

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application for Modification of Resolution T-17502 filed by Conifer Communications, Inc. (U-1527-C)

Draft Resolution T-17599

**CONIFER COMMUNICATIONS INC. (U-1527-C) COMMENTS ON
DRAFT RESOLUTION T-17599**

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CONIFER COMMUNICATIONS INC. (U-1527-C) COMMENTS ON DRAFT RESOLUTION T-17599

Pursuant to Rule 14.5 of the of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure and in accordance with the Notice of Availability issued on March 13, 2018, Conifer Communications, Inc. ("Conifer") (U-1527-C) offers these comments on Draft Resolution T-17599 ("Draft Resolution").

A. Introduction

The Draft Resolution, as written, will unlawfully subsidize a service provider to directly overbuild the existing broadband network of Conifer, a family-owned company that delivers fixed wireless broadband service at qualifying speeds to customers in Tuolumne and Mariposa Counties using its own private funding.¹ On March 31, 2015, Cal.net, Inc. ("Cal.net") submitted an application for a California Advanced Services Fund ("CASF") grant to overbuild fixed wireless infrastructure to provide broadband Internet and VoIP telephony in Conifer's service territory. On April 27, 2015, Conifer filed a challenge to the Cal.net CASF application, demonstrating that it was already serving business and residential customers in Tuolumne and Mariposa Counties by delivering broadband service at qualifying speeds of 6/1.5 Mbps in 58% (28 of 48) of the census block groups in Cal.net's proposed project area. Without notice to Conifer, the Commission adopted Resolution T-17502, approving a \$3,608,224 CASF grant for Cal.net to overbuild Conifer's network in Tuolumne and Mariposa Counties.²

Conifer learned about the resolution months after issuance, at which point was precluded from filing an application for rehearing as a result of the Commission's failure to provide timely notice. Accordingly, Conifer prepared and filed an Application for Modification of Resolution T-17502 ("Petition"), within the confines of Rule 16.4, demonstrating that the resolution: (i) relies solely on subscription data, and not availability data (as required by state law) to improperly find the proposed project area to be underserved; (ii) arbitrarily, and without evidentiary support, discounts the viability of Conifer's fixed wireless service, while at the same time affirming Cal.net's fixed wireless could serve customers *already served* by Conifer; (iii) creates an uneven playing field and unfairly disadvantages Conifer; and (iv) is plagued with procedural deficiencies that undermine the legitimacy of this decision, and the process used by the Commission. Conifer's Petition asked the Commission to deny the Cal.net grant application, or in the alternative, reduce the CASF award by recalculating the award based on

¹ See Petition at 3, for more details.

² See Resolution T-17502 at 1.

census blocks that are *actually* underserved.

Commission staff subsequently issued the Draft Resolution denying Conifer’s Petition without valid reason or legal support. The Draft Resolution would approve misuse of public funds to support a project in an area that is already served, thereby depleting funds for projects in other areas that are actually unserved. The Draft Resolution is flawed because it: (i) improperly claims that Conifer attempts to re-litigate the “underserved” test, an issue that was never litigated and remains unresolved; (ii) dismisses allegations of Cal.net’s conflicts of interest, even though the underlying facts were substantiated by Cal.net; (iii) inaccurately concludes that Conifer has not met the requirements for Rule 16.4, even though Conifer has introduced new facts, meeting the requirement; and (iv) fails to address due process violation underlying Resolution T-17502.

B. The Draft Resolution alleges that Conifer attempts to re-litigate the “underserved” test—that issue was never litigated and remains unresolved.

The Draft Resolution erroneously states: “Conifer now claims that the Commission utilized the wrong test to determine whether the areas were unserved...The claims constitute no more than an attempt to re-litigate.”³ This is plainly false. State law requires that if service at qualifying speeds is offered to customers in the proposed area, the Commission must conclude that broadband is available in the area, and thus that the area is not underserved or qualified for CASF grants.⁴ Conifer submitted evidence that it offers qualifying service, which should have lead the Staff to conclude that the area was not underserved. However, Staff relied solely on subscription data and the resulting misapplication of this test never came up during the Cal.net application process, and the Commission never notified Conifer of the draft or final resolutions which used the flawed application of the test.⁵

Moreover, the Draft Resolution distorts Conifer’s position regarding this test, stating: “Conifer argues that CD Staff should rely only on the deployment data providers submit to the Commission on an

³ Draft Resolution at 4.

⁴ Petition at 5-6

Public Utilities Code Section 281(e)(3)(A) requires: “That projects...only receive funding to provide broadband access to households that are unserved or underserved, as defined in commission Decision 12-02-015.”... Put simply, the test is 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.” The key factual question in this standard is whether an unsubsidized competitor *offers* service of at least 6 Mbps download and 1.5 Mbps upload in the area. If service is offered to customers in the area, the Commission must conclude that broadband is available in the area, and thus that the area is not underserved.” (emphasis in original).

⁵ Petition at 15-16.

annual basis when analyzing a challenge to a CASF Infrastructure Grant application.”⁶ In fact, Conifer never made this assertion, and even provided Staff with subscription data, subscriber addresses, and speed tests in its challenge to demonstrate that its service was offered and available in this area. However, state law is clear that the focus is on availability—subscribership is never mentioned in the statute or Commission rules, and with good reason—when providers spend money to a deploy a network, not every home may choose to subscribe, but that is no reason to deem an area underserved.

Further, the Draft Resolution inappropriately relies on an irrelevant and flawed Commission decision in order to legitimize the misapplication of the “underserved” test. The Draft Resolution cites D.16-05-052 for the proposition that the “Commission has previously reaffirmed that removing households from a project area.”⁷ However, that case was specific to assessing the footprint of fixed wireless provider vis a vis the project area of a wireline CASF grantee. It approved removal of households (as opposed to census blocks) because it determined that fixed wireless was more difficult to validate than the wireline solution at issue in the case.⁸ The same approach cannot apply in the present case because the incumbent (Conifer) and the grantee (Cal.net) are both fixed wireless service providers. By assuming Conifer’s fixed wireless service only reaches subscribed customers (which is patently false), while at the same time assuming Cal.net’s fixed wireless service will be available to serve all households in the proposed project area, the Draft Resolution clearly discriminates against Conifer for no valid reason. Moreover, the precedential value of D.16-05-052 is questionable because it favors wireline over wireless technology—the California legislature has since made clear that the Commission cannot favor wireline over wireless technology in the infrastructure context.⁹

C. Contrary to the assertions in the Draft Resolution, allegations of Cal.net’s conflicts of interest were substantiated by Cal.net.

The Draft Resolution also fails to recognize how Cal.net’s payments to a consortium employee cast doubt on the entire Cal.net CASF application. The Draft Resolution erroneously states: “Conifer’s Application contains speculation and allegations of misdeeds, but fails to substantiate any of these claims, nor does Conifer explain how these items constitute new or changed facts.” In fact, Cal.net

⁶ Draft Resolution at 4.

⁷ Draft Resolution at 6.

⁸ D.16-05-052 at 14 (“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.”).

⁹ AB 1665, Pub. Util. Code § 281(f)(1) (“The commission shall award grants from the Broadband Infrastructure Grant Account on a technology-neutral basis, including both wireline and wireless technology.”)

submitted an affidavit in its response to the Conifer Petition admitting they hired, as a “consultant,” the director (Darrell Slocum) of Central Sierra Connect Broadband Consortium (CSCBC) to aid Cal.net in the application process.¹⁰ Mr. Slocum thereby leveraged his role as CSCBC director to gather letters of support and other activities not revealed by Cal.net.¹¹ Cal.net essentially engaged a consortium employee to abandon his duty to neutrally identify and facilitate opportunities for all providers in the area, at the expense of active broadband service providers like Conifer.¹² The Commission cannot ignore this clear evidence of double dealing that undermines the credibility of the CASF program.

D. The Draft Resolution asserts Conifer has not met the requirements for Rule 16.4, however Conifer introduced new facts, meeting the requirement.

Because the Commission failed to timely notify Conifer of the draft or final Resolution T-17502, Conifer believes it was precluded from filing an application for rehearing. Instead, Conifer filed its Petition, pursuant to the requirements of Rule 16.4. The Draft Resolution incorrectly states that Conifer “does not raise any new factual issues that warrant modification of the Resolution.”¹³ Conifer included in its Petition a declaration of new facts that were not previously in the record, were previously unknown to Conifer, and directly impact the basis for issuing the Cal.net grant, including: (i) evidence that Cal.net paid CSCBC director, Mr. Slocum, to aid Cal.net in the CASF process; (ii) evidence that anchor institutions mentioned in the Cal.net application were already served; and (iii) data showing that the unlawful subsidy to Cal.net will cause deterioration of broadband service in the project area. Additionally, Cal.net’s response to the Petition showed that it relied on survey data that was nearly three years old at the time the resolution was issued—data that was not shared with Conifer at the time.

Even if the substance of Conifer’s arguments were not appropriate for an application for modification, under Public Utilities Code Section 1708 the Commission “may at any time...rescind, alter, or amend any order or decision made by it.” While unnecessary here because Conifer’s Petition met the standards of an application for modification, the Commission could exercise its authority under Section 1708 to correct the unlawful and unfair errors set forth in Resolution T-17502, as it has done in the past in other proceedings.¹⁴

¹⁰ Cal.net Response to Conifer Application for Modification at 12.

¹¹ Cal.net Response to Conifer Application for Modification at 11-12.

¹² Conifer Reply to Cal.net Response at 9.

¹³ Draft Resolution at 3.

¹⁴ *See, e.g.*, D.10-12-050 (denying a petition for modification, yet, sua sponte, approving the request set forth in the petition).

E. The Draft Resolution fails to address the Commission’s violation of due process, and even worse, blames Conifer for such violations.

California law requires that the Commission provide notice of a decision prior to voting,¹⁵ but that did not happen here. Conifer attempted to be added to the service list, emailed Staff periodically during the process to seek updates, and Staff explicitly promised Conifer in writing that it would provide notice of its decision to Conifer: “[w]e will take into consideration the information Conifer has provided and let the applicant and the challenger know of our decision.”¹⁶ As its first time participating in a Commission proceeding, it relied on Staff for guidance on notice. However, neither the Commission nor its Staff provided Conifer with notice of either the draft or final Resolution. Without notice, Conifer was precluded from filing comments on the draft resolution. Moreover, Conifer did not learn of the final Resolution until several months after the issuance of the resolution, and accordingly was effectively precluded from filing an application for rehearing of the resolution, which must be filed within 30 days of issuance of an order or decision.

The Draft Resolution simply ignores this violation, stating: “[R]egardless of whether Conifer received notice of the draft or final Resolution, Conifer participated during CD’s review of the Cal.net’s application review.”¹⁷ While Conifer was active in the challenge process, it had no insight into how the Commission would act on its challenge during the time that mattered. Further, the fact that Conifer submitted a challenge is greater reason it should have received notice. In this instance, the Commission failed at its goal of transparency, and now the Draft Resolution penalizes the very party that was subject of the Commission’s violations.

F. Conclusion

Conifer asks that the Commission to modify the Draft Resolution to deny the Cal.net grant application, or in the alternative, reduce the CASF award by recalculating the award to subsidize Cal.net’s network build in only those census blocks that were actually underserved.

¹⁵ See Pub. Util. Code § 311(g).

¹⁶ See Email from Simin Litkouhi (September 22, 2015). Attached as **Exhibit 1**.

¹⁷ Draft Resolution at 3 (emphasis added).

Respectfully submitted this 16TH day of April 2018.

/s/

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EXHIBIT 1

From: "Litkouhi, Simin" <simin.litkouhi@cpuc.ca.gov>
Date: Tuesday, September 22, 2015 at 2:03 PM
To: Sonja Harris <sonja@conifercom.net>
Cc: "Huang, Xiao Selena" <XiaoSelena.Huang@cpuc.ca.gov>, "Goedecke, William" <William.Goedecke@cpuc.ca.gov>
Subject: RE: Conifer submission comparison

Hi Sonja,

We had received information regarding your challenge and the mapping section has included the data you provided in the maps for CD's review of the application. We will take into consideration the information Conifer has provided and let the applicant and the challenger know of our decision. As I understand it has taken time for the mapping section to ask questions and make data corrections, but we now have all the information we need.

Please send me your telephone number in case I need to call you.

If you have any other questions, please let me know.

Simin Litkouhi 415-703-1865

From: Goedecke, William
Sent: Tuesday, September 22, 2015 2:37 PM
To: 'Sonja Harris'
Cc: Huang, Xiao Selena; Litkouhi, Simin
Subject: RE: Conifer submission comparison

Hi Sonja,

I forwarded your message to my colleague Simin Litkouhi. She should be able to assist you.

Bill

From: Sonja Harris [<mailto:sonja@conifercom.net>]
Sent: Tuesday, September 22, 2015 2:33 PM
To: Goedecke, William
Cc: Huang, Xiao Selena
Subject: Re: Conifer submission comparison

Hi William,

I have not heard from anyone regarding this challenge, is there someone I can contact directly?

Sonja Harris
sonja@conifercom.net
Conifer Communications
www.ConiferCommunications.com

APPENDIX

PROPOSED REVISED FINDINGS AND ORDERING PARAGRAPHS

Findings of Fact

1. On March 31, 2015 Cal.net submitted an application for \$3,337,004 in CASF funding to ~~over~~build last-mile fixed wireless infrastructure to provide broadband Internet and VOIP telephony services with speeds of up to 25 Mbps download and 4 Mbps upload to ~~under~~served rural communities in the Tuolumne and Mariposa Counties.
2. On October 1, 2015, Cal.net modified its submission, requesting \$3,469,295 to account for additional California Environmental Quality Act (CEQA) costs. On October 20, 2016 Cal.net revised its submission to account for the adjustment CD required, adjusting the requested amount from \$3,469,295 to \$3,608,224.
3. On April 24, 2015 CD received timely challenges from Calaveras Telephone Company, Volcano Telephone Company, and Sierra Telephone Company, Inc. On April 27, 2015, CD received a late-filed challenge from Conifer.
4. On December 15, 2016, in T-17502, the Commission awarded Cal.net \$3,608,224 for Cal.net's Tuolumne Mariposa project.
5. Conifer submitted an Application for Modification of T-17502 on December 15, 2017. Cal.net submitted its response on January 12, 2018.
6. Conifer's Application for Modification of T-17502, submitted on December 15, 2017, raises ~~new~~ issues which ~~constitute no more than an attempt to re-litigate matters that were already decided~~ were previously omitted due to a misapplication of the rules by the Commission in Resolution T-17502, and a failure of notice by the Commission.
7. Conifer's Application for Modification of T-17502 offers ~~no new or changed facts or subsequent change in law~~ that justify granting the relief requested in the Application.

THEREFORE, IT IS ORDERED that:

1. Conifer's Application for Modification of T-17502, submitted on December 15, 2017, is ~~denied~~ **granted** for the reasons stated herein.
2. The effective date of this order is today.

I certify that the foregoing resolution was adopted by the California Public Utilities Commission at its regular meeting of April 26, 2018 and the following Commissioners approved it:

—
ALICE STEBBINS
Executive Director