

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Velocity Communications,
Inc. for Rehearing of D.18-06-036.

A.18-07-018
(Filed on July 23, 2018)

**ORDER MODIFYING DECISION (D.) 18-06-036
AND DENYING REHEARING OF DECISION, AS MODIFIED**

I. INTRODUCTION

Today’s decision disposes of the application for rehearing of D.18-06-036 (or “Decision”)¹ filed by Velocity Communications, Inc. (“Velocity”).

On March 23, 2017, the Commission issued Resolution T-17548 (or “Resolution”) approving funding in the amount of \$46,709,036 from the California Advanced Services Fund (“CASF”) for the infrastructure grant application of Inyo Networks, Inc. (“Inyo”) to construct the Digital 299 project, which includes both middle-mile and last-mile facilities. 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 comments to the draft resolution or late submitted 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 6/1.5.²

Velocity timely filed an application for rehearing of Resolution T-17548 (“first rehearing application”) alleging, among other things, that by denying consideration

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

² Resolution T-17548, pp. 7, fn. 13 & 21, fn. 28.

of Velocity's March 10, 2017 speed test results, the Resolution (1) failed to enforce Velocity's section 281³ statutory right to challenge Inyo's Digital 299 project demonstrating that Velocity provided service at broadband speeds prior to the CASF award; (2) failed to consider the entire record thereby denying Velocity a meaningful opportunity to challenge Inyo's Digital 299 project application; and (3) was contrary to prior Commission decisions.

On June 25, 2018, the Commission issued D.18-06-036 in response to Velocity's first rehearing application. D.18-06-036 did not find any legal error in Resolution T-17548, but modified the Resolution to clarify that, pursuant to the Commission's Rules of Practice and Procedure, a proceeding is considered submitted and the evidentiary record is closed as of the date of issuance of a proposed decision or draft resolution. (See Rule 13.14(a)).⁴ 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)).⁵ D.18-06-036 denied rehearing of Resolution T-17548, as modified, finding that no legal error had been demonstrated.

On July 23, 2018, Velocity timely filed an application for rehearing of D.18-06-036 ("second rehearing application"). Similar to its first rehearing application, all of Velocity's allegations in this second rehearing application are based on the fact that Commission staff did not change its recommendation to approve the Digital 299 project, as set forth in the draft resolution, in response to Velocity's comments on the draft

³ All section references are to the Public Utilities Code unless otherwise specified.

⁴ 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).)

⁵ 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).)

resolution and late-submitted March 10, 2017 speed test results for the Lewiston area.⁶ Specifically, Velocity alleges that D.18-06-036 contains legal error for the following reasons: (1) Rules 13.14 (a) and 13.14(b) do not apply to informal proceedings resulting in resolutions such as CASF applications (Rhg. App., pp. 2-3, 6-9); (2) the Commission has previously accepted new evidence in comments on draft resolutions without a motion to reopen the record and is, therefore, discriminating against Velocity by not reopening the record and accepting its late submitted March 10, 2017 speed test results (Rhg. App., pp. 3-6.); (3) the Commission's precedent of accepting additional evidence in comments on draft resolutions required Commission staff to provide notice of the change and failure to do so denied Velocity the opportunity to be heard resulting in a due process violation (Rhg. App., pp. 8-9); and (4) D.18-06-036 affirms legal error in Resolution T-17548 that departs from Commission decisions requiring served households to be removed from CASF awards contrary to section 281 (Rhg. App., pp. 10-13).⁷ On August 6, 2018, Inyo filed a response to Velocity's application for rehearing.

We have carefully reviewed each and every allegation raised in Velocity's rehearing application. D.18-06-036 inadvertently states in a few instances that a proceeding is considered submitted and the evidentiary record is closed prior to the issuance of a proposed decision or draft resolution pursuant to Rule 13.14(a). We correct any such statements by modifying D.18-06-036 to clarify why it is appropriate to look to the Rules of Practice and Procedure (specifically Rule 13.14(a)) for guidance in this informal CASF proceeding regarding the submission of evidence and close of the

⁶ Resolution T-17548 stated that Commission staff did not consider the information provided by Velocity, including the late-submitted March 10, 2017 speed test results because "the challenge and comment period had closed prior to Velocity's submittal. . . ." (Resolution T-17548, pp. 7, fn. 13 & fn. 28.)

⁷ Velocity included three attachments to its rehearing application. Attachment 1 is a copy of Velocity's January 30, 2017 Comments on Draft Resolution T-17548; Attachment 2 is a Declaration from Velocity's President and CEO, which is new evidence that is not part of the record and cannot be considered; and Attachment 3 is a SB 960 Compliance – Scoping Memorandum Information Rule (Rule 2.1(c)), which is not relevant to this rehearing application.

evidentiary record. With these modifications, rehearing of D.18-06-036 is denied as no legal error has been demonstrated.

II. DISCUSSION

A. **The Commission’s Rules of Practice and Procedure may apply to informal proceedings that result in resolutions.**

Velocity alleges that it was legal error for the Commission to clarify in D.18-06-036 that Rule 13.14 (a), which governs submission and reopening of the record, applies to informal resolution processes such as those that result from CASF applications. (Rhg. App., p. 6.) Velocity argues that “Rule 13.14(a) applies only in situations in which there is taking of “evidence,” briefs are filed and a decision as to whether to allow oral argument has been made. None of these enumerated events occurred in this proceeding.” (Rhg. App., p. 6.) Velocity also alleges that “D.18-06-036 departs from the Commission’s prior approach of allowing new evidence to be submitted in comments on draft resolutions by revising the scope of Rule 13.14 to apply to informal resolution proceedings. Because Velocity was not given notice that the Commission intended to re-interpret Rule 13.14(a) to close the record on Inyo’s CASF application at some unidentified date prior to the issuance of the draft resolution, Velocity was denied the opportunity to be heard.” (Rhg. App., p. 9.) As discussed below, not only do Velocity’s allegations lack merit, but Velocity has failed to cite to any legal authority to support these allegations.⁸

⁸ 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).) Instead, these allegations appear to be an improper attempt to relitigate whether the Digital 299 project area is served or underserved, which was thoroughly examined in the proceeding. The purpose of a rehearing application is to specify legal error, not to relitigate issues. (See Pub. Util. Code, § 1732; Cal. Code of Regs., tit. 20, § 16.1, subd. (c); see *OIR re California Renewables Portfolio Standard Program* [D.13-02-037] (2013), pp. 3-4 (slip op.)) Thus, this constitutes another basis for our rejection of Velocity’s application for rehearing.

Pursuant to section 701, “[t]he Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.” (Pub. Util. Code, § 701.) And pursuant to Rule 1.2 (Construction), the Commission’s Rules of Practice and Procedure “shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. . . .”

A CASF application is a proceeding, which has its own specific rules. Those rules state that 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.) Based on those rules, after the initial 14-day challenge period closes, Commission staff could consider the proceeding submitted and the evidentiary record closed.

Commission staff, however, has been lenient with this requirement and at times has 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,² and (2) to guard against duplicative services. Under these

² 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.

(Pub. Util. Code, § 281, subs. (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 (“AB”) 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 analysis of the rehearing application.

circumstances, it has been unclear when a CASF proceeding is considered submitted and the evidentiary record closed.

Therefore, in D.18-06-036, we simply clarified that, under these circumstances, it is appropriate to look to the Rules of Practice and Procedure for guidance regarding when this particular CASF proceeding should be considered submitted and the evidentiary record closed. Unless otherwise specified in a General Order (such as General Order 96-B, which governs the submission of Advice Letters) or in a specific decision or resolution that sets forth rules governing the submission of evidence and the close of the evidentiary record in a particular type of proceeding, we may apply the Rules of Practice and Procedure to informal proceedings, as needed. All parties participating in Commission proceedings should be familiar with these rules and practice accordingly.

All proceedings, formal and informal, must have a point where the evidence is considered submitted and no more evidence is accepted without a motion or request. Thus, the application of Rule 13.14(a) to this CASF proceeding guarantees that at some point the proceeding shall be considered submitted to the Commission and the evidentiary record closed. Such a process ensures that all parties have an opportunity to comment on the evidence thereby ensuring due process.

Velocity also alleges that it was legal error for the Commission to clarify in D.18-06-036 that, pursuant to Rule 13.14(b), Velocity could have submitted a motion to set aside submission for the taking of new additional evidence specifying changes of fact such as the March 2017 speed test results.¹⁰ Velocity argues doing so is impossible because CASF applications are not docketed as formal proceedings but are submitted directly to the Communications Division. (Rhg. App., p. 7.) “There is no mechanism to file a motion of any type because resolutions are not formally docketed and there is no

¹⁰ D.18-06-036, p. 11.

formal proceeding number, which is an absolute prerequisite for filing a motion with the Docket Office.” (Rhg. App., p. 7.)

Again, in D.18-06-036, we simply clarified that the Commission’s Rules of Practice and Procedure provide guidance on how to submit a motion or request to reopen the evidentiary record in an informal proceeding. A review of the record in this proceeding shows that on March 23, 2018, Velocity submitted a Request for Modification of Resolution T-17548 to the Commission’s Director of Communications.¹¹ Therein, Velocity states “[a]lthough this Petition for Modification must meet the minimum requirements of Rule 16.4 of the Commission’s Rules of Practice and Procedure, it must be submitted via letter to the head of the division that issued the Resolution at issue rather than formally filed with the docket office.”¹²

The above-cited communication indicates that Velocity understands that the Rules of Practice and Procedure, at a minimum, provide guidance on how to submit a motion or a request in an informal proceeding. Hence, Velocity’s allegations that the application of the Rules of Practice and Procedure to this informal CASF proceeding results in a due process violation lack merit. Hence, we deny rehearing on these issues.

We acknowledge that D.18-06-036 inadvertently states in a few instances that a proceeding is considered submitted and the evidentiary record is closed prior to the issuance of a proposed decision or draft resolution pursuant to Rule 13.14(a). We correct any such statements by modifying D.18-06-036 to clarify why it is appropriate to look to the Rules of Practice and Procedure (specifically Rule 13.14(a)) for guidance in this informal CASF proceeding regarding the submission of evidence and close of the evidentiary record.

¹¹ We note that today’s decision does not dispose of or prejudice the merits of the issues raised in this petition for modification. A subsequent Commission order (i.e. Resolution) will consider and resolve this petition for modification.

¹² Velocity’s Request for Modification of Resolution T-17548, dated March 23, 2018, p. 1, fn. 1.

B. The Commission’s application of the Rules of Practice and Procedure in D.18-06-036 did not result in discrimination against Velocity.

Velocity asserts that the Commission previously has accepted new evidence in comments on draft resolutions without a motion to reopen the record (Rhg. App., p. 3.).¹³ Thus, Velocity alleges that “[i]t is discriminatory, and thus legal error, for the Commission to refuse to consider new evidence provided by Velocity in its comments on draft Resolution T-17548 purportedly because it didn’t file a motion to reopen the record.” (Rhg. App., p. 5.) “The Commission must not act in an arbitrary and capricious manner and it must proceed in a manner required by law, including the California Constitution [citing section 1757.1(a)]. More specifically, the Commission must apply its rules and always to all parties in a non-discriminatory manner [citing Cal. Const. Art. I, section 7.]” (Rhg. App., p. 5.)

Velocity fails to provide any legal support for this allegation. What the Commission did or did not do in previous informal resolution proceedings is not at issue in this proceeding. The issue here is whether D.18-06-036 committed legal error by modifying Resolution T-17548 to clarify that the Commission’s Rules of Practice and Procedure apply to this CASF proceeding. As explained above, said application does not amount to legal error. Moreover, the fact that Commissions staff has been lenient with the 14-day challenge deadline in other CASF proceedings under different circumstances does not impose a legal obligation upon Commission staff to accept new evidence

¹³ Velocity cites to (1) Resolution T-17495, where the Commission accepted updated evidence on the number of households served by Confax.net in comments to the draft resolution; (2) Resolution T-17488, where the Commission accepted new evidence submitted for the first time in comments from SBC-Wireless that it served 142 residential customers and adjusted the area claimed to be served by SBC-Wireless; and (3) Resolution E.4728, where the Commission adopted new contract provisions advocated by parties in comments on the draft resolution. (Rhg. App., pp. 3-4.)

regardless of how late in the proceeding it was submitted.¹⁴ Hence, Velocity's allegation of discrimination lacks merit. We deny rehearing on this issue.

C. D.18-06-036 does not affirm legal error in Resolution T-17548 contrary to section 281.

Velocity alleges that D.18-06-036 affirms legal error in Resolution T-17548 that departs from Commission decisions requiring served households to be removed from CASF awards contrary to section 281.¹⁵ (Rhig. App., p. 10.) "Households have been excluded from CASF awards in many other instances once a provider demonstrates it does or will shortly provide service at broadband speeds." (Rhig. App., p. 12.)

This is the exact same argument Velocity made in its first rehearing application, which the Commission rejected in D.18-06-036.¹⁶ Therefore, this allegation constitutes an improper collateral attack of Resolution T-17548 on an issue that was affirmed in D.18-06-036. Collateral attacks of prior Commission decisions, which are final and unappealable, are impermissible. (See Pub. Util. Code, §1709; see also,

¹⁴ Velocity did not provide additional evidence in its January 30, 2017 comments to the draft resolution. The evidence in the record shows that Velocity waited until March 10, 2017 (14 days before the Commission issued Resolution T-17548) to submit additional speed test results.

¹⁵ See Footnote 9 above.

¹⁶ As stated in D.18-06-036, the evidence in the record indicates that Velocity had every opportunity to exercise its section 281 statutory right to challenge the Digital 299 project since it participated in this proceeding from the beginning. Velocity submitted a timely challenge letter in August 2015 asserting 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. 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. 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. 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. It would have also given parties notice and an opportunity to comment on the new evidence prior to the issuance of the draft resolution. (D.18-06-036, pp. 7-11.) Moreover, Velocity did not submit additional evidence in its January 30, 2017 comments to the draft resolution. The evidence in the record shows that Velocity waited until March 10, 2017 (14 days before the Commission issued Resolution T-17548) to submit additional speed test results.

D.83-04-090, pp. 12-13.) Accordingly, we reject this allegation as being without merit and deny rehearing on this issue.

III. CONCLUSION

We have carefully reviewed each and every allegation raised in Velocity's rehearing application. D.18-06-036 inadvertently states in a few instances that a proceeding is considered submitted and the evidentiary record is closed prior to the issuance of a proposed decision or draft resolution pursuant to Rule 13.14(a). We correct any such statements by modifying D.18-06-036 to clarify why it is appropriate to look to the Rules of Practice and Procedure (specifically Rule 13.14(a)) for guidance in this informal CASF proceeding regarding the submission of evidence and close of the evidentiary record. With these modifications, rehearing of D.18-06-036 is denied as no legal error has been demonstrated.

THEREFORE, IT IS ORDERED that:

1. For the purpose of clarification, D.18-06-036 shall be modified as follows:
 - a. On page 4, in the first full paragraph, delete the second sentence in its entirety starting with "Pursuant to Commission procedure," and ending with "draft resolution."
 - b. On page 7, in the first full paragraph, delete the second sentence starting with "We are of the opinion" and ending with "draft resolution. (See Rule 13.14(a))" Insert the following before footnote 17:

We are of the opinion that Resolution T-17548 should be modified to clarify why it is appropriate to look to the Rules of Practice and Procedure (specifically Rule 13.14(a)) for guidance in this informal CASF proceeding regarding the submission of evidence and close of the evidentiary record.
 - c. On page 8, in the first full paragraph, delete the first sentence in its entirety beginning with the words "The fact that the CASF application process. . ." including footnote 21, and insert the following new paragraphs:

Pursuant to section 701, “[t]he Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.” (Pub. Util. Code, § 701.) And pursuant to Rule 1.2 (Construction), the Commission’s Rules of Practice and Procedure “shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. . . .”

A CASF application is a proceeding, which has its own specific rules. Those rules state that 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.) Based on those rules, after the initial 14-day challenge period closes, Commission staff could consider the proceeding submitted and the evidentiary record closed.

Commission staff, however, has been lenient with this requirement and at times has 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. Under these circumstances, it has been unclear when a CASF proceeding is considered submitted and the evidentiary record closed.

Therefore, it is appropriate for the Commission to look to the Rules of Practice and Procedure for guidance regarding when this particular CASF proceeding should be considered submitted and the evidentiary record closed. Unless otherwise specified in a General Order (such as General Order 96-B, which governs the submission of Advice Letters) or in a specific decision or resolution that sets forth rules governing the submission of evidence and the close of the evidentiary record in a particular type of proceeding, the Commission may apply the Rules of Practice and Procedure to informal proceedings, as needed. All parties participating in Commission proceedings should be familiar with these rules and practice accordingly.

- d. On page 9, in the first paragraph continuing from page 8, delete the second sentence starting with “Hence, pursuant to the Rules” and ending with “decision or draft resolution.”

- e. On page 10, second full paragraph, delete the first and second sentences in their entirety and and insert:

As of the date of 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. Given that Commission staff did not close the evidentiary record in this CASF proceeding as of the 14-day deadline for challenges as specified in D.18-12-018, it is appropriate for the Commission to look to the Rules of Practice and Procedure for guidance as to when the evidentiary record closes and the proceeding is considered submitted in this informal CASF proceeding. Thus, in this case, we find that close of the evidentiary record and submission occurred when the proposed resolution was issued. (Rule 13.14(a)).

- f. On page 11, second full paragraph, delete the first sentence starting with “However, we modify Resolution T-17584” and ending with “proposed decision or draft resolution.” and insert:

However, we modify Resolution T-17584 to clarify that, under these circumstances in this informal CASF proceeding, it is appropriate for the Commission to look to the Rules of Practice and Procedure for guidance in order to determine when the evidentiary record closes and the proceeding is considered submitted. (See Rule 13.14(a)).

- g. On page 14, third full paragraph, second sentence, after the words in parenthesis “prior to the” insert:

date of

- h. On page 15, first full paragraph, delete the first sentence in its entirety starting with “As discussed above . . . and ending with “resolution.” and insert:

As discussed above, under the particular circumstances in this informal CASF proceeding, it is appropriate for the Commission to look to the Rules of Practice and Procedure (Rule 13.14(a)) for guidance as to the close of the evidentiary record and submission. In this case, close of the evidentiary record and submission occurred when the proposed resolution was issued.

- i. On page 20, second full paragraph, delete the first sentence starting with “We modify Resolution T-17584” and ending with “proposed decision or draft resolution. (See Rule 13.14(a))” and insert:

We modify Resolution T-17584 to clarify that, under these particular circumstances in this CASF proceeding, it is appropriate for the Commission to look to the Rules of Practice and Procedure (Rule 13.14(a)) for guidance in order to determine when the evidentiary record closes and the proceeding is considered submitted. (See Rule 13.14(a)). Hence, we determine that the proceeding was submitted and the evidentiary record closed as of the date of issuance of the proposed resolution.

- 2. Rehearing of D.18-06-036, as modified, is hereby denied.
- 3. The proceeding, A.18-07-018, is hereby closed.

This order is effective today.

Dated June 27, 2019 at San Francisco, California.

MICHAEL PICKER
President
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
Commissioners