

ITEM NO. RM1


PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: January 15, 2019

REGULAR CONSENT EFFECTIVE DATE _____ NA _____

DATE: January 3, 2019

TO: Public Utility Commission

FROM: Stephen Hayes 

THROUGH: Jason Eisdorfer, Bryan Conway, and Bruce Hellebuyck 

SUBJECT: OREGON PUBLIC UTILITY COMMISSION STAFF: (Docket No. AR 618)
Staff update regarding reasonable network management determinations
under Oregon Laws 2018, Chapter 88, Section 1(4)(d) (HB 4155).

STAFF RECOMMENDATION:

Staff recommends that the Commission take no further action at this time and instead consider whether to adopt additional substantive standards or a presumption regarding reasonable network management practices for broadband Internet access service (BIAS) providers, if at all, in the context of proceedings regarding specific practices.

DISCUSSION:

Issue

Whether the Commission should consider adopting a presumption that network management practices disclosed by BIAS providers are reasonable under Oregon Laws 2018, Chapter 88, Section 1(4)(d), or other substantive standards to govern reasonable network management determinations, and if so, what process the Commission should use to do so.

Applicable Rule or Law

State legislation enacted in 2018 (HB 4155) prohibits Oregon public bodies from contracting with a BIAS provider unless the provider abides by certain "net neutrality"

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

Several statutory exceptions permit public bodies to contract with a provider that might not otherwise qualify.³ One of these exceptions, the “reasonable network management” exception, permits a public body to contract with a BIAS provider that engages in certain specified activities if the Commission determines that the provider’s engagement in that activity qualifies as reasonable network management. The specified activities that might qualify as reasonable network management are: (1) blocking of lawful content, applications or services or non-harmful devices; (2) impairment or degradation of lawful Internet traffic for the purpose of discriminating against or favoring certain Internet content, applications or services or the use of non-harmful devices; and (3) unreasonable interference with or unreasonable disadvantaging of an end user’s ability to select, access and use the broadband Internet access service or lawful Internet content, applications or services or devices of the end user’s choice.⁴

A three-part standard set forth in the statute governs whether an activity is reasonable network management. An activity qualifies under that standard if it: (1) has a technical network management justification; (2) does not include other business practices; and (3) 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. Oregon Laws 2018, Chapter 88, Section 1(4)(d)(A)-(C).

The Commission is authorized under the new 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.⁵ Additionally, under ORS 756.060, the Commission may adopt reasonable and proper rules relative to all statutes administered by the Commission.

Analysis

Background

The Commission recently decided to adopt rules setting forth the procedures and pleading requirements to be used in making a reasonable network management

¹ Oregon Laws 2018, chapter 88.

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

³ Oregon Laws 2018, chapter 88, section 1(4).

⁴ Oregon Laws 2018, chapter 88, section 1(3)(b) through (d).

⁵ Oregon Laws 2018, chapter 88, section 3(2).

determination, as well as other determinations under the new statute.⁶ Any substantive determinations themselves were outside the scope of that rulemaking.⁷

The Commission approved Staff's recommendation to issue a notice of proposed rulemaking in a consolidated Docket No. AR 618 at its September 11, 2018 public meeting.⁸ The Staff report presented at that meeting also indicated Staff would return to the Commission with an update after assessing a stakeholder request, made during informal workshops, to recommend that the Commission adopt a presumption that any disclosed network management practices are reasonable under Section 1(4)(d) of the new statute. Such a presumption was not included in the proposed rules at that time.

During the comment period in Docket No. AR 618, CenturyLink proposed the addition of a rule that would have the Commission adopt a broader presumption than was discussed during the workshops. CenturyLink's proposed rule would have read:

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

The Federal Communications Commission (FCC) order cited in that proposed rule is the 2015 Open Internet Order, which established the version of the federal "net neutrality" rules that were in place immediately before the FCC repealed most of those rules in 2018.⁹ The Commission did not adopt CenturyLink's proposed rule, noting that it exceeded the scope of the rulemaking to establish the basic processes and procedures for implementation of HB 4155.¹⁰

Disclosure of BIAS Providers' Network Management Practices

Under HB 4155, a BIAS provider engaged in the provision of BIAS to a public body must publicly disclose information regarding the provider's network management

⁶ See Docket No. AR 618, Order No. 18-491 (Dec. 27, 2018) (adopting rules). See also Docket No. AR 618, Order No. 18-338 (Sept. 11, 2018) (consolidating Docket Nos. AR 618 and AR 619 approving issuance of a notice of proposed rulemaking); Docket No. AR 618, Notice of Proposed Rulemaking (filed Sept. 21, 2018) (giving notice of proposed rule OAR 860-250-0045).

⁷ See Docket No. AR 619, Order No. 18-231 (June 19, 2018) (adopting Staff's recommendation).

⁸ Order No. 18-338.

⁹ See *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) (*RIF Order*).

¹⁰ Order No. 18-491, at 6.

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 Sections 1(3) and 1(4) of the statute.¹¹ The Commission has adopted a rule that disclosures made in a manner and form that comply with existing parallel federal disclosure requirements presumptively satisfy the disclosure requirements under HB 4155, too.¹²

Under the parallel federal disclosure requirements, all BIAS providers must disclose their network management practices.¹³ The FCC's website instructs that this includes blocking, throttling, affiliated prioritization, paid prioritization, congestion management, application-specific behavior, device attachment rules, and security practices.¹⁴

Reasonable Network Management Under State and Federal Law

Under HB 4155, if the Commission determines that a provider's activity is reasonable network management, an Oregon public body may contract for BIAS service with that provider notwithstanding the provisions of the statute that address blocking; impairment of traffic for the purpose of discriminating; and interference with end users' selection, access, and use of BIAS or lawful content, applications, or non-harmful devices.¹⁵

There is not a precise federal analog for this state law that provides a reasonable network management exception. The FCC order establishing federal network disclosure requirements refers to reasonable network management and defines it as "a practice appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."¹⁶ The analogous concept in HB 4155 is phrased slightly differently, requiring that reasonable network management: (1) have a technical network management justification; (2) not include other business practices; and (3) be narrowly tailored to achieve a legitimate network management purpose, taking into account the

¹¹ Oregon Laws 2018, chapter 88, section 1(5).

¹² OAR 860-025-0020.

¹³ 47 C.F.R. § 8.1(a); *RIF Order*, 33 FCC Rcd at 439-444 ¶¶ 218-227.

¹⁴ Federal Communications Commission, Instructions for Internet Service Providers, located at <https://www.fcc.gov/disclosure-instructions-isps> (updated June 13, 2018).

¹⁵ Oregon Laws 2018, chapter 88, section 1(4).

¹⁶ *RIF Order*, 33 FCC Rcd at 440 ¶ 220 (internal quotation marks omitted). In stating this, the FCC cited its previous order in *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*2015 Open Internet Order*), in which the FCC acknowledged legitimate network management includes ensuring network security and integrity, addressing unwanted traffic, and reducing or mitigating the effects of congestion on the network, and that particular network architecture and technology refers to the differences across access platforms such as cable, DSL, satellite, and fixed wireless.

particular network architecture and technology of the broadband Internet access service.¹⁷

The structure of how the concept of reasonable network management operates in the federal disclosure requirements is also different than how it works under HB 4155. The current federal rules merely establish disclosure requirements and do not speak to eligibility of providers for public contracts. These federal rules do not require any party to seek agency determinations that a provider's network management practices are reasonable, nor do they dictate a process by which such agency determinations would occur. HB 4155, in contrast, assigns to the Commission the role of making determinations of what constitutes reasonable network management as one part of a multi-part structure of establishing with which BIAS providers Oregon public bodies may contract. Several other parts of that structure do not involve the Commission. For example, the Commission is not charged with making a determination that a BIAS provider is the sole provider of fixed BIAS to the geographic location subject to the contract¹⁸ or that a BIAS provider is engaging in practices to address copyright infringement, other unlawful activity, or the needs of various public safety authorities.¹⁹

Proposal of Presumption of Reasonable Network Management

The participants in the informal workshops convened by Staff in connection with Docket Nos. AR 618 and AR 619 generally discussed how the concept of reasonable network management operates under federal and state law. This discussion raised the question of whether the Commission would adopt a presumption that any disclosed network management practice is "reasonable" under Oregon Laws 2018, Chapter 88, Section 1(4). Some workshop participants expressed a desire for such a presumption because they believe it would provide increased certainty to both BIAS providers and public bodies during the public contracting process.

Staff and workshop participants also generally noted that uncertainty exists about how the implementation of the new statute will affect public procurement processes in Oregon. At this time, Staff is unaware of how public bodies plan to modify existing procurement processes to reflect the new statute. It is therefore difficult to gauge now whether and how much a presumption as described above might help foster a smooth implementation of the statute. A presumption (or additional substantive guidance) on what the Commission will determine qualifies as reasonable network management might give more certainty to potential contracting partners. However, it might also have the effect of shifting the work of initially applying the statute from those potential

¹⁷ Oregon Laws 2018, Chapter 88, Section 1(4)(d)(A)-(C).

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

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

contracting partners to Commission Staff and the Commission. It is not clear that is consistent with the design of HB 4155.

Potential Paths to Developing a Presumption or Additional Substantive Standards
Staff does not have enough information at this stage to make a recommendation on whether currently disclosed practices meet the statutory standard for reasonable network management. To do so, Staff would need to examine BIAS providers' disclosures and make speculative assumptions significantly affecting the assessment of those practices against the statutory standard. Provider practices involve intricate technical nuances that Staff believes are too complex and potentially too variable to be assessed based on assumptions or casual review. Furthermore, some disclosed practices might qualify for a different exception that does not require Staff or Commission involvement.

Staff has identified the following alternatives for proceeding with further Commission work on what constitutes reasonable network management:

Work Plan 1: No Immediate Action by Commission

The Commission could decide to take no further action at this time and to consider whether to adopt a presumption or further substantive guidance regarding reasonable network management, if at all, in the context of future proceedings regarding specific practices. This option would have the practical effect of leaving initial judgments about whether Commission involvement is necessary to the BIAS providers and public body procurement staff. If, during procurement, those parties do not agree to terms that will ensure provider eligibility without an exception and do not identify an applicable exception that does not involve the Commission, a proceeding seeking a Commission determination on a specific practice or practices would be initiated. Alternatively, those parties could petition the Commission for a declaratory ruling or rulemaking adopting the approach they recommend. A well-organized petition for a declaratory ruling that accounts for Oregon providers' existing disclosed practices and the statutory exceptions that do not involve the Commission might actually be the ideal vehicle, but that would be best put together by the stakeholders.

One benefit of this approach is enabling the parties directly involved in the procurement process—rather than Commission Staff—to lead the next steps of implementing HB 4155. This seems appropriate because it provides those parties the opportunity to determine whether any statutory exceptions that do *not* require Commission involvement apply before the

Commission gets involved. This option may lead to unpredictability with respect to the number, nature, and quality of the subsequent requests the Commission might receive for determinations. A downside of this approach might be that those requests could end up being numerous, disorganized, or both. Should proceedings overwhelm the Commission in connection with this option, the Commission could revisit the other options discussed below, including potentially pursuing an emergency rulemaking, if warranted. To avoid overly numerous or disorganized requests, the Commission should encourage stakeholders filing petitions to be as specific as possible and to affirmatively address exceptions that do not involve the Commission. Such petitions should propose much more specific approaches that account for the Commission's specific role under HB 4155 than did the broad suggestion made by CenturyLink in connection with Docket No. AR 618.

Work Plan 2: Investigation

The Commission could also initiate an investigation into whether it would be appropriate to adopt a presumption of reasonableness for any particular network management practices, or whether other additional substantive standards should be developed. This option would provide for discovery and the development of an evidentiary record to which the Commission could apply the statutory standards for reasonable network management. It would provide for an organized procedural schedule, including potentially legal briefing, if necessary. The Commission may adopt rules via an order resolving such an investigation.

A benefit of this approach would be the development of an evidentiary record to which the Commission could apply the legal standard. A downside of this approach might be that an investigation would probably be more work intensive and inefficient than it would be prudent to pursue now, particularly given the possibility that practices of concern to contracting parties might instead qualify for an exception that does not involve a Commission determination.

Work Plan 3: Further Rulemaking

The Commission could also open a new rulemaking or pursue a second phase of rulemaking in consolidated Docket No. AR 618 to consider adding a presumption of reasonableness for disclosed practices or

incorporate rules containing other substantive guidance to the recently adopted rules regarding reasonable network management determinations.

This option would provide a venue for informal work on the issue, and may be less cumbersome and intensive than an investigation because it would not involve formal discovery or briefing. This process would instead rely on publicly available information and existing disclosures, which might still be complex. Similar to an investigation, a downside to further rulemaking now might be the work intensiveness and inefficiencies that are likely to result, particularly given the possibility that practices of concern to contracting parties might instead qualify for an exception that does not involve a Commission determination.

Work Plan 4: Informal Guidance

The Commission could also direct Staff to research and draft proposed informal guidance on the characteristics of network management practices that are likely to meet the statutory test for reasonable network management. Staff could bring that draft back to the Commission for consideration of whether further development in a rulemaking or investigation is warranted.

This option would represent a relatively low level of Commission commitment to a particular outcome, but might position Staff to be prepared for the initiation of potential proceedings under HB 4155. Guidance might help mitigate confusion resulting from the statute and help foster order in the Commission proceedings that might be initiated. A downside of this approach would be that Staff would likely encounter issues that are not assigned to the Commission under HB 4155. For instance, it is difficult to imagine guidance that is complete enough to be helpful that does not address the exceptions with which the Commission is not prescribed a role under HB 4155. A stakeholder-driven proposal or guidance involving those who oversee the contracting process would likely be more beneficial.

Conclusion

Staff appreciates that stakeholders would like more certainty about how the procurement process will work under this new statute. Staff has also appreciated the contributions of all participants in the workshops conducted in connection with Docket Nos. AR 618 and AR 619, but believes that a stakeholder-driven

proposal would offer more benefits at this stage because the stakeholders have superior knowledge of both the public procurement process and BIAS provider practices. A Staff-led rulemaking process would likely be less efficient. The best approach forward, in Staff's view, for considering whether the Commission should adopt any presumptions or additional substantive standards with respect to reasonable network management will be driven by the parties directly involved in the procurement process, rather than Commission Staff. Such an approach will provide those parties the opportunity to determine whether any statutory exceptions that do *not* require Commission involvement apply before involving the Commission.

For these reasons, the Commission should take no further action now and instead consider whether to adopt a presumption or further substantive guidance regarding reasonable network management, if at all, in the context of future proceedings regarding specific practices. The Commission should also consider encouraging stakeholders to put forward a well-crafted petition for a rule or ruling that addresses the issue in light of all information available to them.

PROPOSED COMMISSION MOTION:

Take no further action at this time and in the future consider whether to adopt additional substantive standards or a presumption regarding reasonable network management practices for BIAS providers, if at all, in the context of proceedings on specific practices.