

February 20, 2018

The Honorable Jennifer Williamson
Chair
House Rules Committee
900 Court Street, NE
Salem, OR 97301

Re: Analysis of long haul provider obligations under HB 4155 vs broadband Internet access service provider obligations

Dear Chair Williamson:

The Electronic Frontier Foundation submits the following analysis in response to arguments made regarding HB 4155 as currently amended. In specific, we explain the different obligations that exists under the legislation for “long haul” providers (also generally referred to as transit providers) and customer facing broadband Internet access service providers.

A. Background on the Internet’s Architecture

The Internet is best conceptualized as a series of networks that interconnect to hand off data until it eventually arrives at a single individual user. The largest network is the global network that consists of high capacity submarine cables and satellite transmissions between countries. The domestic backbone network is where data is transferred between cities and Internet Exchange Point (IXP) aggregation areas. The Internet Service provider’s (ISP) main points of presence is where a majority of the traffic is received and sent by the ISP’s subscribers. This ISP portion of the network sometimes contains the “middle mile” of the network as well as “last mile” that connects to the individual subscriber’s home and business.

Moving data across the Internet is analogous to our everyday transportation systems. The global Internet and domestic backbone network are similar to the airline industry. Movement of data through the highway or rail system can be considered the “middle mile” of the network (for purposes of this analysis, “long haul” providers generally fall within this category). The “last mile” of the Internet can be thought of as the off-ramp connecting to the individual homes and businesses and are considered the broadband Internet access service provider.

B. HB 4155 Only Applies to the Last Mile of a Broadband Internet Access Service Company and not Long Haul Providers that interconnect them to the Internet

Network neutrality rules have always been focused on the last mile access to broadband and HB 4155 maintains that approach by following the FCC’s definitions for broadband Internet access service. The legislation, much like the now repealed federal network neutrality rules, will only apply to companies that sell last mile access and any facility they directly own and control related to providing that service. Long haul providers and other transit providers that a broadband Internet access service must interconnect with to gain access to the Internet are not covered by the legislation and were never covered by the FCC’s network neutrality rules.

The legislation defines “Broadband Internet access service” in the same fashion as the Federal Communications Commission has done so for years and applies to them contractual and procurement conditions to follow network neutrality if they do business with a public body. It has long been understood in communications law that the FCC’s network neutrality rules only apply to “last mile” facilities and any part of the network a “last mile” provider also owns. Concerns raised as to whether transit and “long haul” providers must also follow network neutrality under HB 4155 have misunderstood the intent and impact of the legislation and the now repealed federal rules.

As the bill explains, only companies that are mass-market retail services that directly provide Internet access (with the exclusion of dial-up services) and are capable of transferring information to all or substantially all Internet end points are required to follow network neutrality. Indeed, the FCC for years has maintained that network neutrality only applies to a broadband provider “only as far as the limits of a broadband provider’s control over the transmission of data to or from its broadband customers and excluded the exchange of traffic between networks” from the rule.¹ For exchange traffic, the FCC extended a legal duty to interconnect to networks part of its common carrier authority.²

Under no reading of the legislative text will it be the case that rural communities are cut off due to any obligation applied to “long haul” providers because no obligations exists for long haul providers.

C. Concerns Regarding Long Haul Providers Retaliating against Broadband Internet Service Providers Unfairly is an Interconnection Problem Created by the FCC’s Repeal of the 2015 Open Internet Order

The Oregon Telecommunications Association (OTA) expressed concerns that long haul providers will strand rural communities because they disagree with the business decisions of its membership who will “happily sign any net neutrality agreement the state wants us to sign³” as envisioned by HB 4155. Unfortunately, OTA has misdiagnosed the symptoms of their concern and should lay responsibility with the “Restoring Internet Freedom” Order⁴ recently issued by the FCC and not with the state of Oregon. In fact, whether or not HB 4155 becomes law, the prospect of rural abandonment by transit providers remains as the intended product of the FCC’s “Restoring Internet Freedom” Order. As noted above, prior to the FCC’s repeal decision last year, all networks had a legal duty to interconnect in good faith and were prohibited from engaging from any sort of retaliatory conduct as feared by OTA.

¹ See FEDERAL COMMUNICATIONS COMMISSION, *Open Internet Order* (March 12, 2015), paragraph 194, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

² 47 U.S.C. § 251

³ See Oregon Telecommunications Association letter regarding HB 4155 (February 12, 2018), available at <https://olis.leg.state.or.us/liz/2018R1/Downloads/CommitteeMeetingDocument/145220>.

⁴ FEDERAL COMMUNICATIONS COMMISSION, *Restoring Internet Freedom Declaratory Ruling, Reporting and Order, and Order* (Dec. 14, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-166A1.pdf.

In 2014, the FCC was concerned that exchange agreements between broadband Internet access service providers, edge providers, and transit providers/long haul providers were subject to market abuse⁵ and applied a duty to interconnect and negotiate in good faith to carry out those duties as part of the 2015 Open Internet Order. Any sort of monopoly access a long haul or transit provider may have over a broadband Internet access service in rural America would have been policed by the FCC. In essence, the worrisome conduct of long haul providers described by OTA would have been illegal under their federal duties to interconnect.

Not only has the FCC created this problem for OTA, but the agency expressly saw no problem at all in the first place. The FCC's "Restoring Internet Freedom" Order expressly stated that there was no such cause for concern when it eliminated the duty to interconnect for all networks finding that "freeing Internet traffic exchange arrangements from burdensome government regulation, and allowing market forces to discipline this emerging and competitive market is the better course."⁶ The Electronic Frontier Foundation (EFF) and dozens of other organizations and companies concerned with market abuse staunchly disagreed with the FCC's findings of a competitive and vibrant marketplace and continue to believe the FCC has made a significant error in repealing the 2015 Open Internet Order.

To the extent OTA is worried that they will be stranded by retaliatory conduct of transit providers, they should understand that the FCC effectively legalized that type of conduct with the "Restoring Internet Freedom Order" and should seek state legislation to address the problem in a future session.

The Electronic Frontier Foundation strongly encourages the state of Oregon to continue seeking ways to utilize state power to protect a free and open Internet in light of the federal retreat. We urge the legislature to swiftly pass HB 4155 to firmly put the state in support of network neutrality. We believe more can be done to promote Internet freedom such as improving competition choice for consumers in the access market and restoring broadband user privacy rights. We stand ready to support those efforts in future sessions.

Sincerely,

Ernesto Falcon
Legislative Counsel
Electronic Frontier Foundation

⁵ OPEN TECHNOLOGY INSTITUTE, "Beyond Frustrated" *The Sweeping Consumer Harms as a Result of ISP Disputes* (Nov. 2014), available at <https://www.newamerica.org/oti/policy-papers/beyond-frustrated-the-sweeping-consumer-harms-as-a-result-of-isp-disputes/>

⁶ See FEDERAL COMMUNICATIONS COMMISSION, *Restoring Internet Freedom Declaratory Ruling, Reporting and Order, and Order* (Dec. 14, 2017), paragraph 168, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-166A1.pdf.