



Suite 2400  
1300 SW Fifth Avenue  
Portland, OR 97201-5610

**Phillip E. Grillo**  
503.778.5284 tel  
503.778.5299 fax

philgrillo@dwt.com

## MEMORANDUM

To: Sarah Absher, Planning Director, Tillamook County  
From: Phil Grillo, Local Land Use Counsel, Davis Wright Tremaine  
Date: August 20, 2019  
Subject: Applicant's Hearing Memo – August 20, 2019 (Case #851-19-000105 PLNG)

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In advance of the September 5th hearing before the Planning Commission, and on behalf of Edge Cable Holdings USA, LLC, a wholly owned subsidiary of Facebook, Inc. (“Applicant”), I am writing to provide you with the Applicant’s August 20, 2019 hearing memo.

This memo provides an overview of Project Jupiter, and additional detail on three important topics, namely:

- 1) The threshold legal issue of whether the proposed uses and activities on TL 3200 (“TL 3200” or the “Site”) qualify as a conditional use in RR-2 zone;
- 2) The expected impacts of the proposed use on the surrounding area; and
- 3) The Applicant’s proposed conditions of approval.

It should be noted that representatives of the Applicant have attended three prior meetings with the community—one in February 2019, another in March 2019, and a third on August 11th, 2019 in Pacific City. All three meetings were well attended. Much of what is discussed in this hearing memo was presented at those meetings, especially at the third meeting on August 11th. At that meeting the Applicant proposed a future meeting with the community, probably in late October or early November. The purpose of this future meeting is to maintain an open dialogue with the community as the formal decision-making process continues.

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## A. Overview and Context of Project Jupiter

1. The History and Importance of Submarine Cable Infrastructure. The first submarine cable was laid in the English Channel in 1851, between England and France. Over the past 150 years, laying long distance undersea communication cables has become a routine operation. Today, modern submarine cables use fiber-optic technology to carry digital data, which includes telephone, internet and private data traffic, all over the world. (See Attachment A) The public demand for and reliance on these communication facilities is reflected in the fact that nearly 100% of all international data traffic is carried by submarine cable. In short, the internet, as it exists today, could not operate without submarine cables.

2. Broadband Policy and Infrastructure in the State of Oregon and Tillamook County. In the context of telecommunications, broadband is wide bandwidth data transmission comprised of multiple signals and traffic types. The transmission medium can be coaxial cable, fiber-optic cable, radio signals or other technologies. In the context of internet access, broadband means any high-speed internet access that is always on, and that is faster than dial-up access over traditional analog service technologies.

One of the most comprehensive and current guides to broadband policy and infrastructure in Oregon is the 2018 Report of the Oregon Broadband Advisory Council. (OBAC Report) (See Attachment B.) Portions of that report are quoted below to provide relevant background on state and local broadband policy and infrastructure, which in turn provides context to the public needs and benefits that will be derived from Project Jupiter, both at the state and local level.

In terms of statewide broadband policy, the OBAC Report states that:

“Oregon has recognized telecommunications as essential infrastructure for many years and has an established broadband public policy in statute and resolution. [For example:]

-...it is the goal of this state to promote access to broadband services for all, to improve the economy, improve the quality of life in communities and reduce the economic gap between Oregon communities that have access to broadband digital applications and services and those that do not...” [ORS 759.016(1)]

-“It is the policy of the state to promote, facilitate and encourage activities, projects and businesses that improve Oregon’s Internet Protocol (or IP) network infrastructure, performance and connectivity to the internet backbone network for the benefit of Oregon’s users “ [SJR 19 (2007)]

-“It is the policy of the state to encourage and support the rapid deployment of broadband telecommunications services in areas of the state to ensure homeland security protections and to ensure emergency communications for public safety.” [ORS 401.706]

-“It is the policy of the state to promote and facilitate activities by Oregon’s health care and education communities and their telecommunications providers to develop standards for interoperability, establishing peering for health care and education telecommunications in Oregon” [SJR 20 (2007)] (See OBAC Report at 56)

In terms of statewide broadband infrastructure, the OBAC Report states that:

“There are currently fifteen, soon to be sixteen in-service commercial undersea cables coming ashore in Oregon with additional cable project currently under development. Oregon is a preferred location to come ashore on the West Coast of North America because of a well-established working relationship between state government, the fishing fleet, and the undersea cable operators.” (OBAC Report at 41)

In terms of local broadband infrastructure:

Wave Broadband has completed a 97-mile underground fiber-optic cable between its network of data centers in Hillsboro and the submarine cable landing substations in Tillamook County, (the Nestucca Route) increasing data capacity and reliability for its customers, while connecting these communities with top Asian markets.

“The completion of the Nestucca Route is not only a major milestone for [Wave Broadband] but it, along with the 101-mile Salmon Route, represents a truly unique solution for the submarine cables that land in Oregon. These two fiber-optic cable routes make up the only low-latency submarine cable backhaul constructed on the West Coast in the last 10 years. The Nestucca and Salmon routes will also provide businesses with crucial redundancy in case of route disruption or repair.” (OBAC Report at 54, quoting Greg Palser, Wave VP of Business Development)

In terms of Tillamook County broadband policy:

On November 1, 2000, the Tillamook People’s Utility District, The Port of Tillamook Bay, and Tillamook County, signed an intergovernmental agreement under ORS Chapter 190, establishing a consortium known as Tillamook Lightwave. The goal of the consortium is to create a high-speed telecommunication system that will provide economic development, distance learning, and telemedicine opportunities in Tillamook County, and to improve overall connectivity. The Tillamook Lightwave Consortium currently serves such organizations Tillamook County government, County Emergency Services and 911, the Tillamook School District #9, Tillamook Regional Medical Center, Tillamook Bay Community College and several local businesses. (See Attachment C)

In terms of Tillamook County infrastructure:

Tillamook Lightwave has constructed a fiber-optic cable network that runs from the North Tillamook County Cable Landing Station at Nedonna Beach, south along the railroad tracks to Tillamook, where the cable runs on overhead lines to the Tillamook PUD office. From the PUD office, the fiber extends southward past the high school and out to the Port's industrial park south of Tillamook. The plan is to extend fiber into South County when funds become available. This communications infrastructure will enable both the public and private sector to access affordable broadband services, with increased connectivity. (See Attachment D)

This combination of progressive public policy and robust broadband infrastructure in Oregon and in Tillamook County in particular, continues to attract needed investment from companies like Facebook, which directly supports the County's goal of creating a high speed telecommunication system that provides the local community with increased economic development, distance learning, telemedicine opportunities, greater public safety, and increased connectivity. These policies and investments have put Tillamook County in the forefront of broadband technology on the West Coast.

3. Project Jupiter. At the ODSL hearing on February 19, 2019, the Applicant's primary contractor SUBCOM presented an overview of Project Jupiter to the local community. SUBCOM has been a leading installer of fiber-optic submarine cable for over 30 years, and has completed over 100 installations worldwide. (See Attachment E) A summary of SUBCOM's power point presentation from the February 19<sup>th</sup> hearing is included as Attachment F. Note that only one fiber-optic cable will be installed, rather than two cables as originally proposed in the earlier materials. Also, as noted below in Section D, the Applicant has agreed to impose a covenant on TL 3200 restricting further submarine cable landings.

4. Proposed Uses and Activities on TL 3200. Proposed uses and activities that will occur at the Project Jupiter cable landing site on TL 3200 are described in the application materials submitted by the Applicant's consultant Cameron Fisher, with 48 North Solutions. (See Attachment G.)

5. Why TL 3200? At the community meeting on August 11, Jon Hudson, Network Investment Manager for the Applicant, explained why the Project Jupiter cable needs to land on TL 2300. A summary of that testimony is included in Attachment H.

6. Expected Construction Duration and Timing. As discussed at the community meeting on August 11, the construction duration for Project Jupiter on TL 3200 is expected to last approximately 15 to 30 days. As noted above, only one cable landing will occur on TL 3200, rather than two as originally proposed, so drilling time on the Site will be minimized accordingly. If approval is granted in 2019, construction on TL 3200 is expected to occur after the holidays, during the winter of 2020. All construction activities on TL 3200 will take place between 8am and 5pm only.

## B. Threshold Legal Issues

1. Do the proposed manhole and buried fiber-optic cable lines proposed for Project Jupiter on TL 3200 qualify as “Public utility facilities, including substations and transmission lines” for purposes of LUO 3.010 (3)(n), and therefore qualify as a conditional use in the RR-2 Zone?

a. Short Answer. Yes.

b. Analysis. The Tillamook County LUO does not define the terms “public utility facility”, “substations” or “transmission lines”. In situations where particular terms are not defined in the code, the interpretive rules set out in *PGE v BOLI* 317 Or 606, 859 P2d 1143 (1993) apply, which requires the County to interpret ambiguous terms in a manner that is consistent with their text and context, and in a manner that is consistent with the purpose of the regulation being interpreted.

The Tillamook County Comprehensive Plan provides important context, because communication facilities are a type of public facility. For example, page 11-7 of the comprehensive plan specifically lists “communication” facilities in its list of “public facilities”. Furthermore, the comprehensive plan states that the term “public facilities and services” are defined as “Projects, activities and facilities which the planning agency determines to be necessary for the public health, safety and welfare.” (Comprehensive Plan at 11-35) The comprehensive plan goes on to emphasize that:

“This does not mean that the service or facilities are publically owned, but that they are necessary for public health, safety and welfare. For example, there are several water systems in the county that are privately owned but are essential for the health of the general public.” (Comprehensive Plan at 11-35).

The County therefore considers communication facilities to be a type of public facility, regardless of whether they are publicly owned, so long as the planning agency determines they are necessary for the public health, safety and welfare. The evidence referred to in Section A above, indicates that the State, the County, and its planning agency the Community Development Department, consider broadband telecommunication facilities to be critical public facilities that are essential to the public health, safety and welfare of the County and the State of Oregon.

The Tillamook County LUO also provides additional context. For example, the term “Utility Carrier Cabinet” is defined in the LUO as:

“A small enclosure used to house utility equipment intended for offsite service, such as electrical transformer boxes, telephone cable boxes, cable TV boxes, police call boxes, traffic signal boxes and similar apparatus.”

The County therefore considers communication companies to be utilities, such that the small enclosures housing their utility equipment, meets the definition of a “Utility Carrier Cabinet” for purposes of the LUO.

Dictionary definitions further support this functional interpretation. For example, the term “Public Utility” is currently defined by the Merriam Webster dictionary as:

“a business organization (such as an electric company) performing a public service, and subject to special governmental regulation.”

As noted above in Section A, there is substantial evidence in the record that the cable landing manhole and associated fiber-optic cable line proposed by the Applicant will perform a public service, and that this business organization is subject to a variety of special governmental regulations with regard to its fiber-optic cable equipment and systems. Therefore, the proposed telecommunication facility on TL 3200 meets the current dictionary definition of a public utility facility.

In fairness, it should be noted that some older dictionaries, such as Webster’s Third New International Dictionary of the English Language, Unabridged (1961) define the term somewhat differently, as follows:

“a business organization deemed by law to be vested with public interest, usually because of monopoly privileges and so subject to public regulation such as fixing of rates, standards or service and provisions of facilities.”

This 1961 definition is now outdated because most public utilities have been deregulated over the past 30 years, particularly with respect to telecommunication facilities, following the break-up of ATT and the so-called Baby-Bells, and after the passage of the Telecommunication Act of 1996. The most current Merriam Webster definition, as set out above, reflects the fact that monopoly privileges are no longer a common characteristic of modern public utility facilities in the age of deregulation.

It should also be emphasized that LUO 11.010(3) requires the County to interpret undefined terms according to their common usage, not in a technical way. The LDO defines the term “Utility Facilities” in a functional way, to broadly include:

“Structures, pipes, or transmission lines which provide the public with electricity, gas, heat, steam, communication, water, sewage collection, or other similar service.”

This functional definition in LUO 11.010(3) therefore includes the proposed beach manhole and related fiber-optic cable that provides the public with communication service.

It is also important to note that, the proposed beach manhole and related fiber-optic cable facility lines qualify as a “substation” and “transmission line”, respectively, for purposes of LUO 3.010 (3)(n), for the following reasons:

The term “Substation” is defined by the Merriam Webster dictionary as “a subordinate or subsidiary station.” A look at the definition of “subsidiary” provides further guidance, as it is defined as “furnishing aid or support.” The word “station” is defined as “a place established to

provide a public service” or “a complete assemblage of radio or television equipment for transmitting and receiving.” These definitions are not inconsistent with the example listed in Webster’s Third New International Dictionary definition of the term, which provides as follows:

“Substation: a station subordinate or subsidiary to another station: as a) a station which is subsidiary to a central station and at which high-tension electricity from the central station is transformed to electricity lower in potential and converted if desired to continuous current or to alternating current of a different frequency b) a small post-office station (as a contract station in a drug store or a station set up at a convention for handling philatelic mail c) a subordinate station that rebroadcasts messages from a primary station of a communication system.” (Emphasis added)

Evidence in the record shows that this function is exactly what happens at the proposed beach manhole. The beach manhole acts as a receiver of input signals from the submarine cable and as a re-broadcaster of those messages to the terrestrial cable system. (See attachment I.) Likewise, the beach manhole acts as a transmitter of output signals from the terrestrial cable, and as a re-broadcaster of output signals to the submarine cable. The beach manhole therefore qualifies as a “Substation” in the larger broadband communication system.

The term “Transmission Line” is defined as:

“a metallic circuit of three or more conductors used to send energy usually at high voltage over a considerable distance. Specifically: a usually metallic line used for the transmission of signals or for the adjustment of circuit performance and often consisting of a pair of wires suitably separated, a coaxial cable, or a wave guide.”

The evidence in the record shows that this function is exactly what the submarine and terrestrial fiber-optic cable do with regard to Project Jupiter. The fiber-optic cable transmission line that will be installed on TL 3200 sends energy in the form of light signals over a considerable distance, as part of a broadband communication system that connects Tillamook County and other parts of Oregon, to the rest of the world.

Furthermore, the evident purpose of the regulation being interpreted, namely LUO 3.010 (3)(n), is to allow public utility facilities, including substations and transmission lines to be approved, as conditional uses in several rural residential zones, including the RR-2 zone in Tierra Del Mar. As was discussed at the neighborhood meeting on August 11th, fiber-optic cable installations already exist on both sides of Sandlake Road, which is the frontage road that provides access to all of Tierra Del Mar. These installations are marked by orange topped white posts that demarcate the fiber-optic cable route along Sandlake Road. Therefore, the existence of fiber-optic cable and associated manholes in Tierra Del Mar is consistent with the purpose of LUO 3.010(3)(n), and the purpose of the RR-2 zone itself.

c. Conclusion. The proposed Project Jupiter cable landing manhole and associated fiber-optic cable installation on TL 2300 qualifies as a “public utility facility, including a substation

and transmission line,” for purposes of LUO 3.010 (3)(n), and therefore qualifies as a conditional use in RR-2 zone.

2. In the alternative, are the proposed manhole and buried fiber-optic cable transmission lines similar to other uses permitted in the RR-2 zone, as provided in LUO 2.040.

a. Short Answer. Yes. Even if the proposed manhole and buried fiber-optic cable lines do not qualify as a public utility facility, they are similar to other uses permitted in the RR-2 zone, namely to other public utility facilities that are permitted as conditional uses in the zone.

b. Analysis. There is no doubt that electrical substations and related electrical transmission lines would qualify as a conditional use in the RR-2 zone, because they qualify under LUO 3.010 (3)(n) as a type of “Public utility facility[y], including substations and transmission lines”. From a land use standpoint, there is little, if any, difference between the impacts from an electrical substation and transmission line, and a fiber-optic substation and transmission line. In fact, the impacts from the proposed fiber-optic manhole and related transmission lines will be far less than what would be experienced from an electrical substation and related electrical transmission lines, because there will be no above-ground structures or elevated high voltage wires associated with proposed project, and because the construction period will be much shorter than what would be needed for an above-ground electrical substation, which would require at least 3-6 months or more to construct.

c. Conclusion.

In short, as provided in LUO 2.040, the use proposed by the Applicant would be of the same general character and would have similar impacts on nearby properties as would an electrical substation and related electrical transmission lines, both of which are clearly allowed as a conditional use in the RR-2 zone under LUO 3.010 (3)(n), as a type of public utility facility.

3. Can reasonable conditions of approval be imposed on the applicant, to provide added assurances that the proposed use will comply with the relevant approval criteria, and that the Applicant will be a good neighbor?

a. Short Answer. Yes. LUO 6.070 specifically that:

“In approving a Conditional Use or a modification of a Conditional Use, any conditions which are considered necessary to protect the area surrounding the proposed use, and to preserve the basic purpose and intent of the underlying zone, may be imposed...”

b. Dialogue with the Community Regarding Impacts and Possible Conditions of Approval. At the community meeting on August 11, 2019, the Applicant hosted a meeting with members of the local community, and focused the later part of the meeting on construction impacts from the proposed project, and potential conditions of approval that could be used to

mitigate these construction impacts, and otherwise benefit the community. These impacts and proposed conditions of approval issues are discussed below.

### **C. Impacts on the Site and the Surrounding Area**

#### **1. Noise.**

a. During Construction. Mechanical noise generating activities associated with site preparation, construction and restoration will only occur between 8am and 5pm. During these times, average construction sound levels are expected to be approximately 68 DBA at the property line, as discussed in the application, and at the community meeting on August 11. The primary sound emitting construction activities are expected to last approximately 15 - 30 days. In response to community questions, the Applicant has retained the services of an acoustical engineer to prepare an acoustical analysis, based upon the equipment that will be used during the various phases of construction (i.e. site preparation, construction, and restoration).

The Applicant has already committed to utilize noise barriers/sound curtains and has requested that the acoustical analysis identify additional measures to minimize sound levels during construction. This acoustical analysis and sound minimization plan is underway and will be submitted at or prior to the planning commission hearing.

In the absence of state or local noise standards that apply to construction activities conducted during daylight hours, the Applicant will keep construction noise at or below the level of typical construction activities that would be associated with residential development, installation of local utilities, or local road maintenance projects. The Applicant's acoustical engineer will be available at the hearing to present the findings and recommendations of this analysis. The Applicant is committed to implementing reasonable and feasible minimization measures for these short-term construction activities as indicated by their commitment to limit construction hours between 8am and 5pm, the use of construction noise barriers, and the retention of an acoustical engineer to prepare an acoustical analysis of construction activities.

b. After Construction. No noise will be generated by the use after construction, other than nominal noise associated with routine maintenance, typically limited to daytime hours and consisting of light duty pick-up trucks or automobiles.

#### **2. Vibration**

a. During Construction. As stated in the Applicant's geotechnical report at page 5 (See Attachment J, at pages 6, and 8-10) the risk of vibratory damage to adjacent buildings and infrastructure located 50 feet or more from the drill rig, is low. All of the buildings and associated infrastructure will be located more than 50 feet from the drill rig. (See Attachment J – Site Exploration Map) The Applicant's geotechnical engineer will be available at the hearing to respond to any questions associated with his report.

b. After Construction. No vibration will be generated by the use after construction, other than nominal vibration associated with routine maintenance.

### 3. Site Preparation, Construction, Restoration, and Maintenance.

a. During Construction. The Applicant will work with its local landscape architect, Mr. Douglas Spiro with Sprio Landscapes, our project team, and the adjacent neighbors, to minimize the construction footprint and protect native species on site before, during and after construction. The Applicant's team will also work with the adjacent neighbors on an acceptable site restoration and maintenance plan to ensure that the Site is restored and protected on a long-term basis. During construction, the adjacent neighbors, the neighborhood association, and the County will be provided with a 24-hour contact number to the on-site construction manager.

b. After Construction. The Applicant will perform routine maintenance to ensure that the site restoration is completed, and that the Site is maintained according to a vegetation and access management plan that will be prepared with input from the adjacent neighbors and reviewed by the County. The neighborhood association, the adjacent neighbors, and the County, will be provided with a 24-hour contact number for the Applicant's project team, to ensure that any maintenance or operational issues are quickly responded to and resolved.

### 4. Access and Traffic.

a. During Construction. The Applicant expects 5-10 trucks per day (or fewer) to access the site for site preparation and construction work, and 2-3 trucks per day (or less) for site restoration work. Workers will be shuttled to the Site and will drive their own vehicles. Access to and from the Site will be from a temporary driveway located near the center of the Site along Sandlake Road.

b. After Construction. No traffic will be generated by the use, other than nominal visits associated with routine maintenance. Maintenance access to and from the Site after construction will be determined according to a vegetation management plan that will be prepared with input from the adjacent neighbors and reviewed by the County. The intent of any long-term access point on the Site will balance the need to safely maintain the facility, along with the need to discourage casual use of the Site by unauthorized visitors.

### 5. Character of the Area.

a. During Construction. According to the County's comprehensive plan, the character area of Tierra Del Mar is described as follows:

“Tierra Del Mar is a seasonal residential community with approximately 500 part-time residents living at densities of 4 to 12 dwellings per acre. The Tierra Del Mar Water Company provides water service to the community and the Nestucca Rural Fire Protection District provides fire protection. The nearest fire station is in

Pacific City. Commercial services in the community are limited to souvenir sales.” (Tillamook County Comprehensive Plan p. 14-25)

The above-mentioned character of Tierra Del Mar area will not change during or after construction of the proposed underground public utility facility. Mechanical construction noise will be limited to the hours of 8am – 5pm for a construction period of approximately 15-30 days. If the project is approved in 2019, the 15-30 day construction period is expected to occur after the holidays, during the winter of 2020, when seasonal occupancy of residences in Tierra Del Mar is lower than the holidays or other higher occupancy times. Construction noise, vibration and traffic will be similar to normal construction activity for other permitted uses and activities in the area such as single-family home construction, local utility installation and maintenance and local road maintenance.

b. After Construction. The character of the area will be maintained after construction of the proposed public utility facility. No structures will be built above ground on TL 2300, and a fiber-optic manhole cover will be the only visible indication of a utility facility on the Site. As noted earlier, after construction there will no ongoing noise, vibration, or traffic associated with this utility facility, other than nominal impacts from routine maintenance. The Applicant has also agreed to not install any additional submarine cables on the Site, and to record a covenant to that effect with the County as a condition of approval. The overall number of residents and the overall density of development will not change as a result of the proposed underground public utility facility or TL 2300. Tierra Del Mar is a beautiful, safe, and quiet rural residential area, and will remain so after construction of the proposed public utility facility.

#### **D. Applicant’s Proposed Conditions of Approval**

##### 1. Noise.

a. Construction activities will take place only during daylight hours of 8am to 5pm, during the expected 15-30 day construction period. During that time, construction noise levels will be at or below the level of normal construction activity for a single-family home, a local utility facility installation, or a local road maintenance project, as provided in the Applicant’s noise report and abatement plan.

##### 2. Vibration.

a. The Applicant will offer pre-and post-construction inspections to adjacent neighbors and other neighbors within a reasonable distance from the site, to ensure that no material adverse impacts are caused to structures in the surrounding area. The Applicant will repair or otherwise compensate neighboring owners for any damages caused by construction of the project.

##### 3. Site Clearing, Construction, Restoration and Maintenance.

a. The Applicant and its local landscape architect will work with adjacent owners and the County to prepare a site clearing, restoration and maintenance plan prior to beginning construction.

b. The Applicant will provide a 24-hour contact phone number to the on-site project manager and to Applicant, during construction, who will work with the community to quickly respond to and resolve any construction-related issues.

4. Access and Traffic.

a. The Applicant will work with adjacent owners and the County to prepare a parking and access management plan prior to construction.

5. Community.

a. The Applicant will work with the Tierra Del Mar Neighborhood Association and the County, to consider other reasonable opportunities for the Applicant to provide the local community with technology and other assistance that improves community connectivity, communication, and public safety.

6. Restrictive Covenant.

a. The Applicant will record a covenant with the County that prohibits the installation of further subsea cables on TL 3200.

**E. Conclusion**

For all of the above reasons, this application should be approved, along with the conditions of approval proposed by the Applicant.