



TO: Rep. Jennifer Williamson, Chair
Members of the Rules Committee

From: Fawn Barrie
Oregon Cable Telecommunications Association (OCTA)

RE: HB 4155-4

The Oregon Cable Telecommunications Association (OCTA) is opposed to HB 4155 as written and to the -4 amendments to HB 4155. Our comments will focus on our opposition to the -4 amendments which would effectively regulate broadband by tying compliance with net neutrality requirements to state contracts.

Members of OCTA are committed to providing an open internet. Our members do not and will not block, throttle or discriminate against lawful content. They are committed to transparency and will continue to ensure that policies are clear and provide meaningful information to consumers. Internet Service Providers, in general, have committed to no blocking, no throttling and no unfair discrimination. The FCC's *Restoring Internet Freedom Order* (RIF Order) requires our members to continue to keep customers clearly informed of their net neutrality practices and ensures they are accountable for abiding by these practices. Providers will be held to these commitments by consumers and edge providers who will resist any attempt by providers to undermine the openness of the internet. And they are held to their commitments to consumers in this state through our unfair trade practices act. If providers advertise to consumers in a deceptive way about their handling of net neutrality issues, UTPA provisions will apply.

We are in a very short session and there is limited time to consider these issues. When approaching an issue in the short session, it's important to consider whether a problem currently exists or if there is imminent threat that a problem will exist that cannot wait for action in a regular session, when more time is available to consider an issue.

The new Internet Freedom Order by the FCC retains the requirement, first adopted in 2010, that ISP's disclose their network management practices to consumers. ISPs must disclose any blocking or throttling practices that prevents or degrades consumer access to lawful content, applications, services or non-harmful devices and they must disclose affiliated or paid prioritization practices that directly or indirectly favor some internet traffic over other such traffic. The FCC has authority to bring enforcement actions and to impose significant penalties,

if they find a provider engaging in these activities in a way that is inconsistent with the provider's disclosure.

OCTA members have publicly committed to net neutrality provisions and are not violating these provisions. We are not aware of any circumstances where providers have violated net neutrality provisions, or of any providers who have suggested they will implement policies that would thwart an open internet. We do not know of any issues where consumers in Oregon have claimed providers are violating their commitment to net neutrality principles. And we would suggest that, without an immediate, identifiable circumstance where net neutrality provisions are being ignored, there is not an emergent situation that requires the legislature to act now instead of waiting to consider this issue with additional information in the next regular session.

The Committee is aware that several states have already issued Executive Orders or are currently considering legislation that would implement provisions similar to the provisions in HB 4155-4. Many of these states operate in a much longer legislative time frame than we do in Oregon and have more time to consider the impacts of proposed legislation. To protect consumers from the possibility of costly litigation, doesn't it make sense to wait to see what happens in other states? At least two states have already issued Executive Orders similar to the provisions in the -4 amendments. While we believe state actions on these issues is preempted, in light of other states proceeding with these concepts, Oregon will benefit from the lessons of implementation in those states in the short term without being subject to costly litigation. And it will give the state time to analyze the practical implications of instituting a ban on contracting like the -4 amendments propose, without subjecting Oregonians to the possible pitfalls of situations that potentially could occur if companies decide not to sign forms certifying compliance, and therefore cannot provide services to the state.

The FCC's RIF Order establishes a uniform national regulatory framework for broadband, and expressly preempts not only state or local measures that directly establish net neutrality regulations, but also "any state or local measures" that "effectively" impose net neutrality requirements. In addition, the Supreme Court has long held that states cannot use their spending power to regulate indirectly what federal law bars them from regulating directly. We also have concerns the proposed amendment would be unconstitutional under the Commerce Clause, as the requirements could force ISP's to modify their conduct outside the state's borders. This would have an impermissible impact on interstate commerce.

In terms of precedent around preemption, some may point to the fact that the United States Supreme Court (USSC) has found that, when a state or municipality acts as a participant in the market, and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption. The USSC, and lower courts enforcing the USSC precedents, have also been careful to delineate other contexts where state agencies are acting as regulators rather than as market participants. Contexts, where states are clearly preempted. In doing so, they typically apply the following test:

“...when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption. When, however, a state attempts to use its spending power in a manner ‘tantamount to regulation,’ such behavior is still subject to preemption.” *Cardinal towing & Auto Repair, Inc. v. City of Bedford* (5th Cir.1999)

I would ask committee members to consider this – If you support the -4 amendments, do you support them because you view the state as a market participant and consider these changes narrow and focused? Or will you support them with the goal of ensuring net neutrality as a regulation you would like to see implemented in Oregon? If you support the amendments because you believe they are the only possible way to implement state regulation of net neutrality, doesn’t that violate the FCC order, and automatically open the state up to potentially costly litigation?

Applying the principles and precedents of previous decisions, it seems clear that the -4 amendments, and other similar efforts in various states, are not narrow and focused activities of a market participant, but are efforts to regulate net neutrality.

We would ask the committee to pause on this issue. This is a short session. Other states have decided to move forward with similar proposals. We can see how their policies are implemented without subjecting our state to the concern and potential cost of potential litigation. We urge you to oppose HB 4155 and the amendments proposed.