


PUBLIC UTILITY COMMISSION OF OREGON  
STAFF REPORT  
PUBLIC MEETING DATE: May 29, 2018

REGULAR  X  CONSENT \_\_\_\_\_ EFFECTIVE DATE \_\_\_\_\_ Upon Approval \_\_\_\_\_

DATE: May 9, 2018

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) Request for approval to initiate a rulemaking to implement information disclosure rules for broadband Internet access service providers required by Oregon Laws 2018, chapter 88, section 1(5).

**STAFF RECOMMENDATION:**

Staff recommends that the Commission initiate the informal stage of a permanent rulemaking to implement the information disclosure rules for broadband Internet access service providers engaged in the provision of broadband Internet access service to a public body, as is required by Oregon Laws 2018, chapter 88, section 1(5).

**DISCUSSION:**

Issue

Whether the Commission should initiate the informal stage of a permanent rulemaking to implement the information disclosure rules for broadband Internet access service providers engaged in the provision of broadband Internet access service to a public body, as is required by Oregon Laws 2018, chapter 88, section 1(5).

Applicable Rule or Law

The Oregon legislature recently passed and the Governor signed legislation (HB 4155) that prohibits public bodies in Oregon from contracting with a broadband Internet access service provider unless the provider abides by certain "net neutrality" practices. See Oregon Laws 2018, chapter 88. The new law takes effect on January 1, 2019.

Specifically, unless an exception applies, public bodies may not contract with broadband Internet access 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 of an end user's choice by impairing or degrading lawful traffic; or unreasonably interfere with or unreasonably disadvantage an edge provider's ability to make devices or lawful content, applications or services available. Oregon Laws 2018, chapter 88, section 1.

The net neutrality law assigns several new responsibilities to the Commission. Section 1(5)(a) of the law requires a "broadband Internet access service 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 net neutrality law. To that end, section 1(5)(b) requires the Commission to specify by rule the manner and form in which these disclosures are made.

The law also designates a role for the Commission to make several determinations relating to services, devices, and exceptions to the core net neutrality rules. Those determinations are:

1. that a service is providing a "functional equivalent" of a broadband Internet access service under Oregon Laws 2018, chapter 88, section 1(1)(a)(A)(ii);
2. that a device is "nonharmful" to broadband Internet access services 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 and is therefore permissible under Oregon Laws 2018, chapter 88, section 1(4)(c);
4. that certain otherwise prohibited activities constitute "reasonable network management" and are therefore permissible under 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 prohibited by the new law after its effective date provides "significant public interest benefits" and is therefore permissible under Oregon Laws 2018, chapter 88, section 1(4)(e)(B).

The law does not specify how the Commission must make these determinations. Section 3(2) gives the Commission the authority to "adopt rules and take any action before" January 1, 2019 "that is necessary to enable the [C]ommission \* \* \* to exercise all of the powers and functions" conferred on it by section 1 of new law.

## Analysis

### *Scope of Rulemaking*

Staff proposes that Rulemaking Docket No. AR 618 address the single issue on which substantive rulemaking is clearly required by the Commission under section 1(5): the form and manner of the information disclosures by broadband Internet access service providers engaged in the provision of service to public bodies that is mandated by section 1(5)(a). The information contained in the disclosures will relate to providers' network management practices, performance characteristics, and commercial terms of broadband Internet access service. The purpose of the disclosures is to enable end users to verify that broadband Internet access service is being provided in compliance with Oregon's net neutrality law.

While, as noted above, the net neutrality law assigns other responsibilities to the Commission to make certain types of determinations, Staff proposes that a separate rulemaking address the procedures by which those determinations will be made. Staff would expect that such a rulemaking would deal at least initially and perhaps primarily with procedural issues regarding when and how the Commission would make those determinations, which Staff notes are fact-specific determinations.

By contrast, the Commission clearly must promulgate generally applicable substantive rules regarding the content and form of required information disclosures. Proceeding separately on the disclosure rules is the most efficient path forward. Staff will be mindful of where coordination between dockets may benefit stakeholders and the Commission.

### *Process*

Staff anticipates receiving helpful information from a wide spectrum of stakeholders that may include public bodies, broadband providers, public interest advocacy groups, and citizens. Staff also anticipates drawing on the work of federal agencies, including the Federal Communications Commission (FCC), and other states that have previously engaged in policymaking regarding similar types of information disclosures.

Multiple workshops will address the subjects of rule language, the contents and form of required disclosures, and a potential safe harbor disclosure format to enable easy compliance. Staff expects to propose rules to the Commission by the end of summer to enable the Commission to issue a formal notice of proposed rulemaking in time to meet the statutory timeline. The formal stage of the rulemaking process should conclude by the end of 2018, with updated rules going into effect by January 1, 2019.

### Conclusion

Oregon Laws 2018, chapter 88, section 1(5)(b) requires the Commission to undertake a rulemaking in order to specify the manner and form in which information disclosures shall be made by broadband Internet access service providers that are engaged in the provision of broadband Internet access service to a public body. This initial rulemaking in Docket No. AR 618 is necessary to fulfill the Commission's obligations under the law. Staff will separately bring the Commission a proposal to begin a separate rulemaking process to address the procedural questions that are raised by other components of the net neutrality bill that assign the Commission the role of making certain determinations.

### **PROPOSED COMMISSION MOTION:**

Initiate the informal stage of a permanent rulemaking to implement the information disclosure rules for broadband Internet access service providers engaged in the provision of broadband Internet access service to a public body, as is required by Oregon Laws 2018, chapter 88, section 1(5).