information that will aid the ALJ and/or Commission in setting appropriate procedural schedules,

²⁰ Oregon Laws 2018, Chapter 88, Section 1(4)(e).

Docket Nos. AR 618 and 619
August 30, 2018
Page 9

such as information about RFPs to which a petition relates and whether other statutory exceptions apply. Finally, Staff notes that providers do not necessarily need to wait until an RFP is underway to shape their practices or initiate proceedings.

- *How the Public Contracting Process for BIAS Will Work.* Workshop participants were, more generally, concerned about how the contracting process will work. Public procurement staff expressed concern about how to identify appropriate contracting partners. One concern was that disclosures under Section 1(5) of the statute may not be sufficient, without further information or investigation, for a public body to identify an appropriate contracting partner. As a general matter, the processes by which public bodies enter into contracts are beyond the scope of responsibility assigned to the Commission by this statute. Beyond that, discussions among stakeholders at the workshops raised the possibility that contract language or language in other procurement documents would need to reflect the necessary representations, warranties, and requirements. Staff does not take a position on how public bodies manage the public contracting process.

Additional Recommended Process on Reasonable Network Management

Some workshop participants suggested that the Commission adopt a presumption that disclosed practices are presumptively reasonable network management.

Staff would like to further consider and analyze this issue, rather than include it in this notice of proposed rulemaking. First, such a rule exceeds the scope of the rulemaking opened in Docket No. AR 619 because it involves making a substantive conclusion that a large variety of practices meet the standard outlined in the statute. Such conclusions are beyond the intended and noticed scope of Docket No. AR 619. Second, additional time is necessary for Staff to adequately assess the scope of practices such an approach might cover. The existing timelines for Docket Nos. AR 618 and 619 do not permit this consideration, but there is no reason to hold off on adopting an initial set of procedural and disclosure rules as anticipated in these two dockets. Staff will consider convening an additional discussion involving those on the service lists for Docket Nos. AR 618 and 619 to aid this consideration and analysis.

Staff proposes to report back to the Commission on this issue at a public meeting before the end of November 2018. This update may take the form of an informational presentation or a recommendation to act in some way on this specific issue.

Conclusion

Staff concludes that the proposed rules adequately specify the manner and form of BIAS disclosures and identify the processes and procedures to be used in Commission

Docket Nos. AR 618 and 619
August 30, 2018
Page 10

determinations under Oregon Laws 2018, Chapter 88, while mitigating some concerns expressed by industry and procurement practitioners within the scope of the responsibilities assigned to the Commission under the statute. Staff further concludes that for the purposes of issuing a notice of proposed rulemaking and receiving comment, Docket Nos. AR 618 and 619 should be consolidated. Finally, Staff proposes to return to a public meeting within the next two months with a report or recommendation regarding the potential adoption of a presumption that providers' practices meet the standard of reasonable network management.

PROPOSED COMMISSION MOTION:

Consolidate Docket Nos. AR 618 and 619, and issue a notice of proposed rulemaking on broadband Internet access service disclosures and Commission determinations under Oregon Laws 2018, Chapter 88, as set forth in Attachment 1.

AR618.619.Request.For.NOR

Docket AR 618 & 619
Proposed Rules
860-250-0005

Attachment 1

Page 1

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.
- (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.

860-250-0010

Definitions

For the purposes of Division 250:

- 1) "Broadband Internet access service" or "BIAS" has the same meaning as defined in Oregon Laws 2018, Chapter 88, Section 1(1)(a).
- 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).
- 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).
- 4) "End user" has the same meaning as defined in Oregon Laws 2018, Chapter 88, Section 1(1)(e).
- 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)(i).
- 6) "Paid prioritization" has the same meaning as defined in Oregon Laws 2018, Chapter 88, Section 1(1)(i).
- 7) "Public body" means a public body, as defined in ORS 174.109, in the State of Oregon.

860-250-0015

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, §64.2001 through §64.2011; 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.

Proposed Rules

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. § 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).
- (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.

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.
- (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 service at issue.
 - (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:
 - (i) 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);
 - (ii) a description of or examples of how the service at issue is marketed to customers, including available marketing materials;
 - (iii) a description of or examples of how the service at issue is described to or by other third parties, such as standards bodies; and
 - (iv) a description or copy of an example customer service agreement for the service at issue.
 - (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

Proposed Rules

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.

(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.

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; or

(b) the Oregon Administrative Procedures Act and the generally applicable filing, rulemaking, and confidentiality procedures contained in OAR chapter 860, division 001.

(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 860-001-0250. Either type of filing must also include the following additional information to the extent relevant information is available to the petitioning party:

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

(i) The name, manufacturer, and distributor of the device;

(ii) The purpose of the device (e.g., personal communication, medical monitoring);

(iii) 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

(iv) 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.

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.

Docket AR 618 & 619
Proposed Rules
860-250-0045

Attachment 1

Page 5

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.

(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:

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

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

(iii) 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.

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

Proposed Rules

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:

(i) 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;

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

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

(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.

(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.

(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.