

Decision **PROPOSED DECISION OF ALJ COLBERT** (Mailed 3/5/2015)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of Bright Fiber Network, LLC for a Certificate of Public Convenience and Necessity to Provide Full Facilities Based and Competitive Local Exchange Access and Interexchange Services within California and specifically, within Nevada County.

Application 13-03-010
(Filed March 4, 2013)

DECISION DENYING THE APPLICATION OF BRIGHT FIBER NETWORK, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**Summary**

Pursuant to Public Utilities Code Section 1001, we deny Bright Fiber Network, LLC's (Bright Fiber) application for a Certificate of Public Convenience and Necessity. Bright Fiber may submit a new application when and if it is prepared to offer voice services.

1. Background and Procedural History

On March 4, 2013, Bright Fiber Network, LLC (Bright Fiber), a limited liability corporation in California filed an application for a Certificate of Public Convenience and Necessity (CPCN) to provide broadband services in the service territories of Pacific Bell Telephone Company d/b/a AT&T California (AT&T) and Verizon California Inc. (Verizon). Bright Fiber's principal place of business is located at 416 Broad Street, Nevada City, CA 95959. In its application Bright

Fiber stated that it was seeking a California Advanced Services Fund (CASF) grant to provide broadband services and that it would not be providing any local exchange voice, access, or any voice services within Nevada County.¹ Under the Commission Rules in place when it initially filed its application Bright Fiber was required to obtain a CPCN before seeking a CASF grant.² In its application Bright Fiber proposed to provide broadband services to business and residential customers via facilities that will be constructed and owned by Bright Fiber. Bright Fiber stated that it would also utilize the broadband network facilities that were constructed through the Central Valley Next Generation Broadband Infrastructure Project. The Applicant proposed to build a 100% Fiber to the Premises (FTTP) last-mile internet network in a 26.2 square mile contiguous “underserved” area and will concurrently deploy the network in a 22.9 square mile “served” area of western Nevada County, California.³ Bright Fiber proposes to construct the fiber optic project primarily underground, utilizing existing city, county and state right of ways.⁴

On July 22, 2013, the Administrative Law Judge (ALJ) assigned to the instant proceeding, issued a Ruling requesting additional information from Bright Fiber on the type of services it planned to provide and the legal basis for its’ being granted a CPCN. Specifically the Ruling requested that Bright Fiber:

- Please describe in detail the services to be provided by Applicant. Address what technologies and protocols will

¹ Bright Fiber CPCN Application at 2 § 3.

² *Id.*, at 5 § 11.

³ *Id.*, at 3-4 § 8.

⁴ *Id.*, at 3 § 7.

be used to provide these services, including whether these services will be offered over broadband facilities and whether services will be offered using Time-Division Multiplexing, Internet Protocol or other protocols. Also address the extent to which the services will be provided over the Public Switched Telephone Network and whether any facilities constructed will interconnect to the Public Switched Telephone Network.⁵

- Please state the legal basis on which Applicant claims the Commission can grant it the requested CPCN. Among other things, Applicant's response should address Public Utilities Code Sections 216, 233-234, 239, 710, and 1001; and 47 USC 153(43) and 251; and any other statutes or case law Applicant deems relevant. Also state the legal reason(s) that Applicant believes the requested authority is necessary.⁶

Bright Fiber did not directly respond to the assigned ALJ's ruling. However, on October 15, 2013, Bright Fiber filed an amended CPCN application. As in its initial application, Bright Fiber stated the it was seeking a grant of funds through the CASF Program. The Applicant stated that it would not initially offer any local exchange voice or access services at start up.⁷ Bright Fiber stated that as soon as it had a sufficient customer base and the necessary voice switch and interconnection it would provide such (voice) services.⁸ The Applicant went on

⁵ As used herein, Public Switched Telephone Network means the same as Public Switched Network, defined in 47 CFR 20.3: Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services

⁶ Assigned ALJ Ruling Requesting Additional Information, July 22, 2013.

⁷ Bright Fiber Amended CPCN Application, at 2 § 3.

⁸ Bright Fiber Amended CPCN Application, at 2 § 3.

to say that it would initially be providing broadband services to underserved areas⁹ and that it estimated it would have 1,200 residential and business customers at the end of its first year of service.¹⁰ Bright Fiber stated that its customer base would consist of residents, businesses and anchor institutions such as hospitals, schools, government offices and public safety entities that would benefit from affordable, faster and higher quality broadband services.¹¹

In an August 13, 2014 e-mail response to a March 5, 2014 e-mail from the Commission, Bright Fiber confirmed that the “its broadband facilities would be constructed based on a fiber optic build that will enable Bright Fiber Network LLC to provide broadband to underserved areas. At start, it will only provide broadband access. In time, local exchange voice or access services will be offered when it is determined to be feasible.”¹²

2. Jurisdiction

Public Utilities Code Section (Pub. Util. Code §) 216(a) defines the term “Public utility” to include a “telephone corporation,” which in turn is defined in Pub. Util. Code § 234(a) as “every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.” Furthermore, Pub. Util. Code § 233 defines “telephone line” as including “all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone,

⁹ *Id.*

¹⁰ *Id.*, 7 § 15.

¹¹ *Id.*

¹² Bright Fiber August 13, 2014 e-mail response, (*See* A.13-03-010 Commission Central Files).

whether such communication is had with or without the use of transmission wires.” Pursuant to § 710 of the Code the “Commission shall not exercise regulatory jurisdiction or control over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly allowed to do so by statute...” The Federal Communications Commission (FCC), in a decision upheld by the U.S. Supreme Court, has determined that “internet access service” is an information service, and thus not subject to state regulation.¹³ As noted, *supra*, § 710 states this prohibition in terms of state law.

Bright Fiber proposes to provide broadband services to both served and underserved areas within Nevada County, California. However, Bright Fiber does not intend to provide any local exchange voice, access, or any voice services in addition to its broadband service, although it states it may provide voice service at a later date depending on the sufficiency of its customer base.¹⁴ Therefore, Bright Fiber is not a telephone corporation and thus, not subject to our jurisdiction. When Bright Fiber is ready to provide voice service, it may request authority at that point in time.

The purpose for Bright Fiber’s CPCN application is to be eligible for a CASF grant. The CASF awards grants to support deployment of broadband infrastructure projects offering high-quality advanced communication services. Prior to the Commission’s issuance of an Order Instituting Rulemaking (R.) 12-10-012, CASF applicant eligibility rules did not allow non-telephone

¹³ See, e.g., *High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (*Cable Modem* decision), *aff’d Brand X*, *supra* note 14.

¹⁴ See Bright Fiber CPCN Application at 2 § 3; Amended CPCN at 2 § 3 Application. (See also August 13, 2014 e-mail response.)

corporations to apply for CASF grants and loans. At the moment, Bright Fiber is not definitively intending to become a telephone company and therefore cannot qualify for a CPCN. It has been suggested that Bright Fiber could voluntarily submit to the Commission's jurisdiction with the filing and approval of the instant CPCN application. However, in order for an entity to submit to an agency's jurisdiction, the agency in question must possess the jurisdiction to begin with.¹⁵ § 710 largely removed the Commission's "subject matter jurisdiction" Voice-Over-Internet Protocol (VoIP) and Internet Protocol (IP)-enabled service jurisdiction, jurisdiction it might have had under state law. "As a regulatory body of constitutional origin, the Commission only has such powers as it derives from the Constitution and the Legislature."¹⁶

Decision (D.) 14-02-018,¹⁷ in R.12-10-012, implemented Senate Bill (SB) 740,¹⁸ which permits non-telephone corporations to apply to participate in the CASF program. Specifically, D.14-02-018 implemented revised eligibility rules for the CASF program and additional safeguards for non-telephone corporations applying for CASF funding to ensure that ratepayer funds are protected. Phase II of R.12-10-012 was completed in December of 2014,¹⁹ Bright Fiber is now free to apply for a CASF grant without applying for a CPCN.

¹⁵ See, e.g., *City of Arlington v. FCC*, 2013 U.S. LEXIS 3838, Slip Op. at 6 (May 20, 2013, Scalia, J) (when regulators "act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires* [and] the question ... is always whether the agency has gone beyond what [the Legislature] has permitted it to do").

¹⁶ *Television Transmission v PUC* (1956) 47 Cal.2d 82, 84.

¹⁷ Decision Implementing Revised Eligibility Criteria for the CASF Program, March 2014.

¹⁸ SB 740 (Padilla) Stats. 2013 Ch. 522, amending Cal. Pub. Util. Code § 281.

¹⁹ See D.14-12-039.

3. Conclusion

We conclude that the application does not conform to our rules for certification as a competitive local exchange and interexchange carrier. Accordingly, Bright Fiber's application for a CPCN to provide broadband service in the service territory of AT&T and Verizon is denied. When and if Bright Fiber decides to offer voice access and services, it may file a new application for a CPCN. Pursuant to D.14-02-018 and D.14-12-039 Bright Fiber is free to apply for a CASF grant without being a CPCN holder.

4. Categorization and Need for Hearings

In Resolution ALJ 176-3312, dated April 4, 2013, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. For the reasons stated herein, the application should not be granted. A public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

5. Comments on Proposed Decision

The proposed decision (PD) of the ALJ in this proceeding was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. On Alternate Proposed Decision (APD) written by Commissioner Catherine Sandoval was also mailed to the parties. Comments were filed on March 25, 2015, by Bright Fiber there were no reply comments filed.

In its comments Bright Fiber urges the Commission to adopt the APD and not the PD. Bright Fiber asserts that it unequivocally intends to offer its customers local exchange voice, access and other voice services should its CASF

application be granted, and once it reaches a certain critical mass of subscribers.²⁰ Bright Fiber also points to its Response to the ALJ Ruling Requesting Additional Information, filed August 6, 2013, in which it stated “Applicant will not offer local exchange voice or access services at start up, except as authorized by D.95-07.054. However, as soon as it has a sufficient customer base and the necessary voice switch and interconnections to the Public Switched Telephone Network (PSTN) it will. Applicant will be initially be providing broadband to unserved areas with the intent to offer voice services as soon as possible.”²¹

Bright Fiber also states that it further desires CPCN operating authority in order to have access to “conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires” and for other purposes available to holders of CPCN.²² Bright Fiber’s argument, reiterated in its comments, that it “intends to offer its customers local exchange voice, access and other voice services should its CASF application be granted, and once it reaches a certain critical mass of subscribers” was rejected by the instant PD. Bright Fiber does not have a present intent to offer voice and/or voice access services. When and if Bright Fiber decides to offer voice access and services, it may file a new application for a CPCN.

²⁰ Bright Fiber comments to the PD and APD at 3.

²¹ *Id.* citing Bright Fiber August 13, 2014 e-mail response, (See A.13-03-010 Commission Central Files).

²² *Id.* at 3 and 4.

The second argument raised in Bright Fiber's comments; that it "needs access to conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures... in the same manner as other CPCN holders" was not raised in its application or revised application, but may well be the primary motivation behind the instant application. The issue of non-telephone companies/non CPCN holders' access to conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures for the purpose of providing broadband and other non-voice related services is a policy issue that we should not decide in a CPCN application. In the instant proceeding the issue of access to poles and other infrastructure was not raised in the application or amended application and thus is not part of the record and cannot be considered in this decision.

After reviewing the Comments of Bright Fiber to the PD we have determined that the Applicant has failed to demonstrate any material procedural or legal error.. As a result, we decline to make any changes to the PD based on the Applicant's Comments.

There are no changes to the PD.

6. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and W. Anthony Colbert is the assigned ALJ in this proceeding.

Findings of Fact

1. On March 4, 2013, Bright Fiber, a limited liability corporation in California filed an application for a CPCN to provide broadband services in the service territories of AT&T and Verizon.

2. Bright Fiber is seeking a CASF grant to provide broadband services but will not be providing any local exchange voice, access, or any voice services within Nevada County.

3. Bright Fiber proposes to provide broadband services to business and residential customers via facilities that will be constructed and owned by Bright Fiber.

4. Bright Fiber proposes to utilize broadband network facilities that were constructed through the Central Valley Next Generation Broadband Infrastructure Project.

5. Bright Fiber proposes to build a 100% FTTP last-mile internet network in a 26.2 square mile contiguous “underserved” area and will concurrently deploy the network in a 22.9 square mile “served” area of western Nevada County, California.

6. Bright Fiber proposes to construct the fiber optic project primarily underground, utilizing existing city, county and state right of ways.

7. Bright Fiber will not provide any local exchange voice, access, or any voice services in addition to its broadband service, although it may consider doing so at a later date.

8. On July 22, 2013, the assigned ALJ, issued a Ruling requesting additional information from Bright Fiber on the type of services it planned to provide and the legal basis for its being granted a CPCN.

9. Bright Fiber did not directly respond to the issues raised in the assigned ALJ’s Ruling.

10. On October 15, 2013, Bright Fiber filed an amended CPCN application.

11. In its amended application Bright Fiber stated that it would not initially offer any local exchange voice or access services.

12. In its amended application Bright Fiber stated that its customer base would consist of residents, businesses and anchor institutions such as hospitals, schools, government offices and public safety entities that would benefit from affordable, faster and higher quality broadband services.

13. D.14-02-018, in R.12-10-012, implemented SB 740, which permits non-telephone corporations to apply to participate in the CASF grant and loan program.

14. D.14-02-018 implemented revised eligibility rules for the CASF program and additional safeguards for non-telephone corporations applying for CASF funding to ensure that ratepayer funds are protected.

15. Pursuant to D.14-02-018 Bright Fiber may apply for a CASF grant without holding a CPCN.

Conclusions of Law

1. Bright Fiber is not a telephone corporation because it will not be providing any local exchange voice, access, or any voice services in addition to its broadband service at this time.

2. Since Bright Fiber is not a telephone corporation, it is not subject to the Commission's jurisdiction.

3. As a regulatory body of constitutional origin, the Commission only has such powers as it derives from the Constitution and the Legislature.

4. The Commission does not exercise regulatory jurisdiction or control VoIP and IP-enabled services except as required or expressly delegated by federal law or expressly allowed by statute.

5. The FCC, in a decision upheld by the U.S. Supreme Court, has determined that "internet access service" is an information service not subject to state regulation.

6. Bright Fiber should not be granted a CPCN to provide broadband service in the service territories of AT&T and Verizon.

7. Bright Fiber can apply for and be granted a CASF grant without applying for a CPCN.

8. Bright Fiber may submit a new CPCN application when and if it is prepared to offer voice access and services.

O R D E R

IT IS ORDERED that:

1. Bright Fiber Network, LLC's Application for a Certificate of Public Necessity to provide broadband services in the territories of Pacific Bell Telephone Company d/b/a AT&T California and Verizon California Inc. is denied.

2. Application 13-03-010 is closed.

This order is effective today.

Dated _____, at San Francisco, California.