BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Application of ColfaxNet for Rehearing of Resolution T-17495.	A1601001 Application _____

APPLICATION BY COLFAXNET FOR REHEARING OF RESOLUTION T-17495

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APPLICATION OF COLFAXNET FOR REHEARING OF RESOLUTION T-17495

Pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure, ColfaxNet applies for rehearing of Resolution T-17495, which approved funding for the grant and loan application of Bright Fiber Network, Inc. (U7287C) ("Bright Fiber") from the California Advanced Services Fund (CASF) in the amount of $16,156,323 from the Broadband Infrastructure Grant Account and $500,000 from the Broadband Infrastructure Revolving Loan Account for a fiber-to-the-premise project in rural Nevada County. ColfaxNet served written comments on draft Resolution T-17495 and, therefore, pursuant to Rule 16.2 is deemed a "party" eligible to seek rehearing of the final resolution.

ColfaxNet seeks rehearing of Resolution T-17495 on several grounds. First, Resolution T-17495 arbitrarily determines that large portions of the project area are underserved notwithstanding the availability of adequate wireless Internet access services from existing providers. Second, Resolution T-17495 does not include sufficient findings on the question of project feasibility, specifically including the ability of Bright Fiber to access public roads and highways in order to construct its proposed system. Third, Resolution T-17495 erroneously relies on continued Commission jurisdiction to prevent corporate looting of the CASF funded

assets. Fourth, Resolution T-17495 was issued without proper consideration of potential environmental impacts, in violation of the requirements of the California Environmental Quality Act. For these reasons, Resolution T-17495 is unlawful and must be vacated.

1. RESOLUTION T-17495 ARBITRARILY IGNORES THE AVAILABILITY OF EXISTING HIGH SPEED BROADBAND SERVICES IN THE PROJECT AREA.

The purpose of the CASF Broadband Infrastructure Grant program is to provide high speed Internet access service to residents of communities where such service is not available. There is nothing in the enabling statute that suggests that monies from this ratepayer-funded program should be made available to new entrants seeking to deploy competitive service alternatives where adequate Internet access services already exist. Yet, as to a large portion of the area for which Resolution T-17495 approves grant funding, high speed wireless Internet access service already exists.

The two attached exhibits, which are part of the record upon which Resolution T-17495 was issued, identify specific points throughout a major portion of the project area along the Colfax Highway where ColfaxNet has existing customers. At Communications Division staff request, ColfaxNet also engaged in testing at numerous points in the same area (depicted on Exhibit A), which establishes that ColfaxNet's service provides Internet access at speeds at or exceeding the threshold broadband service level adopted by Decision (D.) 12-02-015.[1]

In addition, as noted in Resolution T-17495, a new competitor, SmarterBroadband, has just completed construction of a federally-funded broadband deployment project in the same area.[2]

[1] Exhibit B shows the service speeds to which end users actually subscribe, not the level of service that is actually available as demonstrated by ColfaxNet's testing.
[2] Resolution T-17495 at 5.

Without inquiring further in light of this evidence as to actual need to provide funding for Bright Fiber's proposed service in this area, Resolution T-17495 dismisses this concern, noting that Communications Division staff "does not have the persons, proprietary equipment or expertise to engage in [line-of-sight] testing" to confirm whether or not the area actually is or is not underserved.[3] Instead, Resolution T-17495 simply guesses that terrain and foliage in the area may cause wireless coverage difficulties and ignores the existing providers' ability to overcome such difficulties by deploying additional equipment, because customers might be charged for such equipment[4] or might not want such equipment[5]. On this basis, Resolution T-17495 concludes that it is preferable simply to expend $16 million in ratepayer-provided funds to enable Bright Fiber to serve these same customers rather than engage in any further investigation.

While the Commission has broad discretion in its administration of the Broadband Infrastructure Grant program, ColfaxNet respectfully submits that approving funding for Bright Fiber's project without undertaking further due diligence into the actual extent of need was arbitrary and an abuse of discretion. Public Utilities Code § 281 specifically authorizes the Commission to use program funds to carry out and administer the program.[6] Thus, the Commission had the ability and opportunity to acquire, either in-house or through outsourcing, the personnel, equipment, and expertise needed to verify the extent to which the project area is actually underserved. And, as the evidence demonstrates, the Commission had every reason to do so. Indeed, the general dispersal of customers served by ColfaxNet within its coverage area belies the notion that wireless coverage is inadequate and the recent completion of the

[3] Id. at 9, footnote 20.
[4] Id. at 10.
[5] Id. at 26.
[6] Pub. Util. Code § 281(c)(1).

SmarterBroadband network raises even further question as to whether there is any need at all for a grant to fund any portion of Bright Fiber's project. The issuance of Resolution T-17495 without any real inquiry at all into project need under these circumstances was premature and clearly an abuse of discretion.

2. RESOLUTION T-17495 IS NOT SUPPORTED BY ADEQUATE FINDINGS OF PROJECT FEASIBILITY.

Clearly, in order for Bright Fiber to be able to construct its network, whether funded by grant of public funds or not, it will need access to public rights of way. Yet, Resolution T-17495 does not contain any findings or discussion on this subject. Public Utilities Code § 7901 provides "telephone corporations" with statewide franchises to construct facilities in and along public roads and waterways. However, the Commission has never defined a broadband Internet access provider as a "telephone corporation" for this or any other purpose.

While Bright Fiber holds a certificate of public convenience and necessity ("CPCN") to provide local exchange and interexchange service, and therefore is a "telephone corporation" for those purposes, the authority held by Bright Fiber is limited to installation of facilities in existing structures.[7] Consequently, Bright Fiber cannot rely on that authority for the purpose of constructing the broadband facilities, which will require trenching and other outside plant construction well beyond the scope of its CPCN.

Accordingly, in the absence of some sort of special franchises issued by the County of Nevada, any affected cities, and CALTRANS, Bright Fiber would not have the legal ability to construct its project. However, Resolution T-17495 fails to address whether Bright Fiber has made any effort to obtain such franchises or under what terms they might be made

[7] D.15-05-028.

available. Thus, there is no basis at this point for the Commission to make a finding of project feasibility in this regard.

Given the absence of any finding that Bright Fiber is authorized to access public rights of way, which is obviously critical to its ability to complete the project, the issuance of Resolution T-17495 cannot be supported and, for this reason, is unlawful.

3. RESOLUTION T-17495 ERRONEOUSLY RELIES ON PUBLIC UTILITIES CODE § 851 TO PROTECT RATEPAYER INTERESTS.

Resolution T-17495 states that Bright Fiber's financial projections are overly optimistic, yet, even Bright Fiber's projections do not provide investors any return within the first five years. Concerned that this might prompt investors to cause the project to be sold at a bargain price "with no guarantee that the buyer would continue to use the network as intended in this grant," Resolution T-17495 addresses this concern by observing that Bright Fiber would have to obtain CPUC authority under Public Utilities Code § 851 before it could so dispose of any CASF-funded assets.[8]

However, § 851 applies only to property that is used or useful in the provision of public utility service. Bright Fiber's network is being constructed, primarily, for the purpose of providing Internet access service, which is jurisdictionally interstate and beyond the Commission's jurisdiction. Further, Bright Fiber's potential use of the network in the future to provide interconnected voice service will rely undoubtedly on Internet Protocol, which under Public Utilities Code § 710 is also outside the Commission's jurisdiction. Thus, it does not appear that a sale of Bright Fiber's assets would actually be subject to prior approval requirements under § 851. Accordingly, the conclusion that Bright Fiber's assets can be protected from corporate looting by operation of section 851 is not consistent with fact or law.

[8] Resolution T-17495 at 22.

As a result, this very significant concern was not properly addressed by Resolution T-17495, and the potential for uncontrolled sales of ratepayer-funded assets clearly remains unresolved.

4. RESOLUTION T-17495 WAS ISSUED IN VIOLATION OF CEQA.

Public Resources Code § 21102 clearly prohibits the Commission from approving the Bright Fiber grant prior to considering potential environmental impacts:

> No state agency, board, or commission shall request funds, nor shall any state agency, board, or commission which authorizes expenditures of funds, other than funds appropriated in the Budget Act, authorize funds for expenditure for any project, other than a project involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted or funded, which may have a significant effect on the environment unless such request or authorization is accompanied by an environmental impact report.

Notwithstanding this unambiguous provision of law, Resolution T-17495 approves the issuance of a grant without having made any determination at all as to whether or not the project presents the potential for adverse environmental impacts. While Bright Fiber contends that the entirety of the project is exempt from CEQA, Resolution T-17495 concedes that the "project's CEQ status is uncertain" and that "Bright Fiber will be required to conduct a detailed PEA prior to [Energy Division's] determining the project's CEQA status."[9]

Quite plainly, Resolution T-17495 is premature. Resolution T-17495 treats environmental consequences as an afterthought, which violates both the letter of section 21102 and the fundamental purpose of spirit of CEQA to ensure that governmental agencies "make decisions with environmental consequences in mind."[10]

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[9] Id. at 23.

[10] *Bozung v. Local Agency Formation Commission of Ventura County* (1975) 13 Cal.3d 263, 283.

CONCLUSION

For each of the reasons set forth above, Resolution T-17495 is unlawful and must be vacated.

Respectfully submitted January 4, 2016 at San Francisco, California.

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By */s/ John L. Clark*
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EXHIBIT A

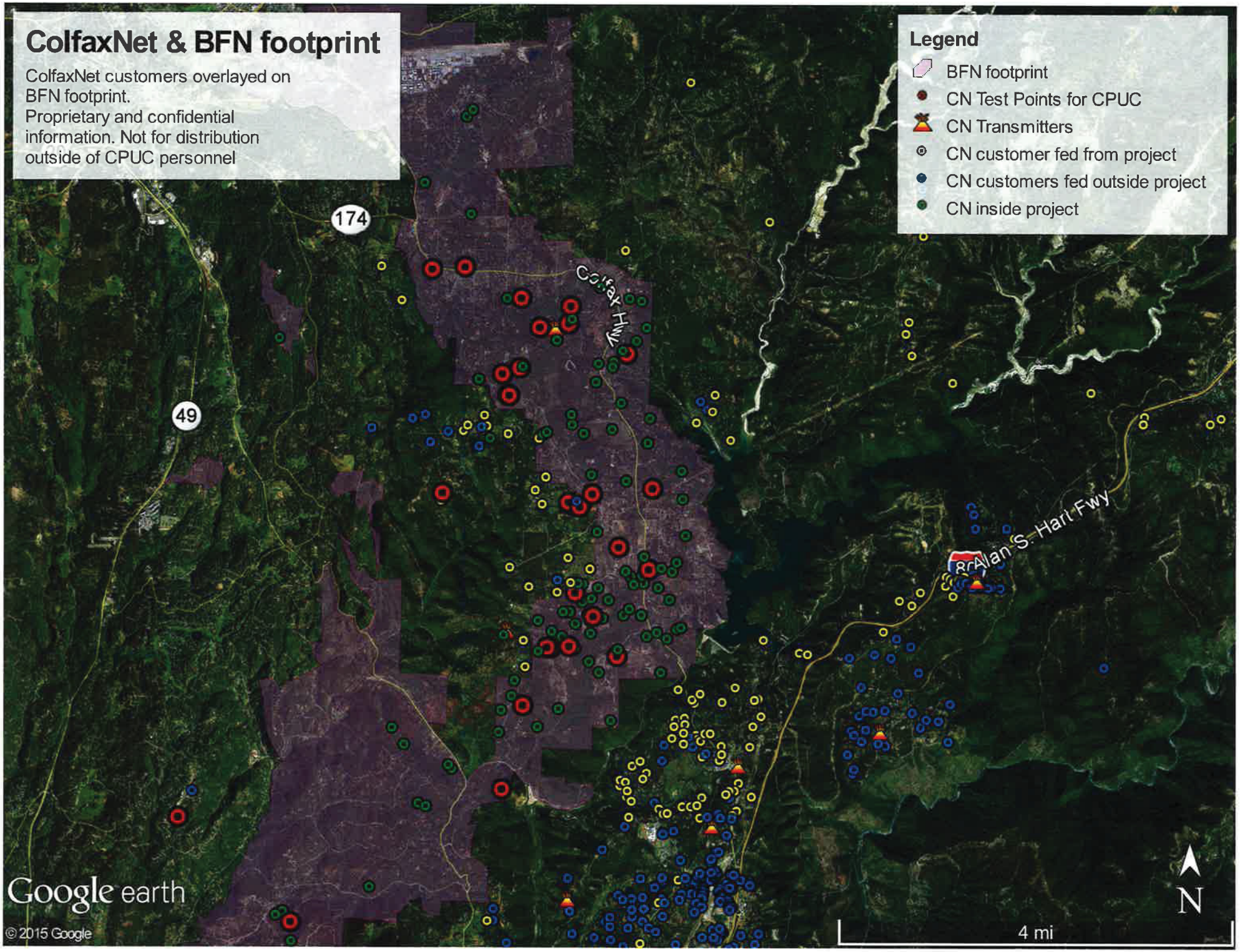
ColfaxNet & BFN footprint
ColfaxNet customers overlayed on BFN footprint.
Proprietary and confidential information. Not for distribution outside of CPUC personnel
Legend
BFN footprint
CN Test Points for CPUC
CN Transmitters
CN customer fed from project
CN customers fed outside project
CN inside project
174
49
Colfax Hwy
Br Alan S. Hart Fwy
Google earth
© 2015 Google
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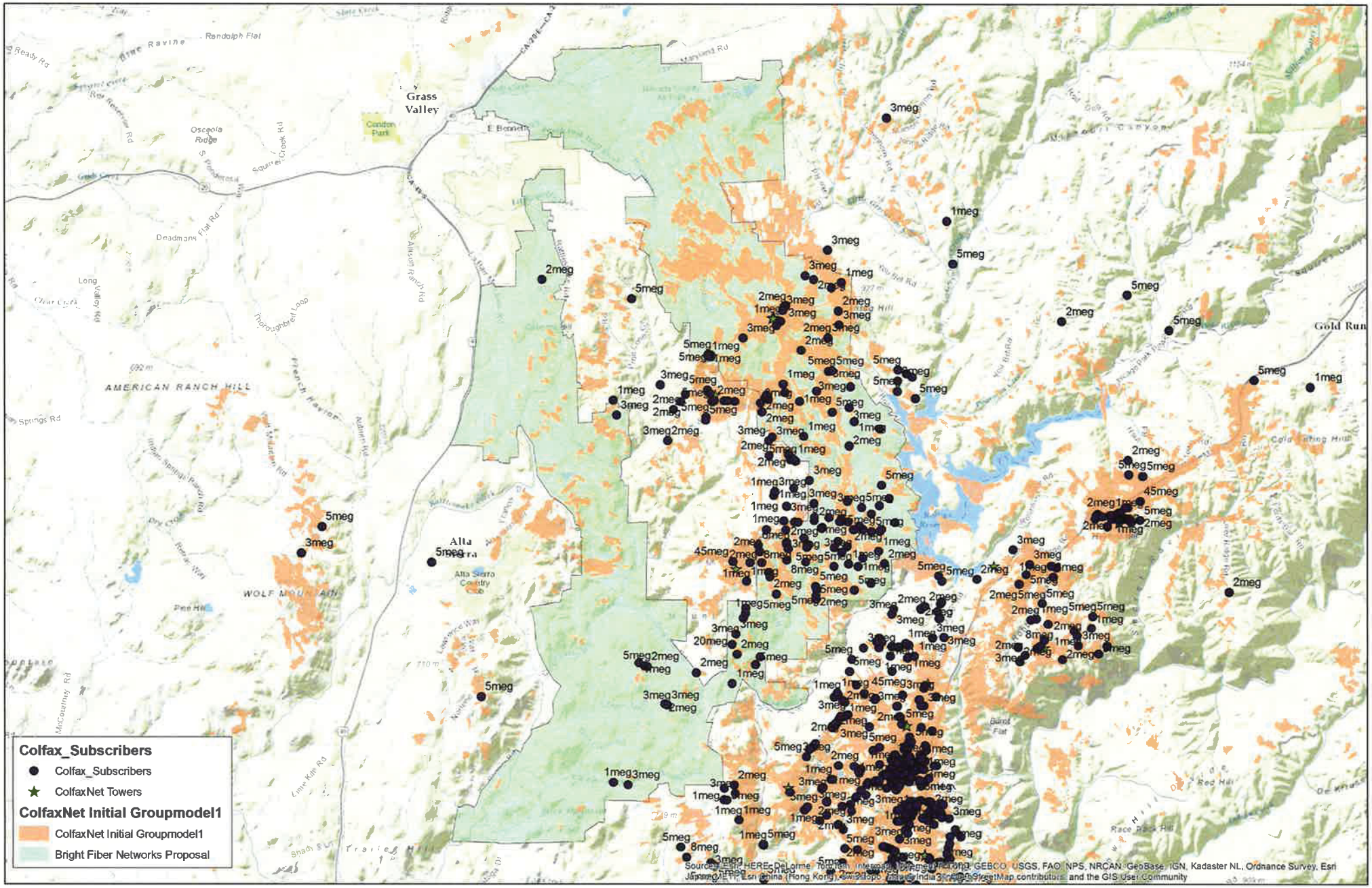
EXHIBIT B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Gold Run
Alta
AMERICAN RANCH HILL
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ColfaxNet Towers
ColfaxNet Initial Groupmodel1
ColfaxNet Initial Groupmodel1
Bright Fiber Networks Proposal
Sources: Esri, HERE, DeLorme, TomTom, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, MapmyIndia, © OpenStreetMap contributors, and the GIS User Community