BEFORE THE PUBLIC UTILITIES COMMISSION OF

THE STATE OF CALIFORNIA

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Order Instituting Rulemaking Regarding Broadband Infrastructure Deployment and to Support Service Providers in the State of California.	Rulemaking 20-09-001 (Filed April 20, 2021)

COMMENTS OF THE CENTER FOR ACCESSIBLE TECHNOLOGY ON THE ASSIGNED COMMISSIONER'S SEPTEMBER 9, 2021 RULING ON PHASE III ISSUES

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I. INTRODUCTION

In accordance with the Administrative Law Judge's Ruling Ordering Additional Comments as Part of Middle-Mile Data Collection issued on September 9, 2021 (ALJ Sept. 9 Ruling), the Center for Accessible Technology (CforAT) submits these opening comments. CforAT does not have the technical expertise to offer specific recommendations for various technical questions asked in the Ruling such as the middle-mile network's interconnection points, technical performance characteristics, and network design, but looks forward to reviewing other parties' opening comments and providing additional recommendations based on those comments. When considering the answer to those technical questions, there are broad statements of principle which the Commission should follow in making those determinations.

II. DISCUSSION

A. Open-Access

1. The Commission should Ensure that the Middle-Mile Network is Capable of Offering Ubiquitous Statewide Service without the Cooperation of Private Providers.

CforAT appreciates the Commission's efforts to effectively support the requirements of SB 156 to develop a statewide open-access middle-mile network, and the specific inquiry into how it can best use its regulatory authority to "assure durable and enforceable open-access and affordability requirements in perpetuity" for the middle-mile network.[1] The best way to ensure durable and enforceable open-access and affordability requirements for the middle-mile network middle-mile network built with SB 156 funds is to keep that network publicly owned. Senate Bill 156 states that "it is the intent of the Legislature that any state-owned assets constructed for the purposes of this bill shall not be sold to any other party for at least 20 years after the

[1] ALJ Sept. 9 Ruling at Issue 1 (Open-Access).

completion of construction"[2] As Next Century Cities notes, it is critical that the Commission ensure that existing open access networks remain open access networks, and there is a risk that a private purchaser of state-funded middle-mile infrastructure could eliminate open access on the purchased network.[3] Accordingly, the Commission should prioritize keeping any newly constructed elements of the state-funded middle-mile network publicly owned.

Additionally, the Commission should be careful when making assumptions about the availability of access to incumbent providers' unbundled network elements[4] in the future. As CforAT has previously noted, and as the ALJ's Sept. 9 Ruling acknowledges, the FCC's recent Unbundling Obligations Review Order all but eliminated the requirement that incumbent providers make some of their facilities, including dark fiber, available to other providers, effective in 2028.[5] As a result, "[i]n a little less than eight years, ISPs that currently are required to offer access to their dark fiber at just and reasonable rates will no longer be obliged to do so."[6] The Commission can no longer be confident that incumbent providers will offer Unbundled Network Elements once the FCC's Order goes into effect.

California should not build a publicly funded middle mile network that is dependent on the same networks whose owners are responsible for digital redlining and the lack of affordable high-speed broadband with sufficient capacity in unserved and underserved communities. The publicly owned middle-mile network will be built and operated with the intention of facilitating

[2] Senate Bill 156, Section 1.
[3] *See* Next Century Cities Opening Comments on Assigned Commissioner's Ruling on Phase III Issues at pp. 9-10.
[4] *See* ALJ Sept. 9 Ruling at Section 2, Issue 1 (Open-Access).
[5] CforAT Reply Comments on Assigned Commissioner's Ruling on Phase III Issues at p. 4, citing Fed. Comm. Comm'n, In the Matter of Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services, WC Docket No. 19-308 (2020), Report and Order at ¶ 7, available at https://docs.fcc.gov/public/attachments/FCC-20-152A1.pdf (last accessed September 19, 2021) ("Unbundling Obligations Review Order"); *see also* ALJ Sept. 9 Ruling at Issue 2.1 (Open Access).
[6] CforAT Reply Comments on Assigned Commissioner's Ruling on Phase III Issues at p. 12.

last-mile service to California's unserved and underserved households, unlike the networks operated by private providers, who are fixated on maximizing profits by eliminating competition and prioritizing service for the most profitable communities. Californian's access to ubiquitous high-speed broadband should not depend on the whims of companies that value quarterly earnings and executive compensation over the needs of unserved and underserved communities. When identifying locations for the middle-mile network, the Commission should assume that incumbent providers will not provide connections to their middle-mile networks unless explicitly required to do so, and that those same providers will fight any attempt to impose open access requirements tooth and nail, causing unnecessary (but, for the providers, highly profitable) delay. Accordingly, the Commission should identify locations for the location of a statewide middle-mile network that are not reliant on the dark fiber (or other UNEs) of incumbent providers.

2. The Commission should Impose Open Access Requirements as a Condition of any Transfer of Ownership of State-Owned Middle Mile Infrastructure.

Notwithstanding our recommendation above that ownership of the new middle-mile network should remain public, CforAT acknowledges that there may be scenarios (for example, a budget shortfall) where it may be economically necessary to transfer ownership of some of the facilities in the statewide middle mile network. In those scenarios, the Commission has broad statutory authority to require a private party that acquires state-funded middle-mile infrastructure to follow open access requirements. Section 854 of the California Public Utilities Code states that "[n]o person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing

business in this state without first securing authorization to do so from the commission."[7] Under section 854, the Commission must determine whether any proposed transaction is in the public interest. If the transaction is not in the public interest, the Commission must deny the proposed transaction unless the Commission can craft mitigation measures that mitigate the harms of the proposed transaction.[8] Given the critical importance of open access infrastructure, it seems likely that any transaction that threatened to eliminate open access to the middle mile network would not be in the public interest.[9] Accordingly, in order to maintain durable and enforceable open-access and affordability requirements in perpetuity, the Commission would have the authority to either deny any proposed transaction that did not maintain open access or else to approve the proposed transaction subject to the condition that the acquiring company comply with open access requirements.

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[7] Cal. Pub. Util. Code §854. Public Utilities Code section 851 contains similar language regarding transfers between public utilities:
A public utility, other than a common carrier by railroad subject to Part A of the Interstate Commerce Act (49 U.S.C. Sec. 10101 *et seq.*), shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public…with any other public utility, without first having either secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars ($5,000,000), or for qualified transactions valued at five million dollars ($5,000,000) or less, filed an advice letter and obtained approval from the commission authorizing it to do so.

[8] Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI, D.05-11-029 (A.05-04-020), COL 8 ("In order to determine whether the transaction is in the public interest pursuant to Section 854(a), it is reasonable for the Commission to assess the public interest factors enumerated in Section 854(c) and undertake an analysis of antitrust and environmental considerations [in Section 854(b)]"); *see also* Joint Application of SFPP, L.P. (PLC-9 Oil), CALNEV Pipe Line, L.L.C., Kinder Morgan, Inc., and Knight Holdco LLC For Review and Approval Under Public Utilities Code Section 854 of The Transfer of Control of SFPP, L.P. and CALNEV Pipe Line, L.L.C., D.07-05-061 (A.06-09-016, A.06-09-021) at p. 24 (stating that "[t]he Section 854 Application represents that no Applicant meets this financial threshold but recognizes that even when Section 854(b) and (c) do not expressly apply to a transaction, the Commission has used the criteria set forth in those statutes to provide context for a public interest assessment").

[9] The fact that the Commission is likely to impose open access requirements on any transfer of assets would likely act as a disincentive to the purchase of those assets by private providers. This does not change the public benefit analysis.

Additionally, in transactions between public utilities, "[f]or a qualified transaction valued at five million dollars ($5,000,000) or less, the commission may designate a procedure different than the advice letter procedure if it determines that the transaction warrants a more comprehensive review."[10] The Commission should require that any parties seeking the transfer of open access infrastructure valued at five million dollars or less file a formal application and serve that application on the parties to this, or any successor, proceeding.

B. Additional Factors to Consider

The ALJ Sept. 9 Ruling asks what additional criteria the Staff Report should consider when determining locations for the middle-mile network.[11] Possible additional issues include affordability, redlining, and competition. All of these are relevant. As CforAT has previously noted, incumbent providers' broadband deployment decisions to date have effectively replicated and perpetuated disinvestment in historically redlined communities and overinvestment in wealthy, predominantly white, communities.[12] Accordingly, the Commission should use historical redlining maps to identify priority areas for middle-mile development that will serve historically redlined neighborhoods.[13]

Additionally, when determining locations for the middle-mile network, the Commission should consider locations where the middle-mile network will increase competition for middle-mile services. Increased competition for middle-mile services can help drive down prices for

[10] Cal. Pub. Util. Code section 851.
[11] ALJ Sept. 9 Ruling at Issue 2.2 (Additional Factors to Consider).
[12] Joint Advocates July 26, 2021 Reply Comments on ALJ Ruling at p. 9.
[13] CforAT Opening Comments on Assigned Commissioner's Ruling on Phase III Issues at pp. 3-4.

those services.[14] Lower prices for middle-mile services will allow providers and new entrants to devote more funding to the construction and maintenance of last-mile infrastructure, discounts on service, and marketing, accelerating the deployment of last-mile services to unserved and underserved communities.

As CforAT has previously noted in this proceeding, provider concerns about the sustainability of multiple middle mile networks are vastly overstated and have been rejected by the Federal Communications Commission (FCC).[15] In fact, the FCC has historically supported the construction of competing middle-mile facilities to increase competition in the middle-mile services market.[16] The Commission should identify areas where the state-owned middle mile network will provide competition for middle-mile services.

C. Middle-Mile Network Services for ISPs

The ALJ Sept. 9 Ruling asks a number of questions about how the Commission can make the statewide middle-mile network attractive and useful for commercial internet service providers.[17] CforAT cautions the Commission against a prescriptive view of which groups are considered "commercial internet service providers." Based on past filings in this proceeding, it appears that some incumbent providers are attempting to position themselves as the voice for *all* providers. For example, Verizon stated that "Verizon recommends that the Commission specifically seek route information from commercial internet service providers that from their perspective would increase the attractiveness and usefulness of the middle mile network for the

[14] D.16-12-025 (I.15-11-007, Competition Review) at p. 135, note 349 (Dec. 1, 2016), citing Department of Justice, January 4, 2010 Ex Parte Submission in FCC docket GN 09-51, In re National Broadband Plan (Economic Issues of Broadband Competition), at p. 4.
[15] CforAT Reply Comments on Assigned Commissioner's Ruling on Phase III Issues at p. 5.
[16] CforAT Reply Comments on Assigned Commissioner's Ruling on Phase III Issues at p. 5. The FCC's UNE requirements were created specifically to allow competitors to enter the market and generate enough revenue that they could build their own networks. *Id*., citing Unbundling Obligations Review Order at ¶ 7.
[17] ALJ Sept. 9 Ruling at Issue 2.3 (Middle-Mile Network Services for ISPs).

purposes of meeting the goals of SB 156 to reach unserved and underserved areas" and then continued by saying " [t]o that end, Verizon is ready to work with staff to provide such information."[18] However, Verizon's input is not the only perspective on what would be attractive and useful to carriers, and the Commission must make sure it does not view input from large incumbents as representing the position of small carriers and potential new entrants to the market.

Nothing in SB 156 limits the Commission to considering how to make the middle-mile network attractive to *only* existing and/or incumbent providers. Indeed, incumbent providers have a record of failing to rise to the needs of a number of California communities. It is particularly ironic that Verizon—a company that has contributed to digital redlining and the lack of high-speed broadband in unserved and underserved communities—is now presenting itself as the solution to those problems.

While the Commission is appropriately considering how to make the middle mile network attractive and useful to all providers, not just the large incumbents, it should do so with the express goal of making the network attractive and useful in ways which will result in the construction of middle mile networks (1) in areas where none currently exists and (2) in areas that are currently unserved, underserved, or lack sufficient middle-mile capacity.[19] The

[18] Verizon September 3, 2021 Opening Comments on May 28, 2021 and August 20, 2021 ALJ Rulings. Even to the extent that Verizon is speaking on its own behalf, CforAT notes that Verizon has acknowledged in the Commission's current review of the proposed Verizon/TracFone transaction, that it does not have expertise on serving low-income & underserved communities. *See* Joint Applicants' Consolidated Reply to Protests to Joint Application for Approval Pursuant to Section 854(a) of Transfer of Control over TracFone Wireless, Inc. at p. 9; Joint Applicants' Post-Hearing Opening Brief at p. 25, note 88, In the Matter of the Joint Application of TracFone Wireless, Inc. (U4321C), América Móvil, S.A.B. de C.V., and Verizon Communications Inc. for Approval of Transfer of Control Over TracFone Wireless, Inc., A.20-11-001 (Nov. 5, 2020). Verizon is in no position to speak on behalf of all providers on this issue.

[19] CforAT Reply Comments on Assigned Commissioner's Ruling on Phase III Issues at pp. 12-13.

Commission should prioritize designing a network plan that is attractive to, and useful for, new entrants and providers that commit to serving every household in their service territory, abiding by net neutrality principles, and offering affordable service offerings to low-income families that are equivalent to mass-market offerings (rather than a separate, substandard "low-income" plan with insufficient speeds and quality).

Additionally, the Commission should be skeptical of claims that incumbent providers are now somehow newly committed to providing service to unserved and underserved communities now that substantial quantities of state funding are being made available. The Commission has heard arguments like Verizon's many times before. For example, in the Commission's LifeLine proceeding, large incumbent providers have frequently insisted that without specific program rules, those providers will not participate in the program. Even when the Commission has implemented the rules specifically requested by the incumbent providers, however, those incumbent providers have continued to decline to participate.[20]

Comments like Verizon's are a standard industry tactic by incumbents to maintain their power of incumbency. In CforAT's experience, incumbent providers offer program "suggestions" that are not designed to close the digital divide, but rather create challenges that make it more difficult for smaller competitors or new entrants to participate. CforAT recognizes that providers will inevitably make recommendations that are in their own self-interest and are

[20] For example, in 2013, T-Mobile asked the Commission to make wireless services eligible for the LifeLine subsidy. May 28, 2013 Joint Comments of Cricket Communications, Sprint Nextel and T-Mobile West on the Assigned Commissioner's Scoping Memo at p. 2, Order Instituting Rulemaking Regarding Revisions to the California Universal Telephone Service (LifeLine) Program, R.11-03-013 (Mar. 24, 2011). T-Mobile argued that allowing customers to purchase bundled service would facilitate provider entry into the program. *Id*. at p. 9. Despite the Commission's adopting T-Mobile's recommendations (D.14-01-036 at p.33), T-Mobile did not begin offering LifeLine service until 2020, when it was required to do so as a condition of the Commission's approval of the Sprint/T-Mobile transaction. D.20-04-008 at p. 52, Ordering Paragraph 13.

anti-competitive.[21] However, the Commission should be wary of recommendations by incumbent providers which would have anti-competitive effects, and it should reject any recommendations that would make the middle-mile network less attractive to smaller providers and new entrants.

D. Middle Mile Network Services for Consumers

The ALJ Sept. 9 Ruling asks whether the statewide middle mile network should provide direct service to anchor institutions or provide direct services (presumably to individual households or businesses).[22] CforAT has reservations about a state-operated middle mile network that offers "direct sales" of services. Building and maintaining a statewide open-access middle-mile network will be a complicated and difficult undertaking, particularly in the first few years of the project, and any determination that the network should also provide direct services would likely create additional and unnecessary complications. CforAT respectfully recommends that the Commission revisit this issue after construction of the network is mostly complete.

The ALJ Sept. 9 Ruling also asks whether the Commission should impose requirements in addition to the 72-hour backup power requirements that apply to "all facilities-based wireline and wireless communications service providers that provide service in Tier 2 and Tier 3 High Fire Threat Districts."[23] It is unclear whether this question refers to additional requirements on providers in Tier 2 and Tier 3 High Fire Districts, or whether the Commission is asking if it should impose additional requirements on all facilities based wireline and wireless providers.

[21] This conduct may be immoral or unethical but is not illegal. Under the First Amendment, private entities are generally immune from liability under antitrust laws for attempts to influence the passage or enforcement of laws, even if those laws or their enforcement would have anticompetitive effects. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).
[22] Sept. 9 ALJ Ruling at Issue 2.4 (Middle Mile Network Services for Consumers).
[23] Sept. 9 ALJ Ruling at Issue 2.4 (Middle Mile Network Services for Consumers).

The Commission should consider requiring that *all* middle-mile infrastructure built using SB 156 funds be subject to a 72-hour backup power requirement. As discussed above, in more remote parts of the state, newly developed middle-mile infrastructure may be the only network available. During any form of emergency or power outage, it is important that last-mile users on this network do not lose broadband service. Additionally, a requirement that SB 156-funded middle-mile infrastructure must meet a 72-hour power backup requirement could create competitive pressure for other middle-mile providers to do the same, even outside of high fire threat locations.[24] It is fair to assume that some last-mile providers will be located in areas where they can choose between the state-funded middle-mile network or a network owned by a private provider. Those providers whose customers value network reliability and resiliency would be more likely to select a middle-mile provider that offered 72-hour backup power. If the state-funded middle-mile network offered that power backup, competing providers would consider also providing power backup—perhaps for even longer than 72 hours—in order to remain competitive. Accordingly, the Commission should consider requiring that all middle-mile infrastructure built using SB 156 funds be subject to 72-hour backup power requirements.

III. CONCLUSION

The Center for Accessible Technology respectfully requests that the Commission take actions consistent with CforAT's recommendations above, as well as our prior comments, and that it work diligently, consistent with the requirements of SB 156, to support the prompt development and deployment of high-speed internet to communities that have been, for far too long, on the wrong side of the digital divide.

Respectfully submitted,

[24] While certain areas of the state are at higher risk of wildfire than others, there are no portions of the state that are immune from disasters where the resiliency of the broadband network would be beneficial.

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