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Via Electronic Mail

Jessica Honeyfield
CPUC Communications Division
505 Van Ness Avenue
San Francisco, CA 94102

Dear Ms. Honeyfield,

Pursuant to Rule 14.5 of the Commission's Rules of Practice and Procedure, Velocity Communications, Inc. ("Velocity") hereby timely comments on Draft Resolution T-17717 ("Draft Resolution") identifying legal and factual errors. Velocity respectfully requests that the Commission correct these errors by denying Hunter's CASF application in its entirety.

The Draft Resolution Violates the Commission's Stated Evaluation Criteria

Velocity is an Internet Service Provider ("ISP") providing broadband service in the area for which Hunter Communications, Inc. ("Hunter") seeks a grant from the California Advanced Services Fund ("CASF") for the Hoopa Valley Broadband Initiative Project. Velocity's service to the Hoopa Valley area is documented on the Commission's Broadband Map, which shows the census blocks in the Hoopa Valley area as ineligible for CASF funds. In the May 18, 2020 notice of the Hunter CASF application, the Commission stated that "Internet service providers do not need to submit challenges for census blocks shown as ineligible on the Commission's Interactive Broadband Map."¹ Out of an abundance of caution, however, Velocity filed a challenge to Hunter's application and identified 70 census blocks where Velocity already provides broadband at or above the required minimum speeds.²

Despite making a *prima facie* showing that Hoopa Valley is ineligible for CASF funding based on the Commission's records, and 121 pages of Velocity's own evidence, the Draft Resolution rejects Velocity's challenge and awards Hunter CASF funds to overbuild Velocity's network. The Draft Resolution violates the Commission's own evaluation criteria and therefore commits legal error. Further, the Draft Resolution violates California Public Utilities Code Sections 281(b)(2) and (e)(3)(C), because it provides public money to overbuild Velocity's privately-funded network. The California Legislature stated, "It is the intent of the Legislature that California achieve the goal [of broadband access to no fewer than 98 percent of California households by Dec. 31, 2022] . . . by fostering private investment . . . and not use moneys in that fund to overbuild the broadband

¹ Notice of New Applications for CASF Infrastructure Grant Account Funding, May 18, 2020, at p. 2 ("CASF Notice"). A copy of the CASF Notice is provided as Exhibit A.

² Velocity Challenge, Exhibit 1.

infrastructure.³ Thus, the Draft Resolution commits further legal error by violating the California Legislature mandate that CASF money not be used to overbuild an existing provider's network.

The Draft Resolution Violates Section 281 Because Hunter Fails To Demonstrate That It Attempted To Use Velocity's Middle-mile Facilities Or That The Proposed Middle-Mile Facilities Are Indispensable to Providing Last-Mile Services

The Draft Resolution also errs by failing to apply the legislature requirement and Commission standard that CASF applicants must attempt to use existing infrastructure rather than seeking public funding.⁴ Specifically, a CASF applicant must provide documentation that that it requested dark fiber or specific data and/or transport services from a provider and that provider was not able to meet that request and offered no other alternative.⁵ Velocity has middle-mile and last-mile facilities in the area for which Hunter seeks CASF monies, but it did not demonstrate that it attempted unsuccessfully to obtain transport services from Velocity rather than overbuilding, as required by D.18-12-018. The Draft Resolution errs by failing to require Hunter to make such showing. In fact, Hunter did contact Velocity seeking middle-mile capacity in the summer of 2018. Velocity responded that it would be able to provide Hunter with its desired capacity and provided an initial cost estimate. Hunter made no further contact. The Draft Resolution does not address Hunter's failure to utilize Velocity's network and apparently attempts to dismiss this failure by stating that Velocity does not serve the entire Hoopa Valley Reservation. The Draft Resolution errs by failing to analyze whether Velocity's facilities could have been used in the areas that it does serve.

Section 281(f)(5)(B) requires a CASF applicant to demonstrate that any middle-mile facilities funded through CASF are indispensable to the project. In D.18-12-018, the Commission held that "middle-mile infrastructure should be deemed 'indispensable' to a last-mile project if applicants are, absent building additional infrastructure, unable to deliver last-mile service at reasonable quality and price levels."⁶ As discussed above, Hunter contacted Velocity to inquire about using its middle-mile facilities and Velocity responded that it would be able to deliver Hunter's desired capacity.

The Draft Resolution errs by concluding that Hunter carried its burden to demonstrate that the middle-mile portion of its CASF application is indispensable to the last mile services it seeks to offer. The Draft Resolution awards Hunter middle-mile funding based on connections it could provide to the following: 1) an as-yet unbuilt and therefore speculative Klamath River Rural Broadband Initiative ("KRRBI"); 2) the now defunct Digital 299 project; and 3) the Bald Hill cell tower site for backhaul.⁷ The Draft Resolution acknowledges that Hunter has not negotiated agreements with the Hoopa Valley Tribe or adjacent entities or tribes to connect with the KRRBI project if it is ever completed.⁸ The Draft Resolution does not mention that the

³ 2017 Cal ALS 851, 2017 Cal AB 1665, 2017 Cal Stats. ch. 851, at Section 2(c).

⁴ *Id.*; D.18-12-018.

⁵ *Id.*; Section 281(f)(13).

⁶ D.18-12-012, at p. 29 (mimeo).

⁷ Draft Resolution, at p. 8.

⁸ The KRRBI project received \$6.6 million in a CASF award in Resolutions T-17418 (issued October 17, 2013). Five years later, the project was apparently less than 25 percent complete because KRRBI requested a waiver of the Commission's rules on CASF disbursements so that it could receive partial funding, which does not occur until a project is 25% complete. The waiver was granted on December 6, 2018. On November 5, 2019, the KRRBI requested an additional funding and the Commission almost doubled the total CASF award by granting \$10.8 million more in Resolution T-17690 (issued on May 7, 2020). Given this history, the viability of the KRRBI project is uncertain.

Digital 299 project is now defunct, but even if it were still proceeding, it would have deployed only middle-mile facilities in the Hoopa Valley, thus interconnecting with that network would not have facilitated (much less been indispensable) to last mile customers in Hoopa Valley.

Thus the only viable justification for the middle-mile funding is backhaul to the Bald Hill cell tower. Backhaul to a cellular tower, however, is not indispensable to serving last mile customers with fiber facilities (as Hunter proposes). Such backhaul would provide only “path redundancy and increase[d] network resiliency” for the area, according to the Draft Resolution.⁹ While these capabilities may be desirable, they clearly fail to meet the requirement that middle-mile facilities be indispensable to the *last mile* component of the proposed network.

The Draft Resolution acknowledges the presence of Velocity middle-mile facilities in the Hoopa Valley area, but reaches a conclusory and unsupported conclusion that “Velocity’s existing infrastructure does not offer the level of services nor bandwidth required for Hunter to serve the project area.”¹⁰ The Draft Resolution does not state how Velocity’s middle-mile facilities fail to offer sufficient bandwidth nor does it document whether Hunter even contacted Velocity to determine whether its facilities could support required bandwidth needs. The Draft Resolution also concludes that Velocity’s facilities are not sufficient because it does not currently serve all households on the Hoopa Valley Reservation. But Velocity undeniably serves *some* households and the Draft Resolution fails to determine whether Hunter made any effort to utilize Velocity’s facilities so as to reduce the amount of CASF money required. (Hunter did not).

The Draft Resolution’s error regarding the extent of Velocity’s service area appears to be based on Hunter’s misleading claims that Velocity serves only 10 percent of the Hoopa Valley Indian Reservation, “leaving about 90% without coverage.”¹¹ Hunter did not disclose that the Reservation’s population is highly concentrated in about 10 percent of the geographic area of the reservation.¹² Thus, Velocity’s facilities may reach less than 100 percent of the geographic area of the reservation, but it serves approximately 50 percent of the Reservation’s populated area.¹³

The Draft Resolution Incorporates And Relies On Incorrect or Misleading Information

Without any analysis or details, the Draft Resolution adopts Hunter’s claims that a sampling of speed tests purportedly show that Velocity’s service does not meet the required minimum speeds at some Tribal departments.¹⁴ Hunter did not provide copies of those speed tests publicly, identify which Tribal departments were tested, or describe its testing technique. The details of the speed tests, performed by a self-interested party, are critical. Velocity requested staff to require Hunter to answer a list of questions about the test it performed,¹⁵ but there is no mention in the Draft Resolution of such documentation having been received or reviewed.

Instead, the Draft Resolution states only that the broadband speeds reported by Hunter were half of the required 6Mbps/1Mbps “in a majority of the results.”¹⁶ But such results (even if accurate) does not examine why. Velocity provided evidence demonstrating that in many locations on the

⁹ Draft Resolution, at p. 8.

¹⁰ Draft Resolution, at p. 8.

¹¹ Hunter Hoopa Valley CASF application, at p2.

¹² Velocity Challenge, Exhibit 5 (Finch Decl.), at ¶5.

¹³ Velocity Challenge, Exhibit 5 (Finch Decl.), at ¶6.

¹⁴ Draft Resolution, at p.7; *see also* Hunter CASF Application at p. 2 of the PDF.

¹⁵ Velocity Challenge, Exhibit 6.

¹⁶ Draft Resolution, at p. 7.

Hoopla Reservation the Tribal department subscribes to Velocity's Basic 3 service, which provides broadband speeds of 3 Mbps download and 1 Mbps upload.¹⁷ Obviously any speed test would return a result that the broadband speed was half of the required 6 Mbps, and would yield completely illegitimate conclusions about Velocity's service. Velocity provided a sworn declaration attesting that broadband at speeds of up to 30 Mbps download and 3 Mbps upload are available from Velocity in every census block it challenged.¹⁹

Because Hunter acknowledges that Velocity already serves the proposed CASF area, and the Commission's Broadband Map shows the area served at required speeds, it was incumbent upon staff to investigate thoroughly the accuracy and veracity of Hunter's data regarding Velocity's broadband speeds. The Draft Resolution does not state what locations were reviewed in Hunter's "sampling" of data speeds or how Hunter's speed tests were conducted. Respectfully, Velocity submits that staff is obligated to test Hunter's self-serving assertions that allege Velocity's broadband does not meet required speeds.

The Draft Resolution Imposes New Requirements of Proof Without Notice And An Opportunity To Be Heard As Required By Section 1708

The Draft Resolution concludes that Velocity's 121-page challenge submitting voluminous evidence that it already served 70 census blocks was not sufficient.¹⁸ The Draft Resolution's conclusion is based on its incorrect assertion that the customer invoices submitted by Velocity did not identify the service address.¹⁹ The Draft Resolution also faults Velocity for not correlating the customer invoices with specific census blocks, but cites to no rule, regulation or order that required such correlation. If staff had contacted Velocity it would have gladly provided the census block number associated with each invoice. There is no mention of a requirement to identify census blocks for each customer invoice in the instructions the Commission issued to prospective challengers. Therefore, the staff has created a new rule requiring a heightened level of documentation without providing any notice of such requirement. Section 1708 requires the Commission to give notice and an opportunity to be heard before modifying, altering or amending its orders, decisions or rules. The Commission did not do so and therefore the Draft Resolution violates Section 1708.

Velocity provided ample evidence that it provides broadband at required speeds in the areas for which Hunter seeks funding. It submitted as Confidential Exhibit 2, a CSV file with street addresses for all households Velocity already serves in census blocks for which Hunter seeks a CASF award. Given the remoteness of the area and lack of access to the Commission's proprietary geo-location tool, Velocity was unable to provide precise latitude/longitude coordinates for every household. However, Velocity requested the opportunity to work with staff using the Commission's tool to locate its served households with sufficient detail to enable staff to verify the household is served. Staff did not respond.

Velocity also submitted as Confidential Exhibit 3, sample customer bills showing that customers in each of the census blocks served by Velocity are purchasing broadband. In some of the census blocks, the customer bill shows that the customer purchases Velocity's Ultra 20 service, which provides 20 Mbps download and 2 Mbps upload, Business Premium 10 service, which provides 10 Mbps download and 1.5 Mbps upload speeds or Turbo 6, which provides 6 Mbps download and 1

¹⁷ Velocity Challenge, Exhibit 5 (Finch Decl.), at ¶3.

¹⁸ Draft Resolution, at p. 7.

¹⁹ Draft Resolution, at p. 7 ("Velocity submitted customer billing information but failed to identify the census block or service address location to verify served status.")

Mbps upload.²⁰ Velocity submitted evidence noting that in some census blocks, no customer is purchasing broadband services at speeds above 3 Mbps download and 1 Mbps upload.²¹ But the lack of a customer does not negate evidence that Velocity offers broadband service at or above the minimum speeds. The Draft Resolution does not mention this evidence or explain why using public money to overbuild Velocity's broadband network is justified when customers in Hoopa Valley are not subscribing to the existing broadband services.

In addition to the invoices, Velocity submitted copies of advertisements, website screen shots and the broadbandnow.com website in Hoopa showing that it offers broadband at or above the required minimum speeds.²² The Commission has held that "maximum advertised speed is the best metric by which the Commission can determine if an area is served or underserved."²³ Finally, Velocity submitted a declaration stating that the households or businesses in Exhibits 2 and 3 have the capability to receive minimum speeds of 6 Mbps download and 1 Mbps upload.²⁴

The Draft Resolution errs legally because it fails to consider all the evidence submitted by Velocity demonstrating that it is serving the area, at required broadband speeds, in the area for which Hunter seeks CASF money. Commission decisions must be based on substantial evidence in the entire record in the proceeding.²⁵ Further, any Commission conclusions must be supported by factual findings based on evidence.²⁶ A clear record is required on every issue in a Resolution, and ambiguity as to the basis for any decision set forth in a Commission decision is grounds for rehearing or reconsideration.²⁷ The Draft Resolution errs legally because it does not consider substantial evidence in the record that Velocity currently serves the area for which Hunter seeks CASF money.

Conclusion

Velocity supports the Commission's digital inclusion efforts, most especially efforts to bring broadband to Tribal areas that have been historically difficult to serve geographically and economically. However, the award for Hunter's CASF application should be denied because it does not meet Commission and state law requirements. Most importantly, the Commission's own Broadband Map shows that the area for which Hunter seeks CASF money is already served by Velocity, thus Hunter has the burden of proof to overcome the evidence in Velocity's challenge (including customer invoices, advertisements and a sworn declaration) confirming that it serves the Hoopa Valley area at required broadband speeds. By approving Hunter's legally deficient CASF application, the Draft Resolution commits legal error. The Commission should deny the application.

Sincerely,
/s/Anita Taff-Rice
Counsel for Velocity Communications, Inc.

²⁰ Exhibit 5 (Finch Decl.), at ¶7.

²¹ Exhibit 5 (Finch Decl.), at ¶8.

²² Velocity Challenge, Exhibit 5 (Finch Decl.), at ¶ 7.

²³ D.12-02-015, at p. 17-18.

²⁴ Exhibit 5 (Finch Decl.), at ¶10.

²⁵ Commission Rules of Practice and Procedure Rule 8.2(m), *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1508.

²⁶ Cal. Pub. Util. Section 1757.1(a)(4).

²⁷ D.10-05-052.