

Decision 16-05-052

May 26, 2016

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of ColfaxNet for Rehearing of Resolution T-17495.	Application 16-01-001 (Filed January 4, 2016)
Application for Rehearing of Resolution T-17495 by SmarterBroadband, Inc.	Application 16-01-004 (Filed January 6, 2016) (NOT CONSOLIDATED)

ORDER MODIFYING RESOLUTION T-17495 AND DENYING REHEARING OF RESOLUTION T-17495, AS MODIFIED

I. INTRODUCTION

Today’s decision disposes of the applications for rehearing of Resolution T-17495 (or “Resolution”)¹ filed by ColfaxNet and SmarterBroadband, Inc. (“SBB”).

On December 20, 2007, the California Public Utilities Commission (“Commission”), in Decision (D.) 07-12-054,² established the California Advanced Services Fund (“CASF”) program as a two-year program to provide funds for the deployment of broadband infrastructure in unserved and underserved areas in California.

On September 25, 2010, Governor Schwarzenegger signed Senate Bill (“SB”) 1040,³ which codified the CASF program and expanded it to include three accounts: (1) the Infra-structure Grant Account, (2) the Consortia Grant Account, and

¹ Unless otherwise noted, all citations to Commission resolutions are to the official pdf versions, which are available at <http://docs.cpuc.ca.gov/ResolutionSearchForm.aspx>.

² *Order Instituting Rulemaking into the Review of the California High Cost Fund B Program* [D.07-12-054] (2007). Unless otherwise noted, all citations to Commission decisions are to the official pdf versions, which are available at <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>.

³ Stats. 2010, ch. 317, codified at Public Utilities Code section 281. All section references are to the Public Utilities Code unless otherwise specified.

(3) the Revolving Loan Account. The latter two accounts are intended to address the needs that were unmet under the original CASF program. SB 1040 also expanded the CASF fund from \$100 million to \$225 million, adding \$100 million to the Infrastructure Grant Account and allocating \$10 million and \$15 million to the Consortia Grant Account and the Revolving Loan Account, respectively.⁴

On February 1, 2012, the Commission approved D.12-02-015 to implement new guidelines for the Infrastructure Grant and Revolving Loan Accounts. In D.12-02-015, the Commission modified the definition of an underserved area as follows:

An “underserved” area is an area where broadband is available, but no wireline or wireless facilities-based provider offers service at advertised speeds of at least 6 mbps download and 1.5 mbps upload.

(D.12-02-015, pp. 18-19 (slip op.))⁵

On February 1, 2013, Bright Fiber⁶ submitted an application for CASF funding (both grant and loan) for underserved areas in Nevada County to the southeast of Grass Valley.⁷ Therein, Bright Fiber proposed to install a fiber-to-the-premises (“FTTP”) system in rural Nevada County (“Bright Fiber Project”) by extending gigabit high-speed internet service to an estimated 1,941 households spread amongst about 21 square miles in underserved Nevada County communities, generally between the outskirts of Grass Valley and Colfax, including the communities of Chicago Park and Peardale, which are

⁴ P.U. Code § 281, sub. (b)(1).

⁵ *Order Instituting Rulemaking to Consider Modifications to the California Advanced Services Fund Including Those Necessary to Implement Loan Program and Other Provisions of Recent Legislation - Decision Implementing Broadband Grant and Revolving Loan Program Provisions*

[D.12-02-015] pp. 18-19 (slip op.). Speeds of at least 6 mbps download and 1.5 mbps upload are referred to as “served” and/or “served speeds.”

⁶ The application was transferred to the parent entity, Bright Fiber, Inc., in August 2015. See Resolution T-17495, p. 2, fn. 5.

⁷ Resolution T-17495, p. 2.

CASF “priority areas” as declared in Resolution T-17443.⁸ The proposed project would also provide redundant broadband infrastructure in the area that would potentially provide additional benefits to educational, medical, and public safety entities.²

On February 11, 2013, the Commission staff posted the proposed project area map, census block groups (“CBGs”) and zip codes for the Bright Fiber Project on the Commission’s webpage under “CASF Application Project Summaries” and also sent notice regarding the project to its electronic service list.¹⁰

Several challenges were received to the proposed project area from both wireline providers and fixed wireless service providers, including ColfaxNet and SBB, claiming they provide service in the proposed project area at served speeds.¹¹

During its examination of Bright Fiber’s application, Commission staff became aware that the United States Department of Agriculture (“USDA”) had awarded SBB a Rural Utilities Service (“RUS”) Broadband Initiative Program (“BIP”) grant in September 2010 (“SBB’s RUS BIP project.”). The \$1.87 million grant (along with a loan of nearly \$625,000) partially funded an effort to provide high-speed broadband access via fixed wireless technology to more than 435 square miles in western Nevada County, with download speeds of 6 Mbps or higher throughout the entire area.¹² The Bright Fiber Project area is located within SBB’s RUS BIP project area and encompasses approximately six percent of said area.¹³

After reviewing the application, data included in the California Interactive Broadband Map, and carefully investigating and examining all information submitted by the challengers, Commission staff concluded some areas are served by the providers, and

⁸ Resolution T-17443, issued June 26, 2014, Appendix 4.

² Resolution T-17495, p. 6.

¹⁰ Resolution T-17495, p. 3.

¹¹ The Bright Fiber Project area was challenged by Comcast, SBB, Suddenlink, Verizon Wireless and ColfaxNet.

¹² <http://www.rd.usda.gov/files/reports/RBBreportV5ForWeb.pdf>, p. 17; accessed November 30, 2015.

¹³ Resolution T-17495, p. 5.

therefore, ineligible for funding consideration, while other areas should be considered underserved, and eligible for funding consideration.¹⁴ The underserved areas include where the Bright Fiber Project and SBB's RUS BIP project overlap.

On December 7, 2015, the Commission issued Resolution T-17495 approving grant funding in the amount of \$16,156,323 and loan funding of \$500,000 from CASF in response to Bright Fiber's application. The Commission agreed with the Commission staff's findings and conclusions.

ColfaxNet timely filed an application for rehearing alleging that Resolution T-17495 errs by: (1) arbitrarily ignoring the availability of existing high speed broadband services in the project area; (2) failing to make adequate findings of project feasibility supporting the determinations; (3) erroneously relying on Public Utilities Code section 851 to protect ratepayer interests; and (4) violating CEQA by not considering potential environmental impacts. Bright Fiber filed a response to ColfaxNet's rehearing application.

SBB also timely filed an application for rehearing of Resolution T-17495 alleging that Commission erred therein because (1) Commission staff did not complete their study of "served" versus "underserved;" (2) the method for measuring served versus underserved for fixed wireless providers is inaccurate; (3) the Commission did not consider the many other fixed wireless providers covering the project area; and (4) the approval of Resolution T-17495 causes government funds to be applied twice to the same geographic area. Bright Fiber filed a response to SBB's rehearing application.

In addition, SBB filed a Motion for Leave to late file a Reply to Bright Fiber's response to application for rehearing of Resolution T-17495 by SBB ("SBB's Reply" or "Reply").¹⁵

¹⁴ Resolution T-17495, p. 9.

¹⁵ SBB calls this document "Reply Comments." The proper label should be "Reply."

We have reviewed each and every allegations raised in the applications for rehearing. We are of the opinion that the Resolution should be modified to clarify the Commission's determinations to have Bright Fiber Network, LLC ("Bright Fiber") remove households with wireline service at served speeds from its project's boundaries, and have Bright Fiber remove the costs of serving households with fixed wireless service at served speeds from its proposed budget. With this clarification, rehearing of Resolution T-17495, as modified, is hereby denied as no legal error has been demonstrated.

II. DISCUSSION

A. **The Commission lawfully found that the Bright Fiber Project area, as adjusted, is underserved.**

ColfaxNet alleges that Resolution T-17495 arbitrarily ignores the availability of high speed broadband services in the Bright Fiber Project area claiming that high speed wireless internet access service already exists in a large portion of the area for which the Resolution approves grant funding. (Rhg. App., p. 2.). ColfaxNet further alleges that "approving funds for Bright Fiber's project without undertaking further due diligence into the actual extent of need was arbitrary and an abuse of discretion." (Rhg. App., p. 3.) ColfaxNet also argues that "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 SBB network raises even further questions as to whether there is any need at all for a grant to fund any portion of Bright Fiber's project." (Rhg. App., pp. 2- 3.)

SBB alleges that Commission staff did not complete its study of whether the proposed Bright Fiber Project area was served or underserved. To support this claim, SBB points to an April 28, 2014 letter from Commission staff to Bright Fiber discussing SBB's RUS BIP project. In said letter, Commission staff indicated that it would put the CASF Bright Fiber Network project proposal on hold and wait for completion of the SBB RUS BIP project to further determine if the CASF proposed project area continues to be underserved. (Rhg. App., Exhibit B, pp. 9-11.) SBB argues that Commission staff

did not follow up to determine whether the Bright Fiber Project area continues to be underserved, and failed in their duty to complete an accurate assessment of the true facts. (Rhg. App., p. 3.)

As discussed in detail below, both ColfaxNet and SBB's allegations lack merit and fail to comply with section 1732 of the Public Utilities Code,¹⁶ which requires applicants for rehearing to "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful or erroneous." The allegations also fail to comply with Rule 16.1(c), which states that "the purpose of an application for rehearing is to alert the Commission to legal error." (Cal. Code of Regs., tit. 20, section 16.1, subd. (c).) Instead, these allegations appear to be an improper attempt to relitigate the issue of whether the Bright Fiber Project area is served or underserved, which was thoroughly examined in the proceeding. The purpose of a rehearing application is to specify legal error, not to relitigate issues. (See Pub. Util. Code section 1732; Cal. Code of Regs., tit. 20, section 16.1, subd. (c).) Both ColfaxNet and SBB have failed to demonstrate that rehearing is warranted on these issues.

1. The Commission examined the availability of existing high speed broadband services provided by ColfaxNet, SBB, and other fixed wireless service providers in the Bright Fiber Project area prior to approving Bright Fiber's CASF funding.

Resolution T-17495 includes a detailed discussion examining the availability of existing high speed broadband services provided by ColfaxNet, SBB, and other fixed wireless service providers in the Bright Fiber Project area. Specifically, the record in this proceeding indicates that ColfaxNet challenged Bright Fiber's application for CASF funding late in 2014 claiming that it offered service in the proposed Bright

¹⁶ All section references are to the Public Utilities Code unless otherwise specified.

Fiber Project area.¹⁷ The record confirms that Commission staff investigated ColfaxNet's claim, including coverage maps and speed tests provided by ColfaxNet that suggested that it did offer served speeds in part of the southern part of the proposed Bright Fiber Project area. Commission staff verified a total of 138 ColfaxNet customers in the proposed project area as receiving served speeds or higher. As a result, Commission Staff recommended and Bright Fiber removed the costs of providing service to the 138 households served by ColfaxNet from its proposed budget. That deduction is reflected in the number of eligible households in the project area.¹⁸

The record also indicates that SBB challenged Bright Fiber's application for CASF funding claiming coverage in the majority of the project area at speeds of 6 Mbps download and 1.5 Mbps upload, or higher.¹⁹ The record confirms that Commission staff investigated SBB's claim, including examining coverage maps and customer lists provided by SBB to ensure households did, in fact, have broadband availability at served levels. Commission staff also examined additional information provided by SBB, including data about the number of existing customers in the Bright Fiber Project area that had signed up for plans that meet the served speed levels. Commission staff verified a total of 193 SBB customers in the proposed project area as receiving "served" speeds or higher. As a result, Commission staff recommended and Bright Fiber removed the costs of providing service to the 193 households served by SBB from its proposed budget. That deduction is reflected in the number of eligible households in the project area.²⁰

¹⁷ Although ColfaxNet filed its challenge to Bright Fiber's application late in 2014 after the window for doing so had passed, Commission staff, in an abundance of caution and exercising due diligence, accepted ColfaxNet's challenge and investigated the claims therein. (Resolution T-17495, p. 5.)

¹⁸ Resolution T-17495, p. 5.

¹⁹ Resolution T-17495, p. 4.

²⁰ Resolution T-17495, p. 4.

As mentioned above, SBB also alleges that the Bright Fiber Project area is served as a result of its RUS BIP project.²¹ Specifically, SBB alleges that Commission staff did not follow up to determine whether the Bright Fiber Project area continues to be underserved, and failed in their duty to complete an accurate assessment of the true facts. (Rhg. App., p. 3.)

SBB's allegation is incorrect. After sending Bright Fiber the April 28, 2014 letter, Commission staff waited until September 2015, a period of approximately 18 months, before checking with the USDA on the status of SBB's RUS BIP project. On September 9, 2015, Commission staff received an email from the USDA indicating that SBB had informed the USDA that construction on the project was completed, but had not submitted a final completion report.²² Moreover, SBB did not provide Commission staff with a copy of the completion report or any other evidence of additional households receiving broadband at served levels in the projects' overlap area.²³

In SBB's Reply, SBB argues that Bright Fiber's statement in its response to SBB's rehearing application that SBB did not submit a completion report to USDA is wrong. SBB asserts that it filed its completion report with the USDA on September 8, 2015, and received the final close out letter from the USDA on September 30, 2015.²⁴

There is no statute or rule in the Commission's Rules of Practice and Procedure that provides for the filing of a reply to a response to an application for rehearing. However, we have discretion to determine whether to accept such a filing. To the extent that such a filing constitutes an amendment to the application for rehearing, and/or an introduction of new evidence outside the record, it should be rejected. In this case, there is no evidence in the record supporting SBB's statement. SBB is attempting to introduce new evidence outside the record in its Reply, which is inappropriate. As

²¹ Rhg. App., Exhibit B, p. 10.

²² Resolution T-17495, p. 5, fn. 11.

²³ Resolution T-17495, p. 5.

²⁴ SBB's Reply to Bright Fiber's Response to Rehearing Application of Resolution T-17495 by SBB, p. 3.

stated above, SBB did not submit a copy of its USDA completion report or evidence of additional households receiving coverage at served speeds as a result of completion of its RUS BIP project in this proceeding. SBB had ample opportunity to do so as a party to the proceeding. Therefore, the Resolution accurately reflects the evidence in the record, which includes the email from the USDA. SBB's Reply is rejected.²⁵

Of importance, the record in the proceeding indicates that the completion of SBB's RUS BIP project would not have altered Commission staff's determination that the Bright Fiber Project area, as adjusted, was underserved due to line of sight issues affecting wireless service discussed in detail below.

2. Fixed wireless technology is adversely affected by line of sight issues in the Bright Fiber Project area rendering the area, as adjusted, underserved.

Commission staff's examination showed that a key limitation of fixed wireless technology is that the antenna at the provider's ground station and at the consumer's premises must have a direct line of sight in order for the household to receive a line of sight signal. Evidence in the record supports Commission staff's finding that while some households in the project area could receive some level of service from fixed wireless service providers, others could not because line of sight signals from fixed wireless service providers' towers were inaccessible. Because terrain in the proposed project area is both irregular, with many hills and valleys as is typical in the Sierra foothills, and heavily forested, wireless propagation in such areas is negatively affected by the scattering effects of randomly distributed leaves, branches and tree trunks, which can cause attenuation, scattering, diffractions and absorption of fixed wireless radio signals.²⁶ Commission staff's site visits and analysis determined that the terrain and

²⁵ Since there is no provision in the statute or the Commission's Rules of Practice or Procedure for the filing of a reply to a response to an application for rehearing, whether the Commission accepts such a filing is discretionary. However, to the extent that such a filing constitutes an amendment to the application for rehearing, and/or an introduction of new evidence outside the record, it should be rejected.

²⁶ Resolution T-17495, p. 9.

foliage in the proposed project area makes full fixed wireless coverage of the area unlikely, making the area, at best, only “partially” served.”²⁷

In addition, Commission staff received propagation models from ColfaxNet and other fixed wireless service providers in the project area. Analysis of the propagation models showed very limited coverage areas for line-of-sight transmission towers in the 2 GHz and up ranges needed for fast bandwidth. Propagation models for bands at and below 900 MHz showed better coverage, but bandwidth in those ranges is generally at lower than served speeds.²⁸

In fact, SBB acknowledges the line of sight issues on its website:

Sometimes areas within the coverage area will not be able to receive service directly from an existing Access Point due to obstructions, mainly hills and/or trees. In these circumstances we can always get you service, by installing additional equipment to provide coverage.²⁹

The website notes that such “additional equipment” would generally be at the customers’ own costs.³⁰ Considering that additional equipment (primarily relay repeaters and/or additional transmission antennas) would be required to achieve service, it is logical to determine that areas needing such equipment are not currently served by SBB.

The record also reflects that Commission staff engaged in a direct comparison of the service proposed by the Bright Fiber Project and the service offered by ColfaxNet, SBB, and other fixed wireless service providers. That comparison demonstrated that the Bright Fiber Project offers potential customers a system that would provide superior reliability, availability, speed, capacity, and value for the following reasons:

²⁷ Resolution T-17495, p. 9.

²⁸ Resolution T-17495, p. 10.

²⁹ Resolution T-17495, pp. 9-10, fn. 22.

³⁰ Resolution T-17495, pp. 9-10.

First, the fiber-to-the-premises network proposed by Bright Fiber is not subject to terrain variability, and Bright Fiber has committed to serve every household in the project area, including households where the distance from the drop to the household may be of an extended length.³¹

Second, fiber-to-the-premise systems have significant speed advantages over fixed wireless systems. The Bright Fiber Project will offer speeds up to 1,000 Mbps download /1,000 Mbps upload, which is 50 times faster than the fastest offered fixed wireless plans in the area at a lower monthly cost per megabit.³² No fixed wireless service provider in the area currently advertises speeds of more than 20 Mbps down.³³

Third, a fiber network has a significant advantage in terms of capacity over fixed wireless in any given area. Fixed wireless may be able to burst high speeds to a customer, but the more other customers are being served by the same antenna at the same time, the more wireless spectrum is required, and spectrum is in limited supply across the industry. Fiber networks are less susceptible to such congestion with dedicated links available to each customer. In addition, fiber networks have a capacity advantage over wireless networks because of the significantly greater frequency range that wired infrastructure is capable of carrying.³⁴ Notably, the entire wireless radio frequency spectrum can fit into a single fiber with room to spare.³⁵

Fourth, Bright Fiber offers a better value over the fixed wireless offerings in the project area in terms of price per megabit (Mb), especially for low-income customers. Price per megabit is a commonly accepted metric for determining the value of broadband service and has been part of the CASF scoring metric since 2012.³⁶

³¹ Resolution T-17495, p. 10.

³² Resolution T-17495, pp. 12-13.

³³ Resolution T-17495, p. 13.

³⁴ Resolution T-17495, pp. 12-13.

³⁵ Resolution T-17495, p. 13, fn. 28.

³⁶ Resolution T-17495, p. 13, fn. 30 citing to D.12-02-015, Appendix 1 – Revised Application Requirements and Guidelines, p. 23.

Evidence in the record shows that ColfaxNet and SBB's rates were not competitive with Bright Fiber's Project offerings.³⁷

In regard to customer value, we also considered the fact that the definition of "served" speeds for the CASF program may be revised upward.³⁸ In fact, a current legislative effort exists for the Commission to raise the CASF threshold by adopting the FCC's definition of "advanced telecommunications services" speeds of 25+ Mbps download/3+ Mbps upload as the CASF benchmarks.³⁹ Such a change would result in areas currently defined as "served" being redefined as "underserved" given that no fixed wireless service provider in the area offers speeds of more than 20 Mbps download.⁴⁰

Because the Bright Fiber Project will offer speeds up to 1,000 Mbps download /1,000 Mbps upload, we determined that, with the award of the CASF funding, the project area could essentially be "future-proofed" against such duplicative funding. We would have to raise minimum download speeds to more than 166 times their current level before the area could again be considered underserved.⁴¹

Lastly, we received a significant number of letters and emails from local residents, businesses, community organizations, and local government expressing support for the Bright Fiber Project.⁴²

Based on all of the above, we concluded in Resolution T-17495 that the Bright Fiber Project offers potential customers a system that would provide superior reliability, availability, speed, capacity, and value as compared to what is being offered

³⁷ Resolution T-17495, p. 14.

³⁸ In at least two cases (Swall Meadows in Mono County and Sea Ranch in Sonoma County), areas that previously were awarded CASF grants were recently included in new grant applications because the updated definition of "served" has changed their prior "served" status to "underserved." (Resolution T-17495, p. 14.)

³⁹ Assembly Bill 1758 (Stone), introduced February 2, 2016 (previously AB 238, introduced February 2, 2015).

⁴⁰ Resolution T-17495, pp. 13-14.

⁴¹ Resolution T-17495, pp. 13-14.

⁴² Resolution T-17495, p. 15.

by fixed wireless service providers, particularly given a topography that limits the availability of fixed wireless service to certain households in the project area.⁴³

For the reasons stated above, it is clear that we did not act arbitrarily, abuse our discretion, or otherwise commit legal error when we determined in Resolution T-17495 that the Bright Fiber Project meets the requirements of D.12-02-015, and qualifies for funding as an underserved area. This underserved area includes the area where the Bright Fiber Project and SBB's RUS BIP project overlap. Hence, the rehearing applicants' allegations on these issues have no merit, and rehearing regarding these matters is denied.

3. Commission staff's method of measuring served versus underserved for fixed wireless service providers is reasonable and supported by the evidence.

SBB also alleges that the method Commission staff used for measuring served versus underserved for fixed wireless service providers is arbitrary, inaccurate, and erroneous. "For Wireline providers . . . if the provider has a customer in the area, then the area was removed from consideration . . . if a fixed wireless provider has a customer in the area, staff considered the area eligible if you remove those households already subscribed at served speeds." (Rhg. App., p. 4.)

SBB ignores the fact that wireline and wireless networks are very different in that wireline is not limited by the line of sight issues that negatively impact wireless networks. Because the actual service footprints of wireline providers are easily discernable by examining the locations of connecting wires, Commission staff was able to verify wireline coverage down to the address level.⁴⁴ As a result, Commission staff was able to remove areas challenged by wireline providers from the project's boundaries with confidence that those areas were indeed served by wireline providers.

⁴³ Resolution T-17495, p. 12.

⁴⁴ Resolution T-17495, p. 3.

Unlike wireline, fixed wireless signals are subject to line of sight issues, discussed in detail above, such as interference from hilly terrain and foliage (both of which are widespread in the project area), and cannot be independently verified without actually signing up for service. As a result, Commission staff could not determine whether fixed wireless service was available at served speeds throughout the entire area that was being challenged by a fixed wireless service provider. Thus, instead of removing an area, Commission staff removed the costs of serving households from Bright Fiber's proposed budget where it could confirm fixed wireless service at served speeds.

Clearly, Commission staff's method of adjusting for households receiving fixed wireless service at served speeds is reasonable and supported by the evidence given the serious line of sight issues. Hence, we find that SBB's allegation lacks merit and rehearing on this issue is denied.

4. SBB's claim that the Commission erred by not considering other fixed wireless service providers who were not parties to the proceeding is erroneous and fails to identify any legal error.

SBB also alleges that Commission staff totally ignored other fixed wireless service providers who have coverage in the Bright Fiber Project area, including Digital Path, Exwire, SkyWest, DACOMM, and Central Valley Broadband. SBB argues that any judgment of served versus unserved is inaccurate because Commission staff did not include those companies' coverage and customers in their findings. (Rhg. App., pp. 4-5.)

Not only do the above allegations fail to identify legal error as required by section 1732, but there is no evidence in the record supporting SBB's allegation. The record demonstrates that SBB asserted in its challenge to the application that the aforementioned wireless service providers either wholly or partially served the proposed project area.⁴⁵ Commission staff investigated this assertion and determined that Digital

⁴⁵ SBB's Challenge to Bright Fiber's CASF Application, delivered by email on March 3, 2013.

Path and Central Valley offer service in the general region, but not within the precise boundaries of the awarded project area, as affirmed by the California Broadband Availability Map. Commission staff could not confirm the presence of the other named wireless service providers. Of importance, none of the aforementioned wireless service providers submitted challenges to the application or participated in the proceeding. Hence, there is no evidence in the record supporting SBB's allegation that we could have considered.⁴⁶ Thus, we find that SBB has failed to demonstrate that rehearing is warranted on this issue and rehearing is denied.

B. Resolution T-17495 makes all necessary findings of project feasibility required by D.12-02-015.

ColfaxNet alleges that Resolution T-17495 is not supported by adequate findings of project feasibility. Specifically, ColfaxNet argues that in order for Bright Fiber to be able to construct its network, it will need access to public rights of way, and that Resolution T-17495 does not contain any findings or discussion on this subject. ColfaxNet argues that, 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. ColfaxNet further argues that 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 available, and that given the absence of any finding that Bright Fiber is authorized to access public rights of way, the issuance of Resolution T-17495 cannot be supported and, for this reason, is unlawful. (Rhg. App., pp. 4-5.)

ColfaxNet's allegations not only lack merit, but demonstrate ColfaxNet's lack of familiarity with applicant requirements for CASF funding set forth in D.12-02-015. Section V of Appendix 1 of D.12-02-015, entitled "Information Required From Applicants," specifies exactly what information applicants are required to submit

⁴⁶ The record reflects that Commission staff thoroughly examined all challenges to Bright Fiber's application submitted by wireline and wireless providers.

for each broadband project.⁴⁷ Those requirements do not include evidence of access to public rights of way. In fact, generally speaking, such a requirement does not make sense because if an applicant applies for CASF funding and we do not approve the application, there is no reason for such applicant to pursue such access.

That said, in D.15-08-028,⁴⁸ we granted Bright Fiber a Certificate of Public Convenience and Necessity (“CPCN”) to provide limited facilities-based local exchange, access, and interexchange services in the service territory of AT&T and Verizon. Therein, we stated: “Because Bright Fiber receives authority to operate in the prescribed service territory . . . it receives access to public rights of way in California as set forth in D.98-10-058.” (D.15-05-028, p. 11.) This means that Bright Fiber gets access to the easements and conduits under the control of the incumbent providers, and that Bright Fiber is subject to time, place, and manner restrictions that may be imposed by local governments on access to those public rights of way. Hence, we find ColfaxNet’s allegations lacking in merit and rehearing on these issues is denied.⁴⁹

C. The Commission did not err in determining that the sale of Bright Fiber’s assets would be subject to section 851.

ColfaxNet alleges that our determination in Resolution T-17495 that the sale of Bright Fiber’s assets would be subject to section 851 amounts to legal error.

⁴⁷ Commission staff reviewed and analyzed data submitted for the Bright Fiber Project’s CASF grant application to determine the project’s eligibility for CASF funding. This data included, but was not limited to: proof of a CPCN from the Commission; descriptions of current and proposed broadband infrastructure; geographic information system (GIS) formatted shapefiles mapping the project areas; assertion that the area is underserved; number of potential subscriber households and average incomes; project construction schedule; project budget; proposed pricing and commitment period for new subscribers; and financial viability of the applicant. (Resolution T-17495, Findings No. 4, p. 29.)

⁴⁸ *In the Matter of the Application of Bright Fiber Network, LLC for a Certificate of Public Convenience and Necessity to Provide Full Facilities Based and Competitive Local Exchange Access and Interexchange Services within California and specifically, within Nevada County -- Granting Bright Fiber Network, LLC a Certificate of Public Convenience and Necessity In Order to Provide Limited Facilities-Based Competitive Local Exchange, Access and Interexchange Services* [D.15-05-028] (2015).

⁴⁹ ColfaxNet also argues that because Bright Fiber’s certificate of public convenience and necessity (“CPCN”) to provide local exchange and interexchange service is limited to installation of facilities in existing structures, Bright Fiber cannot rely on that authority for the purpose of constructing the broadband facilities, which will require trenching and other outside plant construction. This issue will be addressed below under the CEQA discussion.

ColfaxNet argues that section 851 applies only to property that is used or useful in the provision of public utility service, and that because Bright Fiber's network is being constructed primarily for the purpose of providing internet access service, it is jurisdictionally interstate and beyond the Commission's jurisdiction. (Rhg. App., pp. 5-6.)

As explained below, ColfaxNet's analysis of this section 851 issue is flawed because ColfaxNet ignores the fact that Bright Fiber, by virtue of its CPCN, is subject to our jurisdiction. Further, ColfaxNet mistakenly implies that Bright Fiber would be selling its service – internet - instead of focusing on what Bright Fiber would actually be selling – its fiber lines.

The Resolution reflects that Commission staff was concerned with Bright Fiber's required five-years of financial projections not showing repayment to investors,⁵⁰ and the possibility that Bright Fiber may respond to investor pressure for returns by selling the network with no guarantee that the buyer would continue to use the network as intended in this grant.⁵¹ These concerns, however, were put to rest by virtue of the fact that, in D.15-05-028, we granted Bright Fiber a CPCN to provide local exchange, interexchange, and access services in the service territory of AT&T and Verizon. (D.15-05-028, p. 16 [Ordering Paragraph 1].) We found that Bright Fiber qualifies as a telephone corporation because it intends to provide local exchange voice, interexchange, access, or other voice services in addition to broadband service. (*Id.* at p. 15.) D.15-05-028 states: "Because Bright Fiber is a telephone corporation, it is subject to the Commission's jurisdiction." (*Id.* at p. 16 [Ordering Paragraph 2].) Moreover, Bright Fiber is obligated to comply with all applicable Public Utilities Codes and Commission Rules, General Orders, and decisions applicable to telecommunications carriers providing approved services. (*Id.* at p. 11.)

⁵⁰ Bright Fiber, in its application, indicated that investors would be buying equity stakes rather than loaning the company money.

⁵¹ Resolution T 17495, p. 22.

Hence, we correctly determined in Resolution T-17495 that Bright Fiber is required to fulfil all relevant obligations of a public utility including those under section 851.⁵² Section 851 prohibits a public utility from selling, leasing, assigning, mortgaging, or otherwise disposing any part of its plant, system, or other property necessary or useful in the performance of its duties to the public without having secured an order from the Commission authorizing it to do so. Accordingly, if Bright Fiber pursues a sale of assets funded in part by CASF dollars, it must seek Commission approval before any deal for those assets can close. Based on the above, it is clear that ColfaxNet's allegation lacks merit and rehearing on this issue is denied.

D. Resolution T-17495 does not violate CEQA or any provisions of the Public Resources Act

ColfaxNet alleges that Resolution T-17495 was issued in violation of CEQA and that Public Resources Code section 21102 clearly prohibits the Commission from approving the Bright Fiber grant prior to considering potential environmental impacts. (Rhig. App., p. 6.)⁵³ ColfaxNet further alleges that the Resolution approves the issuance of a grant without having made any determination at all as to whether the project presents the potential for adverse environmental impacts.” (Rhig. App., p. 6.) ColfaxNet alleges because Bright Fiber's CPCN to provide local exchange and interexchange service is limited to installation of facilities in existing structures, Bright Fiber cannot

⁵² Resolution T-17495., p. 22, fn. 41.

⁵³ Public Resources Code section 21102 provides as follows:

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.

Feasibility and planning studies exempted by this section from the preparation of an environmental impact report shall nevertheless include consideration of environmental factors.

rely on that authority for the purpose of constructing the broadband facilities, which will require trenching and other outside plant construction. (Rhg. App., p. 4.)

Resolution T-17495 specifically requires us to complete the CEQA review of the Bright Fiber Project prior to disbursing CASF funds for construction activities.⁵⁴ The Resolution indicates that the Commission's Energy Division has required Bright Fiber to conduct a detailed Proponents Environmental Assessment ("PEA") prior to Energy Division determining the appropriate level of CEQA review for the project.⁵⁵ Based on the results of that PEA, Energy Division may grant the categorical exemption Bright Fiber is seeking or may deny the exemption and require a full environmental impact report ("EIR").⁵⁶ Thereafter, the appropriate environmental document come before us for certification through a Resolution that will include specific findings as to the project's environmental impact and mitigation measures, if any. This same Resolution would consider whether CASF funds can be disbursed for construction activities.

Hence, the Resolution does not violate CEQA or any provisions of the Public Resources Code because disbursement of CASF funding for construction of the project is still contingent upon a future decision that will be accompanied by an appropriate CEQA analysis. Thus, ColfaxNet's allegation has no merit, and thus, rehearing on this issue is denied.

E. The Commission's approval of Resolution T-17495 does not unlawfully cause government funds to be applied twice to the same geographic area.

SBB alleges that the Commission's approval of Resolution T-17495 results in double government funding of the project area because of SBB's RUS BIP project.⁵⁷

⁵⁴ Resolution T-17495, p. 30, Findings 11.

⁵⁵ Resolution T-17495, p. 23.

⁵⁶ Resolution T-17495, p. 23.

⁵⁷ As discussed above, the USDA had awarded SBB a Rural Utilities Service ("RUS") Broadband Initiative Program ("BIP") grant in September 2010 ("SBB's RUS BIP project"). The \$1.87 million grant

(footnote continued on next page)

SBB argues that this is wrong because CASF funds are intended to be deployed in areas where no government funds have already been spent and no coverage already exists.

(SBB Rhg. App., p. 5)

First, SBB has failed to articulate how these allegations demonstrate legal error as required by section 1732. Second, there is no evidence in the record demonstrating that SBB's RUS BIP project will result in the entire Bright Fiber Project area being able to receive broadband at served speeds. Due to line of sight issues associated with wireless technology, we concluded that the Bright Fiber Project area, as adjusted, was underserved. This underserved area includes where the Bright Fiber Project and SBB's RUS BIP project overlap. Hence, this allegation also lacks merit and rehearing on this issue is denied.

III. CONCLUSION

Resolution T-17495 is modified to clarify the Commission's determinations to have Bright Fiber remove households with wireline service at served speeds from its project's boundaries, and have Bright Fiber remove the costs of serving households with fixed wireless service at served speeds from its proposed budget. SBB's Reply to Bright Fiber's response to SBB's application for rehearing attempts to introduce new evidence outside the record. Therefore, SBB's Motion to Late File a Reply is denied. Rehearing of Resolution T-17495, as modified, should be denied as no legal error has been demonstrated.

(footnote continued from previous page)

(along with a loan of nearly \$625,000) partially funded an effort to provide high-speed broadband access via fixed wireless technology to more than 435 square miles in western Nevada County, with download speeds of 6 Mbps or higher throughout the entire area. The Bright Fiber Project area is located within SBB's RUS BIP project area and encompasses approximately six percent of said area.

THEREFORE, IT IS ORDERED that:

For purpose of clarification, Resolution T-17495 shall be modified as follows:

1. On page 5, under the first full paragraph, the following paragraph is inserted:

Because the actual service footprints of wireline providers are easily discernable by examining the locations of connecting wires, CD was able to verify wireline coverage down to the address level and, therefore, removed areas challenged by wireline providers from the project's boundaries with confidence that those areas were served by wireline providers. Unlike wireline, fixed wireless signals are subject to line of sight issues, such as interference from hilly terrain and foliage, both of which are widespread in the project area, and cannot be independently verified without actually signing up for service. As a result, CD could not determine whether fixed wireless service was available at served speeds throughout the entire area that was being challenged by a fixed wireless service provider. Thus, instead of removing an area, Commission staff removed the costs of serving households from Bright Fiber's proposed budget where it could confirm fixed wireless service at served speeds.

2. Smarter Broadband Inc.'s Motion for leave to file late Reply to Bright Fiber's Response to application for rehearing of Resolution T-17495 is denied.

3. Rehearing of Resolution T-17495, as modified, is hereby denied.

4. The proceedings, A.16-01-001 and A.16-01-004, are hereby closed.

This Order is effective today.

Dated May 26, 2016, at San Francisco, California.

MICHAEL PICKER

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

LIANE M. RANDOLPH

Commissioners