

Decision 17-08-018

August 10, 2017

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Charter Communications, Inc.  
for Rehearing of Resolution T-17515.

Application 16-07-003  
(Filed July 11, 2016)

**ORDER MODIFYING RESOLUTION T-17515,  
DENYING REHEARING OF RESOLUTION, AS MODIFIED,  
AND DENYING RELATED MOTION FOR STAY OF RESOLUTION T-17515**

**I. INTRODUCTION**

On June 10, 2016, the Commission issued Resolution T-17515 (or “Resolution”)<sup>1</sup> approving grant funding in the amount of \$239,793 from the California Advanced Services Fund (“CASF”) Broadband Public Housing Account (BPHA)<sup>2</sup> in response to public housing infrastructure grant applications from twelve Publicly Supported Communities (“PSC” or PSCs): the Housing Authority of the County of San Bernardino (“HACSB”) for its Lynwood and North E Street projects, Community Housing Works (“CHW”) for its Northwest Manors II projects, and from Eden Housing, Inc. (“Eden”) for its Hayward Senior, Warner Creek, Jasmine Square, Monticelli, Rancho Park, Royal Court, Wheeler Manor 650 5<sup>th</sup> Street and Wheeler Manor 651 6<sup>th</sup> Street projects.<sup>3</sup> In Resolution T-17515, we found that the 12 projects were capable of offering

<sup>1</sup> All Commission Resolutions citations refer to the official Commission PDF versions of the resolutions, which can be found on the Commission’s website: <http://docs.cpuc.ca.gov/ResolutionSearchForm.aspx>

<sup>2</sup> Any references to “BPHA” always refer to the CASF’s BPHA.

<sup>3</sup> As discussed in detail below, Assembly Bill 1299 of the 2013-2014 legislative session added subdivision (h) to section 281 expanding the CASF program by adding a fourth account, the BPHA, dedicated to providing broadband internet access and adoption to residents of low income public housing communities. In D.14-12-039, we adopted the BPHA and, pursuant to the legislative mandate in section 281(h)(2), we also adopted the BPHA Application

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internet service speeds of at least 6 mbps download and 1.5 mbps upload for 548 living units in these PSCs. (Resolution, p. 1.)

Prior to the issuance of the Resolution, Charter Communications, Inc. (“Charter”), an Internet Service Provider (“ISP”), challenged the CASF BPHA grant funding for 10 PSCs alleging that the properties are neither “unserved” nor “underserved,” as defined in D.12-02-015, and that the units at the various properties are currently “wired.”

In Resolution T-17515, we denied these challenges, and modified the expedited review criteria set forth in D.14-12-039,<sup>4</sup> Appendix B, authorizing Commission staff to approve applications through expedited review for properties that are wired and unwired. (Resolution T-17515, pp. 1-2; see also Appendix A, p. A-1.)

Charter filed a timely application for rehearing of Resolution T-17515. Charter alleges that by approving approximately \$190,061 in infrastructure grants from CASF’s BPHA for ten PSCs currently served by Charter,<sup>5</sup> the Resolution violated the plain language and overall objective of the CASF program set forth in Public Utilities

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Requirements and Guidelines set forth in Appendix B, which specify, among other things, that the “Commission will award grants and loans to finance up to 100% of the costs to install inside wiring and equipment.” (D.14-12-039, Appendix B, p. B-1.) Hence, as the Resolution points out, the PSCs’ applications for BPHA infrastructure grant funds are for inside wiring or wifi only. (Resolution, p. 9.)

<sup>4</sup> *Order Instituting Rulemaking to Consider Modifications to the California Advanced Services Fund – Decision Adopting the California Advanced Services Fund Broadband Public Housing Public Housing Account Application Requirements and Guidelines* [D.14-12-039] (2014).

Except for formally published decisions, all Commission decision citations refer to the official Commission PDF versions of the decisions, which can be found on the Commission’s website: <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>

<sup>5</sup> The 10 projects challenged by Charter are Housing Authority of the County of San Bernardino (“HACSB”) for its Lynwood and North E Street projects, Community Housing Works (“CHW”) for its Northwest Manors II projects, and from Eden Housing, Inc. (“Eden”) for its Jasmine Square, Monticelli, Rancho Park, Royal Court, Wheeler Manor 650 5<sup>th</sup> Street and Wheeler Manor 651 6<sup>th</sup> Street projects.

Code section 281.<sup>6</sup> (Rhg. App., p. 1.) Charter argues that section 281(e) generally outlines the rules and purposes for availability of all funds under the CASF umbrella. (Rhg. App., p. 10.) More specifically, Charter argues that an entity that is not a telephone corporation (referring in this instance to a PSC) must meet all of specified requirements set forth in section 281(e)(3), including that projects provide last-mile broadband access to households that are unserved by an existing facilities-based broadband provider, and only receive funding to provide broadband access to households that are “unserved” or “underserved,” as defined in Decision 12-02-015. (Rhg. App., pp. 10-11.) Hence, Charter alleges that the Resolution’s award of BPHA funding to a PSC that is already “wired” and “served” by a private broadband provider such as Charter violated section 281(e)(3) resulting in legal error. (Rhg. App., p. 16.)

Further, Charter also seeks rehearing on the grounds that (i) there is no record evidence that Charter’s service is not affordable; (ii) there is no record evidence that necessary “backhaul” service will be available to each of the PSCs to allow the delivery of broadband services; and (iii) the Resolution’s modifications to the Expedited Review Criteria set forth in D.14-12-039 are procedurally improper implying that the Commission violated Charter’s rights to due process. (Rhg. App., p. 16, fn.16.)

In addition, Charter filed a Motion for Stay of Resolution T-17515 asserting that it is likely to prevail on merits of its application for rehearing, and that Charter and the public will suffer serious harm if the stay is not granted.<sup>7</sup>

Two parties filed a response to Charter’s application for rehearing. California Emerging Technology Fund filed a response in support of Resolution T-17515, while Cox Communications California LLC (“Cox”) filed a response supporting Charter’s application for rehearing.<sup>8</sup>

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<sup>6</sup> Hereinafter, reference to section is to the Public Utilities Code, unless otherwise noted.

<sup>7</sup> Charter’s Motion for Stay of Resolution T-17515, pp. 4-5.

<sup>8</sup> In addition, Cox and the California Cable & Telecommunications Association (“CCTA”) filed motions for party status after Charter filed its application for rehearing. Given that both Cox and

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We have carefully considered all of the arguments presented by the rehearing applicant, and find that Resolution T-17515 should be modified to clarify that **(1)** the Legislature did not intend for section 281(e)(3), including the “unserved” and “underserved” requirements set forth therein, to apply to the Commission’s award of BPHA grants or loans to PSCs, which are governed by section 281(h); **(2)** section 281(h)(3) sets forth the Legislature’s intent for the BPHA funds to be used to connect a broadband network to a PSC; **(3)** section 281(h)(3) specifies that the only grounds for a challenge of a BPHA award to a PSC is if the PSC has denied a right of access to any broadband provider that is willing to connect a broadband network to the facility for which the grant or loan is sought; **(4)** there is no language in section 281(h) prohibiting the Commission from awarding BPHA funding to a PSC because the property is already served and wired by a private broadband provider; **(5)** in D.14-12-039, the Commission intended to allow PSCs with both “wired” and “unwired” properties to apply for BPHA funding; and **(6)** to delete Appendix A to the Resolution because its modification to the expedited review criteria in D.14-12-039, Appendix B, was unnecessary since D.14-12-039 already authorized Commission staff to approve BPHA applications for wired or unwired properties through expedited review.

Rehearing of Resolution T-17515, as modified, is denied because no legal error has been demonstrated. In addition, we deny Charter’s related Motion for Stay of Resolution T-17515 because the issues presented therein are moot with the disposition of Charter’s application for rehearing.

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CCTA are on the CASF service list associated with the PSC applications that resulted in Resolution T-17515, they were already parties to this proceeding and these motions were unnecessary. Furthermore, Cox submitted challenges to several of the PSC applications. Hence, the Commission should deny both motions as unnecessary.

## II. DISCUSSION

### A. The Legislature did not intend for section 281(e)(3) to apply to the CASF's BPHA funding to PSCs.

In its rehearing application, Charter argues that an entity that is not a telephone corporation (referring in this instance to a PSC) is subject to the eligibility requirements set forth in section 281(e)(3), including that projects provide last-mile broadband access to households that are unserved by an existing facilities-based broadband provider and only receive funding to provide broadband access to households that are “unserved” or “underserved,” as defined in Decision 12-02-015.<sup>2</sup> (Rhg. App., pp. 10-11.) Hence, Charter alleges that the grant of BPHA funding in this instance violates section 281(e)(3)'s eligibility requirements that infrastructure funding be used for “unserved” and underserved” properties. (Rhg. App., p. 9.)

A review of the legislative history in regard to Senate Bill (“SB”) 740 and Assembly Bill (“AB”) 1299, both of which amended section 281 in the 2013-2014 legislative session, confirms that the Legislature did not intend for section 281(e)(3) to apply to the Commission’s award of BPHA funding to PSCs.

#### 1. Senate Bill 740

On October 3, 2013, Governor Brown signed SB 740 into law as an urgency measure, which took effect immediately.<sup>10</sup> SB 740 amended section 281(d)(1)(A) by increasing the funding to the Broadband Infrastructure Grant Account

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<sup>2</sup> An “unserved” area is defined as an area that is not served by any form of wireline or wireless facilities-based broadband, such that Internet connectivity is available only through dial-up service. (*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] (2012), p. 13.) An “underserved” area is defined 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. (*Id.* at p. 19.)

<sup>10</sup> SB 740 (Padilla) Stats. 2013 Ch. 522, was double jointed with AB 1299 (Bradford) Stats. 2013 Ch. 507, meaning SB 740 would incorporate AB 1299’s amendments to section 281 if SB 740 was enacted and chaptered last. However, since SB 740 was enacted as an urgency measure, it was not chaptered last and did not include AB 1299’s amendments to section 281.

from \$100,000,000 to \$190,000,000.<sup>11</sup> SB 740 also added paragraph (3) to section 281(e) providing, in pertinent part, that “an entity that is not a telephone corporation shall be eligible to apply to participate in the program administered by the commission pursuant to this section to provide access to broadband to an unserved or underserved household, as defined in commission D.12-02-015, if the entity otherwise meets the eligibility requirements and complies with the program requirements established by the commission.” The statutory eligibility requirements include “[t]hat projects under this paragraph provide last-mile broadband access to households that are unserved by an existing facilities-based broadband provider and only receive funding to provide broadband access to households that are unserved or underserved, as defined in commission Decision 12-02-015.”<sup>12</sup>

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<sup>11</sup> Section 281(d)(1)(A).

<sup>12</sup> Section 281(e)(3) states: Notwithstanding subdivision (b) of Section 270, an entity that is not a telephone corporation shall be eligible to apply to participate in the program administered by the commission pursuant to this section to provide access to broadband to an unserved or underserved household, as defined in commission Decision 12-02-015, if the entity otherwise meets the eligibility requirements and complies with program requirements established by the commission. These requirements shall include all of the following:

- (A) That projects under this paragraph provide last-mile broadband access to households that are unserved by an existing facilities-based broadband provider and only receive funding to provide broadband access to households that are unserved or underserved, as defined in [C]ommission Decision 12-02-015.
- (B) That funding for a project providing broadband access to an underserved household shall not be approved until after any existing facilities-based provider has an opportunity to demonstrate to the [C]ommission that it will, within a reasonable timeframe, upgrade existing service. An existing facilities-based provider may, but is not required to, apply for funding under this section to make that upgrade.
- (C) That the [C]ommission shall provide each applicant, and any party challenging an application, the opportunity to demonstrate actual levels of broadband service in the project area, which the [C]ommission shall consider in reviewing the application.
- (D) That a local governmental agency may be eligible for an infrastructure grant only if the infrastructure project is for an unserved household or business, the [C]ommission has conducted an open application process, and no other eligible entity applied.

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In response to SB 740, we issued D.14-02-018<sup>13</sup> implementing revised eligibility criteria for the CASF and adopting rules permitting non-telephone corporations to participate in the CASF program, including rules to ensure that funds granted to non-telephone corporations are not subject to waste, fraud or abuse.<sup>14</sup> Of importance, pursuant to the legislative mandate set forth in section 281(e)(3), we defined an entity that is not a telephone corporation as “facilities-based broadband service providers”<sup>15</sup> and required them to provide last-mile broadband access to households that are unserved by an existing facilities-based provider and only receive funding to provide access to households that are unserved or underserved.<sup>16</sup>

A review of the Senate’s Third Reading Bill Analysis of SB 740, as amended on September 6, 2013 (emphasis added), clarifies that the legislature did not intend for section 281(e)(3) to apply to grants or loans from the BPHA:

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- (E) That the [C]ommission shall establish a service list of interested parties to be notified of California Advanced Services Fund applications.

<sup>13</sup> *In Order Instituting Rulemaking to Consider Modifications to the California Advanced Services Fund – Decision Implementing Revised Eligibility Criteria for the CA Advanced Services Fund Program* [D.14-02-018] (2014) in Rulemaking (R.) 12-10-012), the Commission implemented SB 740’s amendments to section 281 by adopting rules permitting non-telephone corporations to participate in the CASF Program. (See D.14-02-018, Appendix 1.) D.14-02-018 was an interim decision. Therein, the Commission states that “the remaining issues raised by SB 740 and AB 1299 are to be resolved in a subsequent phase of this rulemaking.” (D.14-02-018, p. 39 [Ordering Paragraph 2].) As discussed below, D.14-12-039 resolved the implementation of AB 1299, specifically adopting the CASF Broadband Public Housing Account and Application Requirements and Guidelines.

<sup>14</sup> D.14-02-018, p.39 [Ordering Paragraph 1.]; see also Appendix 1.

<sup>15</sup> “The Commission shall use the National Telecommunications and Information Administration’s (NTIA) definition of a facilities-based broadband service provider, which is generally defined as any entity providing internet access service or middle mile transport, over its own fixed or wireless facilities to residences, businesses, or other institutions.” (D.14-02-018, p. 12; see also D.14-12-018, Appendix 1, p. 1, and Appendix 2, pp. 4-5.)

<sup>16</sup> See section 281(e)(3)(A).

Current CASF rules limit program participation to telephone corporations. This bill proposes to expand eligibility to for infrastructure grants to entities that are not telephone corporations, similar to the expanded eligibility authorized in connection with the Recovery Act. In October 2012, PUC proposed this very issue, subject to legislative authorization, because it found that commercial and nonprofit entities that are not telephone corporations, such as tribal entities and Wireless Internet Service Providers (WISPs) have expressed interest in providing broadband. These broadband services provide wireless solutions that are viable for "last mile" connection of end users in rural areas that are challenging to serve. . . .<sup>17</sup>

The above Senate Bill Analysis clarifies that the purpose of SB 740's amendments to section 281(e)(3) was to allow entities other than telephone corporations, defined by the Commission as "facilities-based broadband service providers," to apply for CASF funding from the Broadband Infrastructure Grant Account (hence, the \$90,000,000 increase in funding) to provide "last mile" access to households that are unserved or underserved, as specified in section 281(e)(3).

This interpretation makes sense because SB 740's amendments to section 281 did not add the BPHA to the CASF (section 281(c)(4)), or add subdivision (h) to section 281 defining PSCs and mandating that the Commission establish the eligibility and program requirements a PSC must comply with in order to obtain funding from the BPHA. These subsequent amendments to section 281 are the result of AB 1299, which was double jointed with SB 740 and chaptered last, discussed in more detail below.

The fact is there is no language in SB 740 supporting Charter's position that the Legislature intended for section 281(e)(3) to apply to a CASF account (the BPHA) or to a subdivision of law (section 281(h)), which were not even included in that bill. Any analysis to the contrary does not make sense since PSCs are not facilities-based

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<sup>17</sup> SB 740 Senate Bill – Bill Analysis, Senate Third Reading, SB 740 (Padilla), as amended September 6, 2013.



broadband service providers providing last-mile broadband access, as required by section 281(e)(3)(A).

## 2. Assembly Bill 1299

During the 2013-2014 legislative session, Governor Brown also signed Assembly Bill (“AB”) 1299 into law, effective January 1, 2014.<sup>18</sup> AB 1299 made significant changes to section 281 that were not included in SB 740’s amendments. AB 1299 created the BPHA under the CASF program to support the deployment of broadband infrastructure and adoption programs in eligible PSCs.<sup>19</sup> Of significance, AB 1299 added subdivision (h) to section 281 defining PSCs, mandating that the Commission establish eligibility and program requirements for BPHA funding, and specifying that the only grounds for challenge of a BPHA award is if the PSC denied a right of access to any broadband provider that is willing to connect a broadband network to the facility for which the grant or loan is sought.

Section 281(h)(2) provides:

Notwithstanding subdivision (b) of Section 270, moneys in the Broadband Public Housing Account shall be available for the commission to award grants and loans pursuant to this subdivision<sup>20</sup> to an eligible publicly supported community if that entity otherwise meets eligibility requirements and complies with program requirements established by the commission.

(Pub. Util. Code, §281, subd. (h)(2), emphasis added.)

Section 281(h)(3) provides:

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<sup>18</sup> AB 1299 (Bradford) Stats. 2013 Ch. 507, was double jointed with SB 740 (Padilla) Stats. 2013 Ch. 522, meaning that AB 1299 would incorporate SB 740’s amendments to section 281 if AB 1299 was enacted and chaptered last. In this instance, AB 1299 was chaptered last and incorporated all of SB 740’s amendments to section 281, including those set forth in section 281(e)(3).

<sup>19</sup> Section 281(c)(4).

<sup>20</sup> This language provides further clarification that the Legislature intended for section 281(h) to be a stand-alone subdivision.

Not more than twenty million dollars (\$20,000,000) shall be available for grants and loans to a publicly supported community to finance a project to connect a broadband network to that publicly supported community. A publicly supported community may be an eligible applicant only if the publicly supported community can verify to the commission that the publicly supported community has not denied a right of access to any broadband provider that is willing to connect a broadband network to the facility for which the grant or loan is sought.

(Pub. Util. Code, §281, subd. (h)(3), emphasis added.)

First, section 281(h)(2) sets forth a clear legislative mandate to the Commission requiring us to establish the eligibility and program requirements for BPHA funding to PSCs, which we did in D.14-12-039, discussed in more detail below; second, section 281 (h)(3) sets forth the Legislature’s intent for the BPHA funds to be used to connect a broadband network to a PSC; and third, section 281(h)(3) also sets forth the Legislature’s intent that the only grounds for a challenge of a BPHA award to a PSC is if the PSC has denied a right of access to any broadband provider that is willing to connect a broadband network to the facility for which the grant or loan is sought. Of importance, there is no language in section 281(h) prohibiting us from awarding BPHA funding to a PSC because the property is already served and wired<sup>21</sup> by a private broadband provider.

A review of the legislative history of AB 1299 clarifies that (1) the Legislature did not intend for section 281(e)(3), including the “unserved” and “underserved” requirements set forth therein, to apply to our award of BPHA grants or loans to PSCs under section 281(h); and that (2) the Legislature was well aware of the

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<sup>21</sup> “A unit is “wired” for broadband Internet if it is possible to subscribe to a commercially available broadband Internet service, such as via Digital Subscriber Line (DSL), cable modem or another protocol, utilizing the existing “wired” facilities. A unit having such wiring is considered as having broadband service “available”. An “unwired property” has at least one unit that is not “wired.” (D.14-12-039, Appendix B, p. B-3.)

fact that PSCs are already served, therefore, the focus of AB 1299 was on connecting broadband networks to PSCs.

The Senate Energy, Utilities and Communications Committee's Bill Analysis (July 2, 2013) of AB 1299, as amended on April 25, 2013 (emphasis added), states in pertinent part:

**Public Housing and the Digital Divide** - On April 29, 2013, the Assembly Utilities and Commerce Committee held an informational hearing on broadband availability for residents of public housing. According to estimates from the [Commission] and California Emerging Technology Fund (CETF), there are about 300,000 publicly subsidized housing units in California, of which about 200,000 to 250,000 are estimated to lack broadband connections. Representatives from publicly supported and non-profit housing communities, situated primarily in urban areas, testified that a majority of their properties lack reliable broadband connectivity, citing the cost of building or upgrading the infrastructure and maintaining the network and inside wiring as the primary barrier to receiving broadband service. Representatives of cable companies with facilities to the curb near public housing buildings claim that in some cases they have been denied access to install lines that would enable service to individual units. . . . <sup>22</sup>

1. **Author's Purpose.** According to the author, this bill will help bridge the Digital Divide and advance California's policies to extend broadband service to all California communities regardless of their location or income. This bill recognizes that bridging the Digital Divide will require new public policy that encourages investment in deployment and adoption of broadband technology in publicly subsidized affordable housing developments.

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<sup>22</sup> Of importance, AB 1299 addressed the concerns of the cable companies in Section 281(h)(3), which states, in pertinent part, "[a] publicly supported community may be an eligible applicant only if the publicly supported community can verify to the commission that the publicly supported community has not denied a right of access to any broadband provider that is willing to connect a broadband network to the facility for which the grant or loan is sought."

2. **Served But Not Connected.** From the beginning, the CASF's first priority has been to help fund broadband infrastructure in areas of the state without any broadband service (unserved), and secondly in areas where broadband service is not available at benchmark speeds deemed adequate to participate in the modern digital economy (underserved). The overall goal of CASF is to bring adequate broadband service to all Californians. This bill is consistent with that goal but brings a new twist to the program in order to help connect public housing residents in locations that would not otherwise be eligible for CASF funding because they are "served" by a broadband provider. . . . As stated by the author, a broadband cable running to the street or curb does not bring Internet access to public housing residents if the building's individual units are not wired for broadband.<sup>[23]</sup> This bill also authorizes use of CASF funds specifically for broadband adoption projects, which the CASF does not currently authorize. Because this bill reallocates CASF funds for a unique new purpose, there should be a separate account and statutory direction. Thus, the author and committee may wish to consider amending the bill to establish a separate broadband Public Housing Account and recast all the program requirements as a stand-alone subdivision of Section 281 (as reflected in the attached mock-up).
3. **Making Public Housing Eligible.** This bill makes an entity that is not a telephone corporation eligible for funding from a CPUC public purpose program . . . . In addition, this bill's definition of an eligible "public housing community" needs technical clarification to conform with federal program definitions. Thus the author and committee may wish to consider amending the bill to make a public housing

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<sup>23</sup> Charter argues that this sentence means that the Legislature did not intend for "wired" properties to be eligible for BPHA funding. This is an incorrect assumption. Section 281(h)(2) authorizes the Commission to establish eligibility and program requirements for BPHA funding, which the Commission did in D.14-12-039, Appendix B. Therein, the Commission not only defines "wired," but requires PSC applicants to attest to whether or not the property it proposes to serve is wired for broadband internet and provide the percentage of units that have broadband service available. (D.14-12-039, Appendix B, pp. B-5-B-6.) This language indicates that the Commission intended to consider applicants with wired properties for BPHA funding provided the applicant met all other eligibility and program requirements.

community, as defined, eligible for CASF funding (as reflected in the attached mock up.)

4. **Grants and Loans Authorized.** This bill authorizes use of funds from the CASF Broadband Infrastructure Grant Account in order to make grants to public housing entities for inside wiring and adoption.

The Assembly's Bill Analysis of AB 1299, Concurrence in Senate Amendments, as amended on September 6, 2013 (emphasis added), states, in pertinent part, as follows:

Barriers exist in certain publicly supported and non-profit affordable housing developments in California. This bill authorizes PUC to appropriate \$20 million from the Broadband Infrastructure Grant Account to fund grants for deployment of broadband services and adoption programs in publicly-supported housing communities. Representatives from publicly-supported and non-profit housing communities, situated primarily in urban areas, testified at the hearing that a majority of their properties lack reliable broadband connectivity. The housing panelists claimed the costs associated with building or upgrading the infrastructure and maintaining the network is the primary barrier to receiving broadband services for the many disadvantaged residents that reside in these affordable housing developments. . . .

[T]he bill allows PUC to develop the appropriate policies and criteria to awards grants that would effectively achieve the goal of closing the digital gap in public housing communities while also ensuring grants are distributed in a manner that reflects the statewide distribution of the publicly supported housing communities. . . .

The above bill analyses confirm that the Legislature had knowledge that most PSCs are already served and wired, and that the focus of AB 1299 was on connecting PSCs with broadband internet. In summary, the purpose of AB 1299 was (1) to bridge the Digital Divide and advance California's policies to extend broadband service to low income residents of publicly subsidized housing

located mostly in urban areas; (2) to connect public housing residents in locations that would not otherwise be eligible for CASF funding because they are "served" by a broadband provider; (3) for section 281(h) to be a stand-alone subdivision of Section 281; and (4) to allow the Commission to develop the appropriate policies and criteria to awards grants that would effectively achieve the goal of closing the digital gap in public housing communities, which we did in D.14-12-039.

Again, there is no language in AB 1299 or section 281(h) that supports Charter's position that the Legislature intended for section 281(e)(3), including the "unserved" and "underserved" requirements set forth therein, to apply to the our award of BPHA grants or loans to PSCs under section 281(h). Nor is there any language prohibiting us from awarding BPHA funding to a PSC because the property is already served and wired by a private broadband provider.

### **3. D.14-12-039**

In response to AB 1299, and pursuant to the legislative mandate in section 281(h)(2) which required the Commission to establish the eligibility and program requirements for BPHA funding, we issued D.14-12-039 adopting the CASF BPHA<sup>24</sup> and the CASF BPHA Application Requirements and Guidelines set forth in Appendix B.<sup>25</sup>

In D.14-12-039, we authorized staff to approve BPHA applications through the process of expedited review provided the PSC meets all of the criteria set forth therein.<sup>26</sup> The expedited review criteria requires applicants to meet the eligibility requirements under section 281(h)(2),<sup>27</sup> and, consistent with section 281(h)(3), requires

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<sup>24</sup> D.14-12-039, p. 1.

<sup>25</sup> D.14-12-039, p. 27 [Ordering Paragraph 1.].

<sup>26</sup> D.14-12-039, Appendix B, pp. B-13 - B-14.

<sup>27</sup> As discussed above, in response to AB 1299 and the legislative mandate in section 281(h)(2), the Commission established the eligibility and program requirements for BPHA funding in D.14-12-039, Appendix B, including the expedited review criteria. (See D.14-12-039, Appendix B, pp. B-13-B-14.)

applicants to declare that it has not denied an ISP access to its property to provide broadband internet service and that no ISP has challenged this statement.<sup>28</sup>

Consistent with section 281(h), there is no language in D.14-12-039, or in its CASF BPHA Application Requirements and Guidelines, prohibiting us from awarding BPHA funding to a PSC because the property is already served and wired by a private broadband provider.<sup>29</sup> Also consistent with section 281(h), the only grounds for challenge is the applicant's denial of access.<sup>30</sup>

#### **4. Resolution T-17515**

In Resolution T-17515, we correctly determined that, pursuant to section 281(h)(2), the Legislature authorized us to establish the eligibility and program requirements for BPHA funding, which we did in D.14-12-039. (Resolution, p. 9.) We also correctly determined that, consistent with section 281(h)(3) and D.14-12-039's BPHA Application Requirements and Guidelines set forth in Appendix B, including the expedited review criteria set forth therein, the only basis for a challenge to a PSC's eligibility for BPHA funding is if the PSC has denied an ISP access to its property to provide broadband internet service and the ISP challenges the application on this ground. (Resolution, pp. 9-10.) In Resolution T-17515, we found that none of the PSCs had denied access in this instance. (Resolution, p. 9.) In fact, the evidence clearly shows that

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<sup>28</sup> D.14-12-039, Appendix B, pp. B-13-B-14.

<sup>29</sup> Conversely, D.14-12-039's expedited review criteria require an applicant to identify its bandwidth source, either at the minimum point of entry ("MPOE") or its wireless equivalent, (which assumes that the area is already served by an ISP). (D.14-12, 039, Appendix B, p. B-14.)

<sup>30</sup> In D.14-12-039, Appendix B, Section V, 1.6, "Assertion of wired or unwired" states: The applicant must attest to whether or not the property it proposes to serve under its grant request is wired for broadband Internet service, as defined in Section III, and provide the percentage of units that have broadband service available. The applicant also must verify that it has not denied an ISP access to its property in order to provision broadband service to any unit within twelve months prior to its application. An applicant's previous denial of access for cause (e.g., the ISP's costs to residents or the applicant were unreasonably high) does not constitute a denial of a right of access. (D.14-12-039, Appendix B, pp. B-5-B-6.) This language indicates that the Commission intended to allow PSCs with both wired and unwired properties to apply for BPHA infrastructure grant funding.

Charter did not challenge the applications on this ground. Charter's challenges were based on the grounds that it (an ISP) already provides service at the PSC (the PSCs are "wired."). (Resolution, p. 1, fn. 1; see also Resolution, p. 7.)

We point out that nearly all public housing application locations received by the Commission staff are wired. Commission staff arrived at this conclusion based on descriptions of existing building wiring, staff review of project engineering documents and photos, and staff inspections of several urban public housing locations. (Resolution, p. 3.) In fact, the deployments funded through the BPHA program are dependent on the purchase of a digital circuit from an existing ISP, which is already servicing the area. (Resolution, p. 4.) In other words, an existing ISP needs to be servicing the area with sufficient capacity in order for the PSC to acquire its bandwidth source since all public housing project applications are for inside wiring or WiFi only. (Resolution, p. 9.) The Resolution states that public housing projects approved to date are providing facilities grants to PSCS that allow them to offer residents limited broadband services at no charge despite the existing availability of commercial services within the building units. (Resolution, p. 4.)

If we were to accept Charter's statutory interpretation of section 281 (that if a building is already served by an existing ISP and wired, a PSC applicant would not be eligible for BPHA infrastructure grant funding), there would be few, if any, eligible BPHA infrastructure projects since, as discussed above, nearly all PSCs are wired. Thus, Charter's statutory interpretation essentially swallows up section 281(h) and renders the subdivision ineffective contrary to the Legislature's intent.

The above analysis indicates that our interpretation of section 281, and our conclusion that section 281(h) exclusively governs BPHA funding to PSCs, was legally correct. Therefore, we did not commit legal error when we denied Charter's challenges to the PSCs applications for BPHA infrastructure grant funding. Hence, Charter's request for rehearing on the grounds that we violated section 281 lacks merit and is denied.



We find that the Resolution’s modification to the expedited review criteria in D.14-12-039, Appendix B, authorizing Commission staff to approve BPHA applications for properties that are wired or unwired was unnecessary. (Resolution, Appendix A, p. A-1.) In D.14-12-039, we already authorized Commission staff to approve BPHA applications for wired or unwired properties through expedited review, as explained above. Therefore, we modify the Resolution by deleting Appendix A to the Resolution and the modification to D.14-12-039’s expedited review criteria set forth therein. With this modification, Charter’s due process allegation is moot, and we need not address the issue.

**B. There is record evidence that Charter’s service is not affordable.**

Charter also seeks rehearing on the grounds that there is no record evidence that Charter’s service is not affordable (Rhg. App., p. 16, fn. 14). As Charter correctly points out, “affordability” is not a criterion required by section 281(h) (Rhg. App., p. 16, fn. 14.), and we are not required to make any specific findings regarding this issue. That said, Charter is wrong that there is no record evidence addressing the issue of affordability.

In its implementation of the BPHA program pursuant to section 281(h)(2), the Commission addressed the issue of affordability in D.14-12-039’s expedited review criteria, which states that “[r]esidents will be charged no more than \$20 per month for Internet service.”<sup>31</sup>

In an appeal to Charter’s challenge to Eden Housing’s BPHA infrastructure grant applications, Eden stated, among other things, that (1) its housing sites are occupied by 100% low income residents, with an average household income of \$35,000 and much lower at its senior housing sites. “A large majority of our residents – currently an average 73% -- have no access to broadband services because they cannot afford to pay the monthly service fees offered by Comcast and Charter. . . . [T]he monthly fees could

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<sup>31</sup> D.14-12-039, Appendix B, p. B-13.

cause a severe hardship to a family and, in some cases, a basic need could go unmet to pay the bill[;]” (2) many of Eden’s properties are designated for seniors and they also have a large number of disabled special needs, and/or highly vulnerable populations with low broadband adoption rates. “This lack of broadband internet impedes our efforts to connect these residents to services. They are at a disadvantage when it comes to basic daily needs – making an appointment with a doctor, monitoring children’s school attendance and progress, homework completion[,], accessing a bus schedule, paying a bill, looking for work, etc[;]” (3) senior and special needs residents show a tendency toward isolation and depression. “Free broadband access to the Internet helps connect people to friends and loved ones and provides other opportunities for engagement and interaction with the outside world. . . . A monthly fee is an obstacle for this group[;]” and (4) Eden’s program will not prevent those who can afford it from signing up for other services with Comcast or Charter. “Our intent is to provide the most basic level of service, free, to 100% of residents.”<sup>32</sup>

Similarly, the Housing Authority of the County of San Bernardino (“HACSB”) also filed an appeal to Charter’s challenges of its BPHA infrastructure grant applications. Therein, HACSB states that “Charter has access to the families and sites, but fails to provide broadband internet service at a rate affordable to its residents.” HACSB further states that “lack of service to 100% of the residents living at these sites is evidence of the digital divide between the lower income families and the surrounding neighbors. Internet access is increasingly becoming required basic service for families.” HACSB explains that it needs to provide this population access to the internet at an affordable rate and can do so with the assistance of the BPHA grant.<sup>33</sup>

Clearly, there is ample record evidence demonstrating that Charter’s service is not affordable to many of the residents living in low income public housing. Hence,

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<sup>32</sup> See Eden Housing’s Letter of Appeal to challenges posed by Comcast and Charter, dated November 30, 2015.

<sup>33</sup> See HACSB’s Letter of Appeal to challenges posed by Charter, dated November 3, 2015.

Charter's request for rehearing on the grounds that there is no record evidence that its service is not affordable lacks merit. Accordingly, we deny rehearing on this issue.

**C. There is record evidence that necessary Backhaul service will be available to the PSCs.**

Charter also seeks rehearing on the grounds that there is no record evidence that necessary "backhaul" service will be available to each of the PSCs to allow the delivery of broadband services. (Rhg. App., p. 16, fn. 15.) Backhaul refers to the side of the network that communicates with the global Internet. (Resolution, p. 5, fn.14.) Backhaul is provided by an ISP that provides broadband access to households in the area, which constitutes the bandwidth source.

Although "backhaul" is not a criterion required by section 281(h), D.14-12-039's expedited review criteria require an applicant to identify its bandwidth source, either at the minimum point of entry ("MPOE") or its wireless equivalent. (D.14-12-039, Appendix B, p. B-14.) The record evidence shows that both CHW and Eden stated that they will be purchasing backhaul from existing ISPs such as Charter or Comcast for both WiFi and xDSL installations. (Resolution, p. 5.)<sup>34</sup> HACSB stated that it will be building alternate facilities for the backhaul with outside funding. (Resolution, p. 5.)

The record evidence also shows that Charter has stated that it does not offer internet service for this type of "resale" distribution even if there is no cost to the recipients.<sup>35</sup> The Resolution states, however, that Commission staff is aware of Charter offering its internet services for this type of "resale" distribution. (Resolution, p. 17.) The Resolution also states that if Charter has decided not to provide Eden with backhaul, there may be other options for Eden. For example, for the Rancho Park project located in

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<sup>34</sup> See also Eden's BPHA Application Excel Workbook, where they identify sources of bandwidth for each proposed project; see CHW's Engineering Documents, pp. 1-2.

<sup>35</sup> See Charter's Response to Eden Housing, Inc., Rebuttal on Public Housing Infrastructure Grant Application, dated May 24, 2016, p. 3.

Hollister, Commission records show that AT&T service may be available, and for the Monticelli project in Gilroy, Etheric Networks may be able to provide network connections.<sup>36</sup> (Resolution, p. 17.)<sup>37</sup>

Based on the above, Charter's allegation that there is no record evidence that necessary "backhaul" service will be available to each of the PSCs to allow the delivery of broadband services lacks merit. Rehearing on this issue is denied.

**D. Charter's Related Motion for Stay of Resolution T-17515 should be denied as moot and/or without merit.**

Charter filed a related Motion for Stay of Resolution T-17515. Therein, Charter asked for a stay pending the outcome of the rehearing application and/or likelihood of a court challenge. (Motion for Stay, p. 1.) Because the Commission is disposing Charter's application for rehearing, the Motion for Stay becomes moot. Also, in rejecting the allegations raised in the rehearing application, we deny the Motion for Stay because the Charter is not likely to prevail on the merits of its application for rehearing, and we do not believe that the public will not suffer serious harm if the stay is not granted. Thus, the Motion for Stay is made moot with the disposition of the rehearing application.

**III. CONCLUSION**

For the reasons discussed above, we modify Resolution T-17515 as discussed above and set forth in the Ordering Paragraphs below. Further, we delete Appendix A to the Resolution because its modification to the expedited review criteria in D.14-12-039, Appendix B, was unnecessary since D.14-12-039 already authorized

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<sup>36</sup> Information acquired from the California Broadband Availability Map (<http://www.broadbandmap.ca.gov/>)

<sup>37</sup> Of importance, the Resolution states that "[i]n the event that the recipient fails to complete the performance in accordance with the terms of the [Commission's] approval, as set forth in this Resolution, the recipient shall reimburse some or all of the CASF funds it has received." Hence, if any of the applicants are unable to acquire the necessary backhaul, they will be required to reimburse some if not all of the CASF funding. (Resolution T-17515, Section V, Compliance Requirements, Paragraph B, Execution and Performance, p. 11.

Commission staff to approve BPHA applications for wired or unwired properties through expedited review. Attachment A to today's decision incorporates the modification made to Resolution T-17515.

Rehearing of Resolution T-17515, as modified, is denied because no legal error has been demonstrated. Furthermore, Charter's related Motion for Stay of Resolution T-17515 is denied because the issues therein are moot with the disposition of the rehearing application.

**THEREFORE, IT IS ORDERED** that:

1. Resolution T-17515 shall be modified as follows:
  - a. At the bottom of page 1, in the last sentence beginning with "This Resolution denies these challenges" after the word "challenges" insert a period. Delete the rest of the sentence on page 1 and continuing onto page 2.
  - b. On page 2, in the first full paragraph under the caption "BACKGROUND," delete "281(f) (2)" and replace with "281(h)(2).
  - c. On page 2, in the second full paragraph, delete the following words from the first sentence: "On December 18, 2014, the Commission approved D.14-12-039 which implements the rules and guidelines for the BPHA including:" and insert:
 

In response to AB 1299, and pursuant to the legislative mandate in section 281(h)(2), which required the Commission to establish the eligibility and program requirements for BPHA funding, the Commission issued D.14-12-039 adopting the CASF BPHA<sup>3</sup> and the CASF BPHA Application Requirements and Guidelines set forth in Appendix B.<sup>4</sup> Therein, the Commission established the BPHA" (continue with remainder of paragraph 2).
  - d. On page 2, in the last paragraph next to the bullet point, in the first sentence starting with "The Commission," delete the words delegated to CD staff the authority" and insert:

"assigned to CD staff the responsibility"

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<sup>3</sup> D.14-12-039, p. 1.

<sup>4</sup> D.14-12-039, p. 27 [Ordering Paragraph 1].

- e. On page 3, in the first sentence next to the bullet point at the top of the page ending with “operations costs” insert:

“The expedited review criteria requires applicants to meet the eligibility requirements under section 281(h)(2),<sup>6</sup> and, consistent with section 281(h)(3), requires applicants to declare that it has not denied an ISP access to its property to provide broadband internet service and that no ISP has challenged this statement.<sup>7</sup> Consistent with section 281(h), there is no language in D.14-12-039, or in its CASF BPHA Application Requirements and Guidelines, including the expedited review criteria, that prohibits the awarding BPHA funding to a PSC because the property is already served and wired by a private broadband provider.<sup>8</sup> Also consistent with section 281(h), the only grounds for challenge is the applicant’s denial of access.<sup>9</sup>”

- f. On page 3, in the first full paragraph, delete the third sentence starting with “Additionally, and ending with “similar grounds” including deleting footnote 5.

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<sup>6</sup> As discussed above, in response to AB 1299 and the legislative mandate in section 281(h)(2), the Commission established the eligibility and program requirements for BPHA funding in D.14-12-039, Appendix B, including the expedited review criteria. (See D.14-12-039, Appendix B, pp. B-13-B-14.)

<sup>7</sup> D.14-12-039, Appendix B, pp. B-13-B-14.

<sup>8</sup> Conversely, D.14-12-039’s expedited review criteria require an applicant to identify its bandwidth source, either at the minimum point of entry (“MPOE”) or its wireless equivalent, (which assumes that the area is already served by an ISP). (D.14-12, 039, Appendix B, p. B-14.)

<sup>9</sup> In D.14-12-039, Appendix B, Section V, 1.6, “Assertion of wired or unwired” states: The applicant must attest to whether or not the property it proposes to serve under its grant request is wired for broadband Internet service, as defined in Section III, and provide the percentage of units that have broadband service available. The applicant also must verify that it has not denied an ISP access to its property in order to provision broadband service to any unit within twelve months prior to its application. An applicant’s previous denial of access for cause (e.g., the ISP’s costs to residents or the applicant were unreasonably high) does not constitute a denial of a right of access. (D.14-12-039, Appendix B, pp. B-5-B-6.) This language indicates that the Commission intended to allow PSCs with both wired and unwired properties to apply for BPHA infrastructure grant funding.

g. On page 3, in the second full paragraph, delete the first sentence starting with “The expedited review requirements” and ending with “should be treated” including deleting footnote 7.

h. On page 7, under Heading B, Project Criteria Evaluation, in the first sentence starting with “D.14-12-039,” delete the words “delegates to staff the authority” and insert:

“assigns to staff the responsibility”

i. On page 9, in the first full paragraph, delete the last sentence starting with “P.U. Code Section 281(h)(3)” and ending with “Public Housing challenges.”

j. On page 9, in the second full paragraph, first sentence, delete the words, “As discussed above, D.14-12-039 delegates to staff the authority” and insert:

“As discussed above, D.14-12-039 assigned to staff the responsibility”

k. On page 9, in the second full paragraph, delete the last sentence starting with “D.14-12-039 is also consistent” and ending with “wired under expedited review.” Insert:

“In fact, the only basis for a challenge to an applicant’s eligibility indicated in Section 281(h) and in D.14-12-039 is denial of access.<sup>25</sup>”

l. On page 9 and continuing on page 10, delete the fourth full paragraph in its entirety, starting with “CD further notes that Section 281” and ending on the top of page 10 with “differently than an unwired facility,” including deleting footnotes 22-25.

m. On page 10, delete the first full paragraph in its entirety, starting with “Therefore, this Resolution” and ending with “under the BPHA.”

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<sup>25</sup> Section 281(h)(3); D.14-12-039, Appendix B, p. B-13.

- n. On page 10, delete the second full paragraph in its entirety, starting with “In approving this Resolution,” and ending with “via Expedited Review” including footnote 26. Insert:
- “Of importance, there is no language in section 281(h), or in D.14-12-039’s BPHA Application Requirements and Guidelines, including the expedited review criteria, that prohibits the awarding BPHA funding to a PSC because the property is already served and wired by a private broadband provider. Pursuant to section 281(h) and D.14-12-039, the only grounds for a challenge to a PSC’s application for BPHA funding is the applicant’s denial of access.”
- o. On page 14 and continuing onto page 15, in the first paragraph under the heading “Charter,” delete the words “statues” and “statue” and replace with “statutes” and “statute.”
- p. On page 17, delete the second full paragraph starting with “In short,” and ending with “wired” in its entirety, and insert:
- “In short, Charter’s comments do not change staff’s conclusion that awarding these BPHA grants is consistent with the statute for the CASF BPHA and D.14-12-039.”
- q. On page 17, in Finding 1, delete the first three sentences in their entirety, and insert:
- “On December 22, 2014, the Commission issued D.14-12-039. This decision assigned CD with the responsibility to approve applications through an expedited review that meet expedited review criteria.”
- r. On page 17, in Finding 2, delete the words “D.14-12-039 states” and insert:
- “Consistent with Section 281(h)(3) of the Public Utilities Code, D.14-12-039 states”.
- s. On page 18, in Finding 9, delete the sentence in its entirety and insert:
- “Neither section 281(h), or D.14-12-039’s BPHA Application Requirements and Guidelines, including the expedited review criteria, prohibit the awarding BPHA funding to a PSC because the property is already served and wired by a private broadband provider. Pursuant to section 281(h)(3) and D.14-12-039, the



only ground for a challenge to a PSC's application for BPHA funding is the applicant's denial of access."

- t. On page 19, in Ordering Paragraph 1, delete the words "Appendix B" and insert:  
  
"Appendix A"
  - u. On page 19, in Ordering Paragraph 2, after "CASF" insert:  
"Broadband"
  - v. On page 19, delete Ordering Paragraph 6 in its entirety.
  - w. Delete Appendix A (pages A-1-A-2) in its entirety.
  - x. Rename Appendix B to "Appendix A."
  - y. Rename Appendix C to "Appendix B."
  - z. With these modifications the footnote numbering will be adjusted accordingly. See Attachment A.
2. Rehearing of Resolution T-17515, as modified, is hereby denied.
  3. Motion for Stay of Resolution T-17515 is hereby denied.
  4. This proceeding, A.16-07-003, is hereby closed.

This Order is effective today.

Dated August 10, 2017, at San Francisco, California.

MICHAEL PICKER  
President  
CARLA J. PETERMAN  
LIANE M. RANDOLPH  
MARTHA GUZMAN ACEVES  
CLIFFORD RECHTSCHAFFEN  
Commissioners