

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Velocity Communications,  
Inc. for Rehearing of Resolution T-17548.

A.17-04-029  
(Filed on April 24, 2017)

**ORDER MODIFYING RESOLUTION T-17548  
AND DENYING REHEARING OF RESOLUTION T-17548, AS MODIFIED**

**I. INTRODUCTION**

Today’s decision disposes of the application for rehearing of Resolution T-17548 (or “Resolution”)<sup>1</sup> filed by Velocity Communications, Inc. (“Velocity”).

In August 2015, Inyo Networks, Inc. (“Inyo”) submitted an application for a California Advanced Services Fund (“CASF”) infrastructure grant requesting \$50,971,897 (70 percent of the then total project estimated costs of \$72,816,995) to construct the Digital 299 Broadband Project (“Digital 299 project” or “project”), which includes both middle mile and last mile facilities. As originally proposed, the project would provide high-capacity backhaul infrastructure and interconnection points to communities along the California State Route 299 corridor, cover approximately 2400 miles of rural Northern California between Redding and the California coast, and provide more than 1,000 homes with last-mile service including a spur off the main route into the Trinity County community of Hayfork.<sup>2</sup>

<sup>1</sup> 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>.

<sup>2</sup> As discussed below, as a result of Frontier Communications’ challenge and subsequent negotiations between Inyo and Frontier, Inyo modified the project to reduce the last mile service to 307 homes and removed the Hayfork spur.

On August 10, 2015, Commission staff posted the proposed project area map, census block groups (“CBGs”) and zip codes for Inyo’s Digital 299 project on the Commission’s CASF webpage under “CASF Application Project Summaries” and sent notice of the project by email to all parties on the CASF Distribution service list.<sup>3</sup>

On August 25, 2015, Commission staff received a timely challenge letter from Velocity claiming that it provides service to nine of the CBGs that the applicant identified as unserved. To support its claims, Velocity submitted a list of its customers subscribing to at least 6 Mbps downstream and 1.5 Mbps upstream, or served speeds. Commission staff reviewed the challenge and instructed Velocity to submit at least five speeds tests from each CBGs in which it claimed to provide service at served speeds. In April 2016, Velocity submitted its speed tests. The results of these speed tests showed unserved speeds in four of the challenged CBGs and underserved speeds in five of the challenged CBGs. Based on these results, Commission staff determined that Velocity’s challenge did not provide evidence establishing that it provided speeds at the minimum CASF threshold of 6 Mbps downstream and 1.5 Mbps upstream (“6/1.5”). Therefore, Commission staff determined that the challenged area was eligible for CASF funding.<sup>4</sup>

In June 2016, and in a subsequent formal challenge letter in July 2016, Frontier Communications (“Frontier”) informed Commission staff that its April 2016 acquisition of Verizon California, Inc., approved by the Commission in D.15-12-005, affected the last-mile segment of Inyo’s Digital 299 project. The Commission’s approval of Frontier’s transaction included a settlement agreement wherein Frontier committed to increase speeds throughout its California territory by accepting obligations and funding from the Federal Communications Commission’s Connect American Fund (“CAF”) II. Frontier provided Commission staff with confidential details about the CAF II project demonstrating that it overlapped the last-mile segment of Inyo’s proposed Digital 299

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<sup>3</sup> Resolution T-17548, p. 4.

<sup>4</sup> Resolution T-17548, p. 6 (Table 1).

project.<sup>5</sup> Frontier informed Commission staff that it was engaged in discussions with Inyo regarding access to middle mile facilities in Inyo's project application and was expecting further clarification on the last-mile facilities that directly overlap Frontier's CAF II eligible households.<sup>6</sup> Commission staff encouraged Inyo and Frontier to continue negotiating and come to an agreement regarding what areas Inyo would serve after Frontier complied with the terms of D.15-12-005. In October 2016, Inyo and Frontier reached an agreement that resulted in Inyo removing the challenged areas and reducing the proposed last-mile service from 1,032 to 307 households. Inyo also removed the proposed middle-mile spur to Hayfork because those households would benefit from Frontier's upgrades and the spur was no longer economical for Inyo.<sup>7</sup>

As a result of various adjustments, including Inyo's removal of the majority of last-mile households from the Digital 299 project and re-routing, Inyo amended its Digital 299 project application to provide high-capacity backhaul infrastructure and interconnection points to communities along the California State Route 299 (Highway 299) corridor, and to directly connect 307 underserved households to last-mile Internet services capable of 1 Gbps symmetrical throughput using underground and aerial fiber facilities with as many as 102 schools, colleges, research institutions, hospitals, clinics, public safety, tribal lands, and other Community Anchor Institutions also able to take

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<sup>5</sup> Resolution T-17548, p. 7. Frontier Communications' Letter to Robert Wullenjohn, Program Manager, Communications Division, California Public Utilities Commission, dated June 30, 2016.

<sup>6</sup> Frontier Communications' Letter to Mike Amato, Director, Communications Division, California Public Utilities Commission, dated June 30, 2016.

<sup>7</sup> Frontier claimed that its CAF II build in the removed areas will provide broadband to a total of approximately 1,210 households in the Hayfork, Weaverville, and Willow Creek exchanges. Pursuant to FCC requirements, the broadband service to these households will be at a minimum speed of 10 mbps down and 1 mbps up. While 10 mbps down/1 mbps up would still be considered as "underserved" under CASF rules, Frontier estimated that approximately 70 percent of these households will receive speeds greater than the CASF minimum speed (6 mbps down and 1.5 mbps up and higher). (See Letter of October 7, 2016, from Charlie Born, Frontier Manager of Government and External Affairs, to Rob Wullenjohn, CD Program Manager.) Frontier pledged to complete construction no later than December 2020 in order to meet CAF II construction milestones and avoid substantial FCC penalties. (Resolution T-17548, pp. 7-8, fn. 16.)

advantage of such connections. The project area covers almost 2,400 square miles of rural Northern California between Redding and the California coast, encompassing portions of Shasta, Trinity, and Humboldt counties. The total proposed project budget was adjusted downward to \$69,633,568 (of which \$67,073,674 is eligible for CASF funding).

On December 23, 2016, pursuant to Public Utilities Code section 311(g),<sup>8</sup> Commission staff sent an e-mail to all parties on the CASF Distribution service list providing notice that the draft resolution was available for comments and the deadline for comments was January 30, 2017. Pursuant to Commission procedure, the evidentiary record was closed prior to the issuance of the draft resolution. Staff received seven formal written comments, and many informal comments, by the January 30, 2017 deadline.

Velocity filed timely comments to the draft resolution alleging that the Commission did not have Velocity's current levels of broadband service before it and should not rely on the limited data referenced in the draft resolution. Specifically, Velocity asserted that (1) it had signed a contract to access middle mile fiber in Weaverville giving Velocity almost unlimited capacity in Trinity County and surrounding areas, and that this connection would be finished sometime in February 2017; (2) it had upgraded several microwave links to outlying communities to allow for more bandwidth; and (3) it was now able to meet the 6/1.5 served criteria in Lewiston and has additional evidence to present on speed test results in the service area.<sup>2</sup>

On March 2, 2017, Velocity sent an e-mail to Commission staff indicating that further upgrades had been completed in Lewiston to bring the area to served speeds. Thereafter, on March 10, 2017, Velocity submitted eight tests in the last-mile section of

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<sup>8</sup> All section references are to the Public Utilities Code, unless otherwise indicated.

<sup>2</sup> Comments of Velocity Communications, Inc. on Draft Resolution T-17548, January 30, 2017, p. 4.

Inyo's project using the Commission's CalSPEED testing application. Of the eight tests, five appeared to show served speeds.<sup>10</sup>

The Resolution states that Commission staff did not change its recommendation to approve the Digital 299 project, as reflected in the draft resolution, in response to Velocity's March 10, 2017 speed tests for the following reasons: (1) the challenge and comments period had closed prior to Velocity's providing the March 2017 speed test results; (2) Velocity's service could be affected by line-of-sight issues; and (3) Velocity's advertised speeds topped out at 6/1.5.<sup>11</sup>

On January 24, 2017, during the comment period, Jefferson State Broadband dba Com-Pair ("Com-Pair"), a wireless service internet company in Trinity County, sent Commission staff an email attempting to challenge the Digital 299 project. Com-Pair claimed that it provided service to eight of the nine CBGs the application proposes to serve, and that this was evidenced by its previous submissions to the Commission's broadband mapping proposal as well as its recent FCC 477 filing. On January 26, 2017, Commission staff acknowledged receipt of Com-Pair's email attempting to challenge the project application. Subsequently on March 7, 2017, Com-Pair sent another e-mail to Commission staff stating that it offered service in Lewiston. To support this claim, Com-Pair submitted a single speed test that showed served speeds within the last-mile portion of Lewiston to be served by the Digital 299 project.

The Resolution points out that Com Pair's challenge was submitted extremely late and not properly served to all parties on the CASF service list.<sup>12</sup> The Resolution states that Commission staff did not change its recommendation to approve

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<sup>10</sup> Resolution T-17548, p. 7, fn. 13.

<sup>11</sup> Resolution, p. 7, fn. 13; p. 21, fn. 28.

<sup>12</sup> Resolution T-17548, p. 21.

the Digital 299 project, as reflected in the draft resolution, in response to Com-Pair's late filed challenge and submission of the speed test.<sup>13</sup>

On March 23, 2017, the Commission issued Resolution T-17548 approving funding in the amount of \$46,709,036 from the CASF for the infrastructure grant application of Inyo to construct the Digital 299 project, which includes both middle-mile and last-mile facilities. The project will provide high-capacity backhaul infrastructure and interconnection points to communities along the California State Route 299 (Highway 299) corridor. Additionally, the project will directly connect 307 underserved households to last-mile Internet services capable of 1 Gbps symmetrical throughput using underground and aerial fiber facilities, with as many as 102 schools, colleges, research institutions, hospitals, clinics, public safety, tribal lands, and other Community Anchor Institutions also able to take advantage of such connections. The project area covers almost 2,400 square miles of rural Northern California between Redding and the California coast, encompassing portions of Shasta, Trinity, and Humboldt counties. Of the proposed \$46,709,036 grant, \$1,455,215 is earmarked in subsidies for the last-mile connection to 307 households, leaving \$45,253,821 dedicated for common costs, connections to Community Anchor Institutions and Native American communities, the middle-mile portion, and other connecting infrastructure.<sup>14</sup>

Velocity timely filed an application for rehearing alleging as follows:

(1) Resolution T-17548's rejection of Velocity's challenge is based upon material factual error; (2) Resolution T-17548 violates section 281 by failing to consider the entire record thereby denying Velocity a meaningful opportunity to challenge Inyo's Digital 299 project application; (3) Resolution T-17548 is contrary to prior Commission decisions;

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<sup>13</sup> See generally, Resolution T-17548, pp. 21-22, fn. 29.

<sup>14</sup> Resolution T-17548, p. 1.

and (4) Resolution T-17548 unfairly favors Velocity's competitors.<sup>15</sup> Com-Pair timely filed a response supporting Velocity's application for rehearing.<sup>16</sup>

We have reviewed each and every allegation raised in the rehearing application. We are of the opinion Resolution T-17548 should be modified to clarify that, pursuant to the Commission's Rules of Practice and Procedure, a proceeding is considered submitted and the evidentiary record is closed prior to the issuance of a proposed decision or draft resolution. (See Rule 13.14(a)).<sup>17</sup> As a result, no new evidence can be included as part of the record, absent good cause or unless the submission of the proceeding has been set aside and the record reopened. (See Rule 13.14(b)).<sup>18</sup> With this clarification, rehearing of Resolution T-17548, as modified, is denied as no legal error has been demonstrated.

## II. DISCUSSION

### A. **Resolution T-17548 does not violate Velocity's due process rights or its section 281 right to challenge the Digital 299 project.**

In its rehearing application, Velocity alleges that the Commission failed to enforce its section 281 statutory right to challenge Inyo's Digital 299 project by

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<sup>15</sup> Velocity's included four attachments to its rehearing application. Aside from the Certificate of Service (Attachment 1) and what appears to be Velocity's mock-up of Resolution T-17548 with new proposed findings (Attachment 2), Attachment 3 consists of Velocity's March 10, 2017 speed test results, which are not part of the evidentiary record, and cannot be considered. Similarly, Attachment 4 is a declaration from Velocity's President and CEO, which is new evidence that is not part of the record and cannot be considered.

<sup>16</sup> In this response, Com-Pair attached a declaration from its Vice President, which is new evidence that is not part of the record and cannot be considered.

<sup>17</sup> Subsequent rule references are to the Commission's Rules of Practice and Procedure, unless otherwise noted. Rule 13.14(a) states: "A proceeding shall stand submitted for decision by the Commission after the taking of evidence, the filing of briefs, and the presentation of oral argument as may have been prescribed." (Cal. Code of Regs., tit. 20, § 13.14, subd. (a).)

<sup>18</sup> Rule 13.14(b) states: "A motion to set aside submission and reopen the record for the taking of additional evidence, or for consideration of a settlement under Article 12 shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced." (Cal. Code of Regs., tit. 20, § 13.14, subd. (b).)

disregarding information demonstrating that Velocity provided service at broadband speeds prior to the CASF award. (Rhg. App., p. 9.)<sup>19</sup> Velocity bases this allegation on the fact that Commission staff did not consider Velocity’s March 10, 2017 speed test results for the Lewiston area. The Resolution explains that one of the reasons Commission staff did not consider information provided by Velocity, including the speed tests was because “the challenge and comment period had closed prior to Velocity’s submittal. . . .”<sup>20</sup> Velocity argues that “[g]iven the level of informality [of the application review process and the fact that it is conducted by Commission staff], all communications and documents provided to Staff must be considered to constitute the record.” (Rhg. App., p. 9.) Velocity is wrong.

The fact that the CASF application process and challenges thereto are handled by Commission staff does not negate the application of the Commission’s rules for the submission of the proceeding and the closing of the record.<sup>21</sup> Pursuant to Rule 13.14(a): “[a] proceeding shall stand submitted for decision by the Commission after the

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<sup>19</sup> Section 281 of the Public Utilities Code provides, in pertinent part, as follows:

The commission 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 commission shall consider in reviewing the application.

(Section 281(b)(2), (e)(3)(C), as amended by Senate Bill 745, 2015-2016 Legislative Session, Chapter 710.)

Section 281 was subsequently amended by Assembly Bill 1665, 2016-2017 Legislative Session, Chapter 851, enacted as an urgency measure effective October 15, 2017. These amendments, however, were not in effect at the time this proceeding was submitted and, therefore, not relevant to this rehearing analysis.

<sup>20</sup> Resolution, p. 7, fn. 13; p. 21, fn. 28.

<sup>21</sup> The deadline for submitting challenges is 14 days after Commission staff posts the proposed project area’s CBGs, zip codes, and maps on the Commission’s CASF website. *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), Appendix 2, p. 17.) Although Commission staff has been lenient with this requirement and accepted challenges after the 14-day deadline, Commission staff cannot accept challenges after the period for submitting evidence into the record has closed; i.e., prior to the issuance of the draft resolution.



taking of evidence, the filing of briefs, and the presentation of oral argument as may have been prescribed.”<sup>22</sup> The procedures set forth throughout the Rules make it clear that, in the ordinary course of business, parties are expected to make their case before the proposed decision or proposed resolution is issued for public review and comment. (E.g., Rules 13.6, 13.11, 14.2.) Hence, pursuant to the Rules, a proceeding is considered submitted and the evidentiary record is closed as of the date of issuance of the proposed decision or draft resolution. The Rules also clarify that comments on a proposed decision or draft resolution are mainly for the purpose of identifying errors made in the proposed disposition of the case and are not a forum for introducing new evidence or advancing novel theories or arguments. (Rule 14.3(c).)

The Rules provide a fair and orderly way for managing a proceeding. In particular, the Rules ensure that all parties are aware of the evidence and arguments that the Commission will rely upon when it decides a case. When a case is conducted in the manner anticipated by the rules, parties have time to review—and an opportunity to respond to—any material submitted by other parties before that material is considered by the Commission. This is due process. Moreover, the Rules make it clear that the normal approach to managing cases must be followed unless unusual circumstances have occurred, and a good reason is provided by the party seeking to deviate from the rules. (Rules 1.2, 9.1.) For example, pursuant to Rule 13.14(b), a party can submit a motion to set aside submission for the taking of additional evidence specifying material changes of fact. This rule clearly contemplates that parties seeking to introduce new evidence, or make new arguments, or enter into new settlements after a case has been submitted must either show that some change in the facts or law should be considered, or explain why they have waited until the end of the proceeding to raise the issue or material they seek to have considered, or to reach a settlement.

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<sup>22</sup> Cal. Code of Regs, tit. 20, § 13.14, subd. (a).

The evidence in the record shows that Velocity participated in this proceeding from the beginning. As discussed above, Velocity claimed in its August 2015 challenge letter that it provided service to nine of the CBGs that Inyo had identified as unserved in its CASF application. To support its claims, Velocity submitted a list of its customers subscribing to at least 6/1.5, or served speeds. Commission staff instructed Velocity to submit at least five speeds tests in each of the CBGs in which it claimed to provide service at served speeds.<sup>23</sup> The record shows that in April 2016, Velocity submitted speed tests, which showed unserved speeds in four of the challenged CBGs and underserved speeds in five of the challenged CBGs.<sup>24</sup> Based on this evidence in the record, Commission staff correctly determined that Velocity's challenge did not establish that it provided speeds at the CASF threshold of 6/1.5, and that the area was eligible for CASF funding.<sup>25</sup>

Prior to the issuance of the draft resolution, Velocity did not submit any additional evidence (such as updated speed tests) that would have enabled Commission staff to reassess whether it provided service at served speeds. Pursuant to Rule 13.14(a), the proceeding was submitted for a decision (in this case, a final resolution) prior to the issuance of the draft resolution and the evidentiary record was closed. Moreover, Velocity's comments on the draft resolution do not constitute evidence.<sup>26</sup> Hence, by the

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<sup>23</sup> Resolution, p. 6, fn. 12: "Despite CD's instructions, in some areas, Velocity submitted fewer than five speed tests."

<sup>24</sup> Resolution T-17548, p. 6 (Table 1).

<sup>25</sup> Resolution T-17548, p. 6.

<sup>26</sup> On January 30, 2017, Velocity filed timely comments to the draft resolution. Therein, Velocity argued that the Commission did not have before it the current levels of broadband service Velocity is providing and, therefore, should not rely on the limited data referenced in the draft resolution. Specifically, Velocity's comments state that (1) it had signed a contract to access middle mile fiber in Weaverville giving Velocity almost unlimited capacity in Trinity County and surrounding areas, and that this connection should be finished sometime in February 2017; (2) it had upgraded several microwave links to outlying communities to allow for more bandwidth. Velocity asserts that this upgrade took place after Velocity submitted its challenge in August 2015 and after Commission staff reviewed its speed test results; and (3) it is able to meet the 6/1.5 served criteria in Lewiston and has additional evidence to present on speed test results in the service area. (Comments of Velocity Communications, Inc. on Draft Resolution T-17548,

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time Velocity submitted additional speed tests on March 10, 2017, Commission staff could not consider these results because the evidentiary record was closed. Pursuant to Rule 13.14(b), Velocity could have submitted a motion to set aside submission for the taking of additional evidence specifying material changes of fact such as the March 2017 speed test results. Velocity did not do so.

Accordingly, we find that the Resolution did not violate section 281 by denying Velocity a meaningful opportunity to challenge the Digital 299 project, nor did it violate Velocity's rights to due process, when it held that Velocity's March 10, 2017 speed tests results would not be considered because the challenge and comment periods had closed. A review of the record confirms that Commission staff followed the normal approach for conducting Commission proceedings set forth in the Rules and there is no legal error. Thus, rehearing on this issue is denied.

However, we modify Resolution T-17584 to clarify that, pursuant to the Commission's Rules, a proceeding is considered submitted and the evidentiary record is closed prior to the issuance of a proposed decision or draft resolution. (See Rule 13.14(a)). As a result, no new evidence can be included as part of the record, absent good cause or unless the submission of the proceeding has been set aside and the record reopened. (See Rule 13.14(b)).

Velocity also alleges that Commission staff failed to provide sufficient notice that it was rejecting Velocity's challenge. Velocity states that that it did not learn of Commission staff's intention to reject its challenge until December 23, 2016, when it received a Notice of Availability of the draft resolution. (Rhg. App., pp. 16-17.)<sup>27</sup>

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January 30, 2017, p. 4.)

<sup>27</sup> Velocity fails to explain how lack of notification is legal error. Section 1732 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." (Pub. Util. Code, § 1732.) 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, § 16.1, subd. (c).) Furthermore, the purpose of a rehearing application is to specify legal error,

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There is no requirement, statutory or as a result of a Commission decision, resolution, or rule, that Commission staff notify a challenger about the status of its challenge. In fact, D.14-02-018 requires Commission staff to notify the CASF applicant of the challenges filed. (D.14-02-018, *supra*, Appendix 2, p. 18.) That said, Velocity was aware that the April 2016 speed tests it submitted in a timely manner as part of its challenge showed unserved speeds in four of the challenged CBGs and underserved speeds in five of the challenged CBGs.<sup>28</sup> Velocity should not have waited until March 10, 2017, to submit updated speed tests. By that date, the draft resolution had been issued and the evidentiary record was closed. Hence, this allegation also lacks merit and we deny rehearing on this issue.<sup>29</sup>

**B. Resolution T-17548 does not unfairly favor Velocity's competitors.**

Velocity alleges that Resolution T-17548 and the process that led to its issuance gave an unfair advantage to both Inyo (the CASF applicant) and Frontier (a competitor that also challenged the CASF grant). (Rhg. App., p. 13.) Velocity further alleges that the preferential treatment afforded to Inyo and Frontier constitutes legal error under the California Constitution. (Rhg. App., p. 13.)<sup>30</sup>

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not to relitigate issues. (See Pub. Util. Code, § 1732; Cal. Code of Regs., tit. 20, § 16.1, subd. (c); see *OIR re California Renewables Portfolio Standard Program* [D.13-02-037] (2013) \_\_Cal.P.U.C.\_\_, pp.3-4 (slip op.)) We reject the allegations on these grounds.

<sup>28</sup> Resolution T-17548, p. 6 (Table 1).

<sup>29</sup> We note, however, that Velocity has submitted a request for modification of Resolution T-17548, dated March 23, 2018, which is the correct procedural vehicle to address new or changed facts such as the March 10, 2017 speed test results. However, this request for modification is pending, and today's decision is not intended to resolve this request or prejudice the outcome.

<sup>30</sup> Velocity also argues that the Commission violated section 1757.1, which precludes the Commission from acting in an unlawful manner or from violating a company's constitutional rights. (Rhg. App., p. 13.) However section 1757.1 is not applicable here because this statutory provision sets forth the standard of review in the appellate courts. It is sufficient to address the constitutional claims. Further, for the instant proceeding, the standard for judicial review is section 1757, and not section 1757.1, since the matter is about a specific applicant.

**1. Velocity's allegation regarding competition and discrimination constitute no more than an attempt to relitigate.**

Specifically, Velocity alleges that awarding CASF funds to an entity that will duplicate an existing network that already provides broadband speeds is contrary to section 281 and inconsistent with the Commission's mandate to promote competition because it provides public money to overbuild Velocity's network, which was built with private investment. (Rhg. App., p. 14.) Essentially, Velocity is arguing that the award given to Inyo for the Lewiston portion of its Digital 299 project affords a substantial and unfair advantage over Velocity in the following three ways: (1) Velocity must continue to get private investment for its broadband expansion and the availability of CASF funds for Inyo will make it increasingly difficult for Velocity to continue to obtain private investment; (2) Inyo's cost basis will be substantially more favorable than Velocity's due to the CASF funding enabling Inyo to undercut Velocity's prices; and (3) Inyo will offer service in competition with Velocity's existing services for businesses and "anchor institutions" in Lewiston and along the entire middle-mile route, which will put current and pending contracts in Weaverville and other areas with businesses and anchor institutions at risk. (Rhg. App., p. 14.) We reject these allegations because they fail to comply with the legal requirements for section 1732 and Rule 16.1(c).

Specifically, Velocity fails to explain how these three specific allegations amount to legal error. Section 1732 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).) 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).) Therefore, we reject the allegations on these grounds because Velocity has failed to comply with the legal requirements.

**2. Velocity's allegation that Resolution T-17548 unfairly favors Frontier has no merit.**

Velocity also alleges that Resolution T-17548 unfairly favored Frontier: “Communications Division staff declined to accept Velocity’s updated speed test results showing that it provides broadband speeds in Lewiston on the basis that it was filed too late. Yet staff allowed Frontier to file its initial challenge to Inyo’s CASF application ten months after the deadline for challenges.” (Rhg. App., p. 14.) More specifically, Velocity contends that Commission staff accepted Frontier’s late challenge and allowed it to demand the removal of households from Inyo’s CASF application based solely on Frontier’s assertion that it intends to build facilities that will support broadband speeds at an undetermined time in the future, possibly not until 2018. (Rhg. App., p. 15.)

Velocity is correct that Commission staff accepted a late filed challenge from Frontier. Pursuant to D.14-02-018, the deadline for submitting letter challenges to a CASF application is 14 days after web posting of the CASF application by Commission staff.<sup>31</sup> Historically, Commission staff has been lenient with this requirement and accepted late-filed challenges after the 14-day period out of an abundance of caution as a means to ensure that (1) any entities alleging that they provide service at served speeds in the proposed CASF application area have an opportunity to exercise their section 281 challenge, and (2) to guard against duplicative services.

What Velocity fails to acknowledge, however, is the significant difference between Commission staff accepting a late filed challenge while the evidentiary record is still open compared to accepting new evidence after the proposed resolution has been issued and the evidentiary record has been closed. There is no statute, Commission decision, resolution, or rule prohibiting Commission staff from accepting a late filed challenge while the evidentiary record is still open (prior to the issuance of the draft resolution), which is what staff did in regard to Frontier’s challenge.<sup>32</sup>

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<sup>31</sup> D.14-02-018, Appendix 2, p. 17.

<sup>32</sup> As discussed above, Frontier’s challenge proved to be significant for several reasons

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As discussed above, the Commission's Rules make clear that the evidentiary record is closed prior to the issuance of a draft decision or resolution. Absent good cause or the reopening of the record, Commission staff cannot accept new evidence such as Velocity's March 10, 2017 speed tests into the record and consider them after the evidentiary record has closed (in this instance, on December 23, 2016, upon issuance of the proposed resolution). Moreover, Velocity did not file a Rule 13.14(b) motion to set aside submission.

Based on the above, Velocity's allegations of unconstitutional unfair treatment lack merit. Rehearing on these issues is denied.

**C. Resolution T-17548 does not contain material factual errors.**

Velocity alleges that the Resolution's reference to Velocity's advertised speeds topping out at 6 Mbps/1.5 Mbps and possibly being degraded by line-of-sight factors such as terrain and weather constitute material factual error. Velocity argues that it provided evidence in March 2017 that its speeds would exceed the CASF broadband threshold in the immediate future. "As of the date of this Application, Velocity's broadband speeds exceed the CASF broadband definition because it provides service at 10 Mbps down/1.5 Mbps up at the time of this Application." (Rhg. App., p. 8.) Thus, Velocity alleges that the Commission's rejection of Velocity's challenge is based on

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including, but not limited to (1) Frontier's April 2016 acquisition of Verizon California, Inc., approved by the Commission in D.15-12-005, which included a settlement agreement wherein Frontier committed to increase speeds throughout its California territory by accepting obligations and funding from the FCC's Connect American Fund ("CAF") II; (2) Frontier notified Commission staff and provided confidential details about a CAF II project that overlaps the proposed project location described in Inyo's Digital 299 project application; and (3) Frontier informed Commission staff that it was engaged in discussions with Inyo regarding access to middle mile facilities in Inyo's project application and was expecting further clarification on the last-mile facilities that directly overlap Frontier's CAF II eligible households. In October 2016, Inyo and Frontier came to an agreement that resulted in Inyo removing the challenged areas and reducing the proposed last-mile service from 1,032 to 307 households. Inyo also removed the proposed middle-mile spur to Hayfork because those households would benefit from Frontier's upgrades and the spur was no longer economical for Inyo.

material factual error. (Rhig. App., p. 8.) As discussed below, these allegations lack merit.

First, a review of the record confirms that the primary reason Commission staff did not accept the results of Velocity's March 10, 2017 speed tests was because the proceeding had been submitted and the evidentiary record was closed. As discussed above, Commission staff correctly declined to consider Velocity's March 10, 2017 speed tests because the proceeding had been submitted and the evidentiary record was closed. The bottom line is that the results of the speed tests Velocity submitted in April 2016 as part of its timely challenge showed underserved speeds in four of the challenged census blocks and underserved speeds in five of the challenged census blocks.<sup>33</sup> In other words, all speed test results that were part of the evidentiary record fell below the CASF minimal service level of served speeds at 6 mbps down and 1.5 mbps up.

Second, evidence in the record confirms that line-of-sight factors may affect Velocity's coverage. Specifically, an April 20, 2016 email from the President and CEO of Velocity to Commission staff discussing speed test results states that "Test 2 did not have a clear line of sight and was taken near one of our existing subscribers through some trees, which may have affected performance. . . ." <sup>34</sup> Third, Commission staff found that Velocity's own website stated that its line-of-sight signals "may be affected by weather, foliage, terrain, and man-made structures" and that its advertised speeds top out at 6 Mbps download/1.5 Mbps upload.<sup>35</sup>

Based on the above, the Resolution's references to line of sight issues and advertised speeds do not constitute material factual error and we deny rehearing on these issues.

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<sup>33</sup> Resolution T-17548, p. 6 (Table 1).

<sup>34</sup> Email from Travis Fitch to Owen F. Rochte dated April 20, 2016.

<sup>35</sup> (<http://www.velotech.net/content/coverage/coverage.html>).



**D. Resolution T-17548 is not contrary to prior Commission decisions.**

The rehearing application is quite vague as to which prior Commission decisions to which the Resolution was contrary. Again, without specificity, Velocity has failed to comply with section 1732 and Rule 16.1(c). Thus, we deny rehearing on this issue.

Velocity's argument is really about different treatment by the Commission staff. Velocity asserts that in Resolution T-17495, Commission staff "worked for months with Comcast to validate its challenge to a CASF grant application filed by Bright Fiber." Velocity further asserts that similar to Velocity, Comcast's speed tests showed that some, but not all, of the areas in the Bright Fiber application were served by Comcast with broadband speeds. "Rather than classify the entire area as underserved, Commission staff required Bright Fiber to remove households that Comcast could demonstrate were already served with broadband speeds. The Communications Division similarly required Bright Fiber to remove homes from the CASF application in response to a challenge from Suddenlink Communications and SmarterBroadband." (Rhg. App., p. 12, footnotes omitted.)

Velocity contends it did not receive the same consideration from Commission staff. Specifically, Velocity alleges that Commission staff deviated from prior procedure and disregarded evidence that some areas were served by Velocity by not accepting its March 10, 2017 speed tests. Thus, Velocity asserts:

When evaluating Velocity's challenge, however, the Communications Division deviated from its prior procedure, disregarded evidence that some areas in the Inyo application were served at broad band speeds by Velocity, and instead declared the entire town of Lewiston to be unserved. Under its own precedent, at least the Commission should have required Inyo remove households or areas for which Velocity demonstrated it provides service at broadband speeds."

(Rhg. App., p. 12.)

Velocity's allegation that Commission staff disregarded evidence that Velocity served some areas in Inyo's Digital 299 project area at broadband speeds is wrong. Unlike Velocity, the challengers to Bright Fiber's CASF application submitted speed test results in a timely manner that provided Commission staff with evidence that some of the challenged area was indeed served.<sup>36</sup> Once again, Velocity's allegation is based upon its claim that the March 10, 2017 speed test results it submitted to Commission staff prove service at served speeds. As discussed above, the Resolution did not consider the March 10, 2017 speed test results because the proceeding had been submitted and the evidentiary record was closed. The only Velocity speed test results that were considered were those that Velocity submitted in a timely manner as part of its challenge. The results of those speed tests showed underserved speeds in four of the challenged census block groups and underserved speeds in five of the challenged census block groups.<sup>37</sup> Accordingly, we deny rehearing on this issue.

**E. The Commission lawfully rejected Com-Pair's challenge.**

Velocity alleges that "[i]t is legal error for Commission staff to notify Com-Pair that it accepted its challenge (regardless of how late it was filed) yet decline to give it any consideration when evaluating the Inyo CASF Application." (Rhg. App., p. 17.)<sup>38</sup>

Velocity's allegation lacks merit. The record shows that on January 24, 2017, after the draft resolution had been issued and the evidentiary record had closed, Com-Pair, a competitor of Velocity, sent Commission staff an email attempting to challenge the Digital 299 project. Com-Pair claimed that it provided service to eight of the nine CBGs the

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<sup>36</sup> D.16-05-052, pp. 6-7.

<sup>37</sup> Resolution T-17548, p. 6 (Table 1).

<sup>38</sup> Velocity again fails to explain how this specific allegation amounts to legal error, and this argument constitutes as an attempt to relitigate. Thus, it should be rejected on the grounds as set forth above.

application proposes to serve, and that this was evidenced by its previous submissions to the Commission's broadband mapping proposal as well as its recent FCC 477 filing.<sup>39</sup> On January 26, 2017, Commission staff acknowledged receipt of Com Pair's email letter attempting to challenge the project application. Said communication did not state that Commission staff was accepting Com-Pair's challenge.<sup>40</sup> Subsequently on March 7, 2017, Com-Pair sent another e-mail to Commission staff stating that it offered service in Lewiston. To support this claim, Com-Pair submitted a single speed test that showed served speeds within the last-mile portion of Lewiston to be served by the Digital 299 project.

The Resolution points out that Com-Pair's challenge was submitted late and not properly served to all parties on the CASF service list.<sup>41</sup> Moreover, the record shows that Com-Pair's challenge was submitted after the draft resolution had been issued and the evidentiary record had closed. Hence, Commission staff acted in accord with Rule 13.14(a) by not considering Com-Pair's late-submitted challenge and speed test. There was no legal error and rehearing on this issue is denied.

**F. Velocity's Request for Oral Argument should be denied.**

Pursuant to Rule 16.3, Velocity requests oral argument asserting that it will materially assist the Commission in resolving the issues in this application. "Velocity notes several recent applications for rehearing have questioned the processes used by the Communications Division to evaluate CASF applications." (Rhg. App., pp. 17-18.) Hence, Velocity asserts that oral argument would provide a full opportunity for the Commission to consider whether modifications are needed not only in the context of Velocity's challenge specifically, but also on a more global basis. (*Ibid.*)

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<sup>39</sup> Email letter dated 1/24/17 from Corey Ricketts, Vice President of Com-Pair, stating the letter is submitted as a challenge to Digital 299 project.

<sup>40</sup> Email letter dated 1/26/17 from John Baker, Analyst Communications Division, to Mr. Ricketts, Vice President of Com-Pair, acknowledging receipt of 1/24/17 email.

<sup>41</sup> Resolution T-17548, p. 21.

The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. (See Cal. Code of Regs., Tit. §20, 16.3, subd. (a).) Velocity's request for oral argument does not meet the requirements specified by the Rules. The issues raised by Velocity are basic issues that are not of exceptional complexity. Resolution T-17548 does not present legal issues of exceptional controversy and public importance. Accordingly, there is no basis to conclude oral argument would benefit disposition of the application for rehearing. Consequently, Velocity's request for oral argument is denied.

### III. CONCLUSION

We modify Resolution T-17584 to clarify that, pursuant to the Commission's Rules, a proceeding is considered submitted and the evidentiary record is closed prior to the issuance of a proposed decision or draft resolution. (See Rule 13.14(a)). As a result, no new evidence can be included as part of the record, absent good cause or unless the submission of the proceeding has been set aside and the record reopened. (See Rule 13.14(b)). With this clarification, rehearing of Resolution T-17548, as modified, is denied as no legal error has been demonstrated.

**THEREFORE, IT IS ORDERED** that:

1. For purpose of clarification, Resolution T-17548 shall be modified as follows:

- a. On page 7, in line 1 of footnote 13, delete the words "well after the challenge and comment periods for this resolution had closed," and insert the following:

"after the draft resolution had issued and, pursuant to the Commission's Rules of Practice and Procedure, the evidentiary record had closed (Rule 13.14(a)),"

- b. On page 7, in line 5 of footnote 13, after the word "factors:" delete the rest of the footnote in its entirety through the last word "level." and insert the following:

"(1) The draft resolution had issued and the evidentiary record had closed, pursuant to the Commission's Rules of Practice and

Procedure (Rule 13.14(a)), prior to Velocity’s submittal of its March 10, 2017 speed tests; (2) Velocity’s website notes that advertised speeds top out at 6 Mbps download/1.5 Mbps upload, whereas the CASF standards are a minimum service level; and (3) Velocity’s website also notes that line of sight signals may be affected by weather, foliage, terrain, and man-made structures <https://www.velotech.net/hscableinternet/>.”

- c. On page 21, in line 3 of footnote 28, after the word “factors:” delete the rest of the footnote in its entirety through the last word “level.” and insert the following:

“(1) The draft resolution had issued and the evidentiary record had closed, pursuant to the Commission’s Rules of Practice and Procedure (Rule 13.14(a)), prior to Velocity’s submittal of its March 10, 2017 speed tests; (2) Velocity’s website notes that advertised speeds top out at 6 Mbps download/1.5 Mbps upload, whereas the CASF standards are a minimum service level; and (3) Velocity’s website also notes that line of sight signals may be affected by weather, foliage, terrain, and man-made structures <https://www.velotech.net/hscableinternet/>).”

- d. On pages 21, in line 1 of footnote 29, delete “the words “well after the challenge and comment periods for this resolution had closed,” and insert the following:

“after the draft resolution had issued and, pursuant to the Commission’s Rules of Practice and Procedure, the evidentiary record had closed (Rule 13.14(a)),”

- e. On pages 21, in line 4 of footnote 29, after the number “299.” delete the rest of the footnote in its entirety, which continues onto page 22, and insert the following:

“Because the draft resolution had issued and the evidentiary record had closed, pursuant to the Commission’s Rules of Practice and Procedure (Rule 13.14(a)), Commission staff could not accept Com-Pair’s challenge or the results of its one speed test into evidence.”

2. Rehearing of Resolution T-17548, as modified, is hereby denied.
3. The proceeding, A.17-04-029, is hereby closed.

This order is effective today.

Dated June 21, 2018, at San Francisco, California.

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