

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**Communications Division
Broadband, Video and Market Branch**

**RESOLUTION T-17599
April 26, 2018**

R E S O L U T I O N

**Resolution T-17599: Denying Conifer Communications Inc.'s Application for
Modification of Resolution T-17502**

I. Summary

The Application for Modification of Resolution T-17502 (or "Application"), submitted by Conifer Communications, Inc. ("Conifer"), is denied. In T-17502, the Commission approved \$3,608,224 in California Advanced Services Funding ("CASF") for Cal.net Inc's., ("Cal.net") grant application to provide broadband Internet and Voice over Internet Protocol ("VOIP") telephony services to underserved rural communities of the Tuolumne and Mariposa Counties (Tuolumne Mariposa project). In its application, Conifer requests the Commission modify T-17502 to deny Cal.net's application, or alternatively, modify the Resolution to reduce the CASF award.

II. Background

On March 31, 2015 Cal.net submitted an application for \$3,337,004 in CASF funding to build last-mile fixed wireless infrastructure to provide broadband Internet (and VOIP telephony services) with speeds of up to 25 Mbps download and 4 Mbps upload to underserved rural communities in Tuolumne and Mariposa Counties. Cal.net later modified its submission to account for additional costs related to California Environmental Quality Act ("CEQA") review, submitting a request for a grant award of \$3,608,224 on October 20, 2016.

On April 24, 2015, CD received timely challenges from Calaveras Telephone Company, Volcano Telephone Company, and Sierra Telephone Company, Inc. On April 27, 2015, CD received a late-filed letter of intent to challenge from Conifer.¹ In its letter, Conifer

¹ A late filed challenge was also received from Marv Dealy of Throckmorton on April 27, 2015. Mr. Dealy later withdrew his late-filed challenge on April 24, 2016.

stated that “the intent behind the Challenge is to solidify that areas stated as underserved and unserved within the Cal.net proposals are in fact being well served by fixed-wireless broadband technology deployed by Conifer Communications. Conifer Communications currently serves business and consumers in Calaveras, Tuolumne, Merced, Mariposa, and Stanislaus counties with up to 100Mbps synchronous download and upload speeds. Further documentation to support Conifer Communications services within these counties will be provided within the challenge.”

On May 07, 2015, Conifer provided data related to its service area as of December 31, 2014 to the California Broadband Mapping Program.²

On December 15, 2016, the Commission issued Resolution T-17502, which awarded Cal.net \$3,608,224 for Cal.net’s Tuolumne Mariposa project. In the Resolution, the Commission acknowledged receipt of the various challenges, including the one filed by Conifer.³ As noted in the Resolution, at that time, Conifer provided fixed wireless at served speeds for some project areas. Households identified as having access to Internet service at served speeds were removed from the grant award.⁴

Approximately 12 months after the Commission issued Resolution T-17502, Conifer submitted its Application for Modification of the Resolution on December 15, 2017. Cal.net submitted its response on January 12, 2018. Conifer submitted a reply on January 26, 2018.

In its Application, Conifer alleges the following: (1) the Resolution utilized the wrong test for determining whether the areas were served; (2) the Resolution is procedurally deficient and relies on flawed evidence; (3) the Resolution discriminates against fixed wireless service offered by Conifer; and (4) the Resolution violates Commission policy, and creates an uneven playing field that penalizes small businesses.

III. Discussion

A. The Application for Modification does not meet the requirements of Rule 16.4 for the Granting of the Application.

Conifer submitted an Application for Modification under Rule 16.4 of the Commission’s Rules of Practice and Procedure. Rule 16.4 sets forth the standard for a Petition for

² See email received from Sonja Harris, dated May 7, 2015, titled Conifer Communications, Inc. 12-31-14 Broadband Mapping Data.

³ Resolution T-17502, pp. 3-4.

⁴ *Id* at p. 6 and at Finding 11.

Modification of a Commission Decision filed in a formal proceeding.⁵ In analyzing whether to grant or deny Conifer's request for modification of a Resolution, the Commission applies Rule 16.4.

Rule 16.4(a) states: "A petition for modification asks the Commission to make changes to an issued decision." Rule 16.4(b) states: "A petition for modification of a Commission decision must concisely state the justification for the requested relief" and "Allegations of new or changed facts must be supported by an appropriate declaration or affidavit."⁶ A petition for modification seeks "changes to the text of an issued decision," typically in light of changes occurring since the decision issued.⁷ Further, Rule 16.4 requires a petitioner to support, by declaration or affidavit, allegations of new or changed facts that warrant the relief requested. To the extent that Conifer has provided new or changed facts, properly supported by the appropriate declaration or affidavit, the Commission will consider issues raised in the Application. The Commission will not, however, consider issues which are simply re-litigation of issues that were decided in T-17502.⁸ Conifer's declaration does not identify new or changed facts as required by Rule 16.4(b).⁹ As such, Conifer has not complied with the procedural requirements of Rule 16.4 and the Application does not raise any new factual issues that warrant modification of the Resolution.

Conifer claims due process has been denied on the grounds that it did not receive adequate notice of the draft or final Resolution. Albeit, regardless of whether Conifer received notice of the draft or final Resolution, Conifer participated during CD's review of the Cal.net's application review. Specifically, on April 27, 2015, Conifer submitted a challenge to Cal.net's Tuolumne Mariposa project. Additionally, on October 19, 2015,

⁵ Conifer's Application for Modification of Resolution T-17502 is considered under the standards for granting or denying a Petition for Modification filed in a formal proceeding. (See Rule 16.4.)

⁶ *Order Instituting Rulemaking on the Commission's Own Motion to Develop Standard Rules and Procedures for Regulated Water and Sewer Utilities Governing Affiliate Transactions and the Use of Regulated Assets for Non-Tariffed Utility Services* [D.11-10-034], (2011), p. 5, "To the extent that CWA has provided new or changed facts, properly supported by the appropriate declaration or affidavit, we will consider issues raised in the Petition." See also, *Order Instituting Rulemaking for Adoption of Amendments to a General Order and Procedures to Implement the Franchise Renewal Provisions of the Digital Infrastructure and Video Competition Act of 2006* [D.17-12-006] (2017), pp. 9-11, "Pursuant to Rule of Practice and Procedure 16.4(b) ..., the Petition must be denied because it has failed to demonstrate a new fact, material change in conditions, or misconception that would create a "strong expectation" that the Commission would have reached a different result based on the new information."

⁷ Rule 16.4; see also *Opinion Denying the Petition for Modification of Greenlining Institute Decision* [D. 06-12-026], (2006) p. 2

⁸ D.11-10-034, p. 5

⁹ Conifer's Application for Modification of T-17502, Declaration of David Harris.

Conifer sent a letter to the Commission raising some of the arguments raised in their Application for Modification. As such, Conifer had notice of Cal.net's CASF grant application, and Conifer actively participated during the application review period and prior to the Commission approving Resolution T-17502.

As discussed in greater detail later below, the Commission reviewed Conifer's April 27, 2015 late-filed challenge and October 19, 2015 letter. (See Resolution T-17502, pp. 3-6.) CD Staff reviewed and considered the data Conifer provided¹⁰ and removed households from the project area based on Conifer's challenge.¹¹ For example, the Commission in Resolution T-17502 observed:

"In its challenge, Conifer stated that it currently serves business and consumers in Tuolumne and Mariposa Counties with up to 100 Mbps synchronous download and upload speeds. CD evaluated Conifer's subscribership data and removed that number of households from the proposed project area." (Resolution T-17502, p. 6.)

"Conifer provides fixed wireless at served speeds for some project areas (these households have been removed)" (Resolution T-17502, p. 4)

The fact that one year later, Conifer now claims that the Commission utilized the wrong test to determine whether the areas were unserved or that it can provide service at served speeds in select areas is too late. The claims constitute no more than an attempt to re-litigate. Like a petition for modification, an application for modification of a Resolution is not a vehicle for re-litigation.¹²

Regardless, Conifer's claim that the Commission used the wrong test when analyzing its challenge lacks merit. Specifically, Conifer argues that CD Staff should rely only on the deployment data providers submit to the Commission on an annual basis when analyzing a challenge to a CASF Infrastructure Grant application. (See Conifer Application, pp. 5-9) Following Conifer's logic, an Internet service provider could claim to serve large swaths of the State and the Commission is precluded from undertaking any due diligence to verify that claim; it must accept the provider's claim at face value.

¹⁰ Any party that challenges a proposed area or CBG as already served or not underserved must provide documentation that the area or CBG is in fact already served and not underserved. (Resolution T-17443, p. 17.)

¹¹ See also, Conifer letter dated April 27, 2015.

¹² D.11-10-034, p. 5.

The Commission is well aware that broadband deployment data is not perfectly accurate¹³ and CD Staff has taken a number of steps to depict providers' service territories and services offered as accurately as possible to inform decisions awarding CASF grants. This includes public feedback via the Commission website, through printed questionnaires and developing the CalSPEED crowd-sourced testing tools. Moreover, CASF rules require entities challenging an application to provide documentation that the area in question is served. Challengers must submit maps of their service area(s) as well as addresses to enable CASF staff to verify that the area(s) are already served. If CD Staff determines the challenged area is "served" the applicant is still eligible for areas that remain unserved.¹⁴ CD Staff has asked challengers to CASF infrastructure grant applications to provide subscriber data, including the following instances:¹⁵

- T-17350 – Verizon Crowley Lake.
- T-17495 – Bright Fiber.
- T-17548 – Inyo Networks HWY 299
- T-17433 – Race Mono County.
- T-17439 – Shasta County Telecom.
- T-17415 – Race High Desert.

In evaluating the Cal.net application approved in T-17502, CD Staff determined that underserved and unserved households exist in otherwise served census blocks on California Broadband Interactive Map.¹⁶ As noted in greater detail in the Resolution, CD Staff relied on public feedback and subscriber data in reaching its recommendation

¹³ As noted on the Commission's website:

"Broadband data is submitted by providers, and although we take steps to validate its correctness, the CPUC does not warrant its accuracy. We are only able to require data to be given to us by census block, so a provider that reports deployment of a particular technology and bandwidth in a census block may not necessarily offer that service everywhere in the block. Accordingly, a list of providers deployed in a census block does not necessarily reflect the number of choices available to any particular household or business location in that block, and the number of such providers in the census block does not purport to measure competition. For that reason, the information on our map layers represents a rebuttable presumption of coverage, which can be, and often is, rebutted in the process of reviewing CASF applications. Public feedback may be provided to correct the data."

¹⁴ Decision 12-02-015 p. 34.

¹⁵ Additionally, the Commission also has used subscriber data for analysis in others proceedings, including its investigation into the state of competition. See D. 16-12-025 at p. 60. "We also use granular census block subscription data to validate carrier deployment claims."

¹⁶ T-17502 at p. 5

to remove households from the proposed project area. This included removing households subscribing to Internet service from Conifer at served speeds.¹⁷

The Commission has previously reaffirmed that removing households from a project area is a reasonable manner in which to evaluate challenges from fixed wireless Internet service providers.¹⁸ Given similar circumstance in this case,¹⁹ CD Staff's method of measuring service for fixed wireless service providers is reasonable and supported by the evidence.

B. Right of First Refusal and Other Items that have no merit

Conifer also raises new legal and policy issues regarding due process that were not raised in their April 27 challenge or October 19 letter which we now consider, even though these arguments are untimely because they should have been raised during the Commission's consideration of the Cal.net's CASF application.

To begin, Conifer argues it was denied the opportunity to claim a right of first refusal (or "ROFR") in 2014 under Public Utilities Code section 281(e)(3)(B). (Conifer Application, pp. 14-15.) Senate Bill ("SB") 740 amended Public Utilities Code section 281 which provided all existing facilities based broadband providers (existing providers) the opportunity to demonstrate that they will upgrade their networks in their existing underserved territories. In Resolution T-17443, the Commission set forth the process by which the Commission provided an existing provider with an opportunity to demonstrate that it will, within a reasonable timeframe, upgrade existing service, in order to exercise its "right of first refusal". An existing provider had until November 1, 2014 to file a commitment to upgrade and until May 1, 2015 to complete the upgrade.²⁰ After November 1, 2014, an eligible entity may apply for a

¹⁷ T-17502 at p. 6. Cal.net provided CD with a list of several hundred inquiries made of prospective customers in the project area indicating that neither Cal.net nor any other WISPs in the area could serve them. The company also provided survey responses conducted by the Central Sierra Connect Broadband Consortium (CSCBC) which identified addresses at which broadband was unavailable at the Commission-defined served speeds of 6 Mbps download and 1.5 Mbps upload. In total, 753 households reported unserved speeds in their public feedback surveys.
¹⁸ D. 16-05-052 at pp. 13-14.

"Unlike wireline, fixed wireless signals are subject to line of sight issues... such as interference from hilly terrain and foliage (both of which are widespread in the project area), and cannot be independently verified without actually signing up for service. As a result, Commission staff could not determine whether fixed wireless service was available at served speeds throughout the entire area that was being challenged by a fixed wireless service provider. Thus, instead of removing an area, Commission staff removed the costs of serving households from Bright Fiber's proposed budget where it could confirm fixed wireless service at served speeds."

¹⁹ Note that O.P. 5 requires Cal.net to provide service to all customers within the project area.

²⁰ Resolution T-17443, pp. 3-7, regarding ROFR extensions.

CASF grant in any underserved areas, including those areas where an existing provider had exercised its “right of first refusal,” but then failed to upgrade its network by May 1, 2015 without applying for an extension. Cal.net submitted an Application for CASF funding on March 31, 2015; 4 months after the November 1, 2014 ROFR deadline.

Conifer’s claim that it was denied the opportunity to make a showing that it intended to upgrade service by November 1, 2014 lacks merit because Conifer submitted a challenge to Cal.net’s application. Specifically, while the “right of first refusal” gave existing providers the opportunity to prevent the CPUC from granting funds to other projects for a reasonable amount of time, even after this time expired, an existing provider could still challenge future project applications after they are submitted to the Commission for consideration by demonstrating that it has upgraded its network in a particular area to provide served speeds, which CD takes into consideration when reviewing a CASF project application.²¹ Here, the Commission took notice and fully considered Conifer’s challenge to Cal.net’s CASF application. (See Resolution T-17502, pp. 3-6.)

Equally without merit is Conifer’s allegation that the Resolution discriminates against its fixed wireless service, and the Resolution violates public policy and creates an uneven playing field penalizing small businesses. The Resolution in general discusses limitations of fixed wireless technology, including the need for line of sight, and indeed requires Cal.net to provide service to all households in the project area (See Resolution T-17502, p. 17, Ordering Paragraph 5). Both companies in their filings attempt to compare their services against each other, including, Conifer’s speculation regarding the effects of Cal.net’s fixed wireless services on “noise” in various wireless spectrums. However, the Resolution does not compare the different technologies offered by each company beyond questions of whether or not the areas in question are already served. Conifer’s assertions are unpersuasive, and do not constitute any new or changed facts which would provide a basis to justify modifying the Resolution.

Finally, Conifer’s Application contains speculation and allegations of misdeeds, but fails to substantiate any of these claims, nor does Conifer explain how these items constitute new or changed facts that would provide a basis to justify modifying the Resolution.

In sum, the Application constitutes an impermissible attempt to re-litigate a final Commission decision. Further, the Application fails to meet the criteria for granting an

²¹ T-17443, p. 6.

Application for Modification. (See Rules 16.4 of the Commission's Rules of Practice and Procedure.) Conifer offers no new facts that were not known at the time when Cal.net's CASF application was being considered, and fails to demonstrate changes in the law after the Resolution was issued. Thus, modification of Resolution T-17502 is unwarranted, and Conifer's Application should be denied.

Findings of Fact

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

THEREFORE, IT IS ORDERED that:

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

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

ALICE STEBBINS
Executive Director