

DRAFT
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

COMMUNICATIONS DIVISION

RESOLUTION T-17347
November 10, 2011

D R A F T R E S O L U T I O N

Resolution T-17347
California Broadband Coalition (CBC)

PROPOSED OUTCOME: This Resolution adopts a Mitigated Negative Declaration pursuant to the California Environmental Quality Act for the CBC ARRA/CASF funded broadband project.

On the Communications Division's own motion and in Compliance with Resolution T-17232 Filed on December 3, 2009

SUMMARY

The California Broadband Coalition (CBC) has applied to the National Telecommunications Information Administration (NTIA) for funding under the American Recovery and Reinvestment Act (ARRA) and to the Commission (CPUC) for California Advanced Service Fund (CASF) funding to plan and install a fiber optic communications network in portions of California. The CPUC's decision to grant or deny funding under the CASF triggers the requirement for environmental review under the California Environmental Quality Act (CEQA)¹, and the CPUC is the lead state agency for compliance with CEQA. This Resolution adopts the Final Initial Study and Mitigated Negative Declaration (MND) prepared for the CBC project in accordance with the CEQA Guidelines, the Public Resources Code, and CPUC Resolution T-17232.

¹ Section 21000 et seq. of the California Public Resources Code [PRC]) and the State CEQA Guidelines (Title 14, Section 15000 et seq. of the California Code of Regulations [14 CCR 15000 et seq].

BACKGROUND

As authorized under the ARRA, the NTIA is administering grant funds through the Broadband Technology Opportunities Program (BTOP) to expand access to broadband services in unserved and underserved areas of the United States and to expand broadband infrastructure. CBC has applied to NTIA for ARRA funding to plan and install a fiber optic communications network in portions of California (proposed project). CBC proposes to install approximately 583 miles of middle-mile fiber-optic network and infrastructure, providing broadband service to unserved and underserved areas in the Eastern Sierras. This project is known as the Digital 395 Project.

The Digital 395 network will be located between Carson City, Nevada, and Barstow, California, providing broadband services to the area commonly referred to as the Eastern Sierras. The route mainly follows the US 395 highway, a major transportation corridor between southern California and northern Nevada. The project route crosses through San Bernardino, Kern, Inyo, and Mono Counties in California, and Douglas, Carson City, and Washoe Counties in Nevada. The service area contains 36 communities as well as six Indian reservations. In addition to these civilian areas, the region is host to two military bases: Naval Air Weapons Station China Lake and the United States Marine Corps Mountain Warfare Training Center. The Digital 395 Route consists of a main backbone and various spurs that lead away from the main backbone. The various spurs along the project route branch from the main backbone to connect to nodes within communities along the route.

Because the proposed fiber optic communications network project would use federal funds and would also require grant approval by the CPUC, it is subject to environmental review under both the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). The Department of Commerce, National Telecommunications and Information Administration (NTIA) is the Federal lead agency responsible for compliance with NEPA and the California Public Utilities Commission (CPUC) is the lead agency responsible for compliance with CEQA.

As stated in CPUC Resolution T-17232: “The CBC Digital 395 project is subject to California Environmental Quality Act (CEQA) review. Thus, the Commission cannot award a CASF grant for project construction without completing CEQA review. The CBC would be required to comply with all the guidelines,

requirements and conditions associated with the granting of CASF funds as specified in Resolution T-17143 including the submission of Form 477 and compliance with CEQA.”² In addition, Resolution T-17232 at finding number 17 states: “The Digital 395 project is subject to California Environmental Quality Act (CEQA) review. The Commission must complete California Environmental Quality Act (CEQA) review before dispersing CASF funds to Inyo Networks, fiscal agent for CBC for the construction of the proposed facilities. At this time, the physical components of this project are too speculative for the Commission to conduct meaningful environmental review. Inyo Networks or CBC should submit a Proponent’s Environmental Assessment (PEA) to Commission staff as soon as the detailed project information is known.”³ In satisfaction of the foregoing requirements of Resolution T-17232, as well as Ordering Paragraph No.s 3, 6 and 7 of Resolution T-17232, this Resolution adopts the Final Initial Study (IS) and Mitigated Negative Declaration (MND) prepared for the CBC proposed project in accordance with the CEQA Guidelines, the Public Resources Code, and CPUC Resolution T-17232.

NOTICE

No Advice Letter or formal application has been filed with the CPUC seeking adoption of a Mitigated Negative Declaration for the CBC broadband project; rather, this Resolution has been prepared on the Communications Division’s own motion. The Commission’s preparation and adoption of a Mitigated Negative Declaration pursuant to CEQA is in response to a requirement that CBC comply with CPUC Resolution T-17232 filed on December 3, 2009.

The Commission staff provided notice to the public, Responsible and Trustee agencies, and other interested parties of the availability of the Draft Mitigated Negative Declaration for 30 days of comment on August 29, 2011. That notice also indicated the intent of the CPUC to adopt the Mitigated Negative Declaration at a subsequent business meeting.

² Commission Resolution T-17232, page 5.

³ Commission Resolution T-17232, page 16.

PROTESTS

The award of matching CASF funding was originally granted to CBC in Resolution T-17232. That award was not protested and there were no requests for rehearing of Resolution T-17232. The Mitigated Negative Declaration prepared by the CPUC was available for comment from August 29, 2011 to September 27, 2011. All comments received during the comment period have been addressed in the Response-to-Comments in the Final Mitigated Negative Declaration. Because no Advice Letter or formal application has been filed with the CPUC seeking adoption of a Mitigated Negative Declaration for the CBC broadband project, this Resolution has been prepared on the Communications Division's own motion and there was no formal protest period.

DISCUSSION

CEQA requires the Commission to consider the environmental consequences of its discretionary decisions. Pursuant to CEQA and Rule 2.4 of the Commission's Rules of Practice and Procedure, the Commission examines projects to determine any potential environmental impacts in order that adverse effects are avoided and environmental quality is restored or enhanced to the fullest extent possible under CEQA. In this instance, the Commission is the lead agency under CEQA with respect to the environmental review of the CBC broadband project and preparation of the Final Mitigated Negative Declaration (MND). The Commission, as the lead agency, must adopt the Final MND before the conditions of the CASF grant award are satisfied per Resolution T-17232.

A "Draft Initial Study and Notice of Intent to Adopt a Mitigated Negative Declaration" was prepared for the proposed project in accordance with CEQA. The CPUC prepared the Draft IS/MND to provide the public and responsible and trustee agencies with information about the potential environmental effects of the proposed project. An environmental assessment was also prepared under NEPA, concurrently with this IS/MND. In addition to environmental review under NEPA and CEQA, other federal, state, regional, and local permits and approvals are required. The Draft Mitigated Negative Declaration may be viewed at:

http://www.digital395.com/environmental_assessment.html

All environmental issues identified in Appendix G of the State CEQA Guidelines are discussed in the IS/MND. Environmental protection measures to protect sensitive environmental resources have been incorporated into the project and will be made conditions of project approval by the CPUC (under CEQA) and NTIA (under the concurrent but separate NEPA process). Because these measures would be incorporated into project design, construction and operation, impacts to sensitive environmental resources will be avoided or minimized to less than significant levels.

The Commission has reviewed the Final MND as part of our consideration of whether CBC has complied with the requirements of Resolution T-17232, which awarded CBC a CASF grant. Based on that review, we find that the Final MND represents our independent judgment regarding the environmental impact of the proposed project. Therefore, we will adopt the Final MND for the proposed project pursuant to and in compliance with CEQA. The Final Mitigated Negative Declaration may be viewed at:

http://www._____.html

COMMENTS

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(3) provides that this 30-day period may be reduced/waived by Commission adopted rule. The 30-day comment period has been reduced by a decision where the Commission has determined that public necessity, as defined in Rule 14.6(c)(9), requires reduction/waiver of the 30-day period.

Rule 14.6(c)(9) reads in pertinent part that a comment period may be reduced or waived:

"...for a decision in a proceeding in which no hearings were conducted where the Commission determines, on the motion of a party or on its own motion, that public necessity requires reduction or waiver of the 30-day period for public review and comment. For purposes of this subsection, "public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment. [...] When acting pursuant to this subsection, the Commission will

provide such reduced period for public review and comment as is consistent with the public necessity requiring reduction or waiver."

Here the Commission must balance the interests of providing a comment period with the public interest in expediting the adoption of the Final Mitigated Negative Declaration for the CBC proposed project. In this case, no hearings were conducted; the Commission has already conditionally approved the matching CASF grant award; and there is a strong public interest in adopting the Final Mitigated Negative Declaration prior to the end of the normal 30-day comment period.

The CBC proposed project provides for a 80% match of federal stimulus funds with a 20% match of CASF funds. In order to leverage the CASF funds to the maximum, the federal ARRA grant requirements must be adhered to, and these involve essentially two deadlines: 67% of the project funding and project construction must be completed within two years of the grant award; and 100% of the funding and construction must be completed within three years. The federal ARRA stimulus award was made to CBC in the fall of 2010.

In order to meet these deadlines, CBC must begin construction of the proposed project in the fall of 2011 prior to the rainy season. This requires that both construction permits and contracts have been obtained and resolved prior to the fall of 2011. This is problematic because both the permit-issuing agencies and construction contractors must know what the requirements and standards of the Final Mitigated Negative Declaration will be with respect to resource avoidance and mitigation prior to issuing permits or bidding on contracts. Therefore, in order to begin construction prior to the rainy season of 2011/2012, the Final Mitigated Negative Declaration must be formally adopted by the Commission on an expedited basis.

Clearly there is a public interest in adopting the Final Mitigated Negative Declaration on an expedited timeframe. In addition, there are three other factors weighing in favor of a shortened comment period: (1) the Final Mitigated Negative Declaration has already undergone a 30-day public review and comment period; (2) we are reducing the comment period by only a few days in this case -- we are not eliminating it; and (3) we have granted the majority of the requests made during the public review period. Therefore, balancing the interests of public comment with the clear public interest in a shortened review period, we find that approving this Resolution and adopting the Final Mitigated

Negative Declaration is in the public interest and outweighs a full comment period.

FINDINGS AND CONCLUSIONS

1. Commission Resolution T-17232 directed CBC to conduct an environmental review of its proposed project pursuant to CEQA as a condition of receiving a CASF grant award to match federal ARRA grant funding.
2. The Commission is the lead agency under CEQA with respect to the environmental review of the CBC broadband project and preparation of the Draft and Final Mitigated Negative Declaration.
3. A Draft Mitigated Negative Declaration was published for public comment between August 29, 2011, and September 27, 2011, pursuant to CEQA Guidelines.
4. A Final Mitigated Negative Declaration was prepared by the Commission staff pursuant to the CEQA Guidelines.
5. All comments received have been responded to in the Final Mitigated Negative Declaration.
6. With the implementation of the applicant-proposed mitigation measures identified in the Final Mitigated Negative Declaration, all environmental impacts are reduced to less-than-significant.
7. We conclude that the Final MND is competent, comprehensive and has been completed in compliance with CEQA and the Public Resources Code.
8. We find that the Final MND reflects our independent judgment.
9. We have reviewed and considered the Final MND prior to adopting it as adequate for our decision-making purposes.
10. The Final Mitigated Negative Declaration should be adopted by the Commission as adequate for our decision-making purposes pursuant to CEQA.
11. With this Resolution CBC has satisfied the requirements of Ordering Paragraph No.s 3, 6 and 7 of Resolution T-17232.
12. For the CBC proposed project, no hearings were conducted; the Commission has already conditionally approved the matching CASF grant award; and there is a strong public interest in adopting the Final Mitigated Negative Declaration prior to the end of the normal 30-day comment period.
13. In order to leverage the CASF funds to the maximum, the federal ARRA grant requirements must be adhered to, and these involve essentially two deadlines: 67% of the project funding and project construction must be

completed within two years of the grant award; and 100% of the funding and construction must be completed within three years.

14. In order to meet these deadlines, CBC must begin construction of the proposed project in the fall of 2011 prior to the rainy season. This requires that both construction permits and contracts have been obtained and resolved prior to the fall of 2011.
15. In order to begin construction prior to the rainy season of 2011/2012, the Final Mitigated Negative Declaration must be formally adopted by the Commission on an expedited basis.
16. An additional three factors weigh in favor of a shortened comment period: (1) the Final Mitigated Negative Declaration has already undergone a 30-day public review and comment period; (2) we are reducing the comment period in this case by only a few days, but we are not eliminating it; and (3) we have granted the majority of the requests made during the public review period.
17. Approving this Resolution and adopting the Final Mitigated Negative Declaration is in the public interest and outweighs a full comment period.
18. This Final Mitigated Negative Declaration is available for consideration by all Responsible Agencies who must issue permits pursuant to CEQA Guidelines Section 15050(b).

THEREFORE IT IS ORDERED THAT:

1. The Final Mitigated Negative Declaration for the CBC Digital 395 Middle-Mile Project is adequate for the Commission's decision-making purposes and is hereby adopted pursuant to the California Environmental Quality Act Guidelines and the Public Resources Code.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on November 10, 2011; the following Commissioners voting favorably thereon:

Paul Clanon
Executive Director