

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)

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

Paul Goodman  
Center for Accessible Technology  
3075 Adeline Street, Suite 220  
Berkeley, CA 94703  
Phone: (510) 841-3224  
Fax: (510) 841-7936  
E-mail: [service@cforat.org](mailto:service@cforat.org)

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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 (September 9 ALJ Ruling), the Center for Accessible Technology (CforAT) submits these reply comments.

## II. DISCUSSION

### A. Providers Attempt to Improperly Narrow the Scope of the September 9 ALJ Ruling.

Several providers argue that the Commission’s involvement in supporting the development and deployment of a statewide, public access middle-mile network is limited to drafting a report recommending locations for that network, and providing that report to the Office of Broadband and Digital Literacy.<sup>1</sup> For example, Comcast argues that because Senate Bill 156, which authorized the development of this network, specifically directs the Commission to draft such a report, “any effort to adopt new obligations for communications providers operating in California would be procedurally improper and beyond the scope of the Commission’s responsibilities specified under SB 156.”<sup>2</sup> AT&T argues that “Senate Bill 156 does not authorize the Commission to issue regulations, such as tariffs, for middle-mile networks, and such a topic is clearly beyond the scope of this phase which is to issue a Staff Report recommending locations for the state’s middle-mile network.”<sup>3</sup> These arguments are attempts to improperly narrow the scope of the Staff Report.

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<sup>1</sup> AT&T Opening Comments at p. 2; Comcast Opening Comments at p. 2; CTIA Opening Comments at p. 4. In this document, “Opening Comments” refers to opening comments on the Administrative Law Judge’s Ruling Ordering Additional Comments as Part of Middle-Mile Data Collection issued on September 9, 2021. Any opening comments in response to a different ruling or Commission order will be identified specifically.

<sup>2</sup> Comcast Opening Comments at p. 2.

<sup>3</sup> AT&T Opening Comments at p. 3.

As a threshold issue, Government Code section 11549.54 is not the Commission's only source of regulatory authority over providers.<sup>4</sup> The Commission's authority is not constrained by SB 156, even as that legislation assigned the Commission the task of creating the Staff Report. As the Commission has recently reiterated in the pending Disaster Relief proceeding (R.18-03-011), the Commission has broad regulatory power over public utilities, including providers of traditional landline, wireless, and IP-enabled services, including both public utility services and facilities.<sup>5</sup> Additionally, the Commission has "broad authority to regulate public utility services and infrastructure as necessary to ensure they are operated in a way that provides for the health and safety of Californians."<sup>6</sup> In this proceeding, the Commission is determining, among other things, the adequacy of middle-mile infrastructure to ensure that everyone in California has access to broadband services, including telephone services, at just and reasonable rates. Accordingly, the Commission should reject arguments that it does not have the authority to impose tariffs or other regulations on middle-mile infrastructure and providers.

Additionally, all of the questions asked the September 9 ALJ Ruling are relevant to determining where California should build its statewide broadband network. Accordingly, even under a narrow reading of the Commission's role to implement SB 156, those questions are within the scope of the September 9 ALJ Ruling and appropriate for consideration. For example, the September 9 ALJ Ruling's questions on open access explore issues that are relevant to providers' (including municipal providers) future ability to access open access networks and unbundled network elements.<sup>7</sup> The Commission's questions regarding what criteria the Staff Report should consider when making its recommendations, including affordability, redlining,

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<sup>4</sup> See, e.g., Cal. Const., Art. XII, section 6; D.21-10-015 (R.18-03-011, Disaster Relief).

<sup>5</sup> D.21-02-029 (R.18-03-011, Disaster Relief) at pp. 8-11.

<sup>6</sup> D.21-02-029 (R.18-03-011, Disaster Relief) at p. 13.

<sup>7</sup> September 9 ALJ Ruling at p. 5.

competition, cell coverage, and labor and economic development benefits<sup>8</sup> are, as parties have already noted, indicators that areas are unserved or underserved.<sup>9</sup> Similarly, the Commission's questions about route redundancy, hardening, undergrounding, deployment in high fire threat areas, and backup power requirements<sup>10</sup> are relevant to whether the state-wide middle-mile network will be able to maintain service during natural disasters or other disruptions. Finally, questions about how the network can attract commercial service providers,<sup>11</sup> whether the network should provide last-mile service to unserved and underserved communities,<sup>12</sup> and how the network can enable last-mile connections<sup>13</sup> are directly relevant to ensuring that unserved and underserved communities reap the benefits of high-speed broadband.

All of these factors are relevant to considerations of where new facilities should be deployed. Throughout the discussion of the proposed middle-mile network, providers have argued that the middle-mile network should only be built where no middle-mile network currently exists,<sup>14</sup> again attempting to narrow the scope of the Commission's review while minimizing options for new middle mile resources. As CforAT has previously demonstrated, providers' interpretation of SB 156 is contrary to both the plain language of the statute and its legislative intent.<sup>15</sup> Providers are inappropriately attempting to minimize the Commission's role in implementing SB 156, apparently believing themselves the only entities qualified to determine

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<sup>8</sup> September 9 ALJ Ruling at p. 5.

<sup>9</sup> CforAT Opening Comments at p. 5; CforAT Opening Comments on August 6, 2021 Assigned Commissioner's Ruling on Phase III Issues at pp. 3-4.

<sup>10</sup> September 9 ALJ Ruling at p. 6.

<sup>11</sup> September 9 ALJ Ruling at p. 6.

<sup>12</sup> September 9 ALJ Ruling at p. 6.

<sup>13</sup> September 9 ALJ Ruling at p. 7.

<sup>14</sup> CCTA Opening Comments on August 6, 2021 Assigned Commissioner's Ruling on Phase III Issues at p. 5; Comcast Opening Comments on August 6, 2021 Assigned Commissioner's Ruling on Phase III Issues at p. 3.

<sup>15</sup> CforAT Reply Comments on August 6, 2021 Assigned Commissioner's Ruling on Phase III Issues at pp. 12-14.

where the state should build the middle mile network.<sup>16</sup> This perspective disregards that Commission staff has a depth of experience in the issue areas raised in the September 9 ALJ Ruling and disparages the expertise of other stakeholders who have an interest in the location and operation of the statewide middle-mile network. Providers' arguments are a blatant attempt to distract the Commission from its duties and delay this proceeding. The Commission should reject those arguments.

B. The Commission has Expressly Rejected Providers' Jurisdictional Arguments

Even beyond its utility to inform the direct creation of the report required by SB 156, the Commission's investigation is appropriate and within its authority to conduct. Providers continue to cling to the belief that the Commission lacks jurisdiction over information services.<sup>17</sup> AT&T cites the holding in *Mozilla Corp., et al. v. Federal Communications Commission, et al.*, 940 F.3d 1 (D.C. Cir. 2019) that broadband services are information services.<sup>18</sup> AT&T then cites to a number of pre-Mozilla cases for the principle that the Commission cannot impose "common carrier-type regulations" (a term that AT&T never defines but appears to be a catch-all for "any regulation"), on internet service providers (ISPs).<sup>19</sup>

This is not the first time that AT&T has cherry-picked language from the Mozilla case in an attempt to argue against the Commission's jurisdiction.<sup>20</sup> It is also not the first time that AT&T has failed to disclose language in the 2019 Mozilla decision that is adverse to AT&T's position.<sup>21</sup> Specifically, AT&T continues to omit the fact that the Mozilla decision expressly

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<sup>16</sup> Verizon Opening Comments at p. 4; See CforAT Opening Comments on Assigned Commissioner's Ruling on Phase III Issues at pp. 3-4.

<sup>17</sup> AT&T Opening Comments at p. 4; CTIA Opening Comments at pp. 3-4; Frontier Opening Comments at p. 1; Verizon Opening Comment at p. 1.

<sup>18</sup> AT&T Opening Comments at p. 4.

<sup>19</sup> AT&T Opening Comments at p. 4.

<sup>20</sup> AT&T Opening Comments on Phase I Proposed Decision at p. 2.

<sup>21</sup> AT&T Opening Comments on Phase I Proposed Decision at p. 5.

rejected the argument that the FCC could preempt all state regulation of broadband.<sup>22</sup> As the Commission recently noted in its Order Denying Rehearing of Decision (D.) 20-07-001 in the Disaster Relief proceeding:<sup>23</sup>

In *Mozilla*, the D.C. Circuit held that the FCC may preempt state law “only when and if it is acting within the scope of its congressionally delegated authority.” In the 2018 Order under review in *Mozilla*, the FCC “meant for that preemptive effect to wipe out a broader array of state and local laws than traditional conflict preemption principles would allow.” The D.C. Circuit determined that the FCC had exceeded its authority and decided to “vacate the portion of the 2018 Order that expressly preempts any state or local requirements that are inconsistent with [its] deregulatory approach.” The D.C. Circuit’s holding remains in effect and applies to the Health and Safety Rules we adopted in D.20-07-011.<sup>24</sup>

AT&T further argues that any attempt by the Commission to impose common carrier regulations on providers would somehow violate principles of conflict preemption.<sup>25</sup> Conflict preemption occurs when simultaneous compliance with both federal and state regulations is impossible.<sup>26</sup> In support of its argument, AT&T cites *Onoek, Inc. v. Learjet, Inc.*, 575 U.S. 373, a case that did not involve claims of conflict preemption,<sup>27</sup> and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), which held that states could impose safety regulations for oil tanker docking that were stricter than federal requirements.<sup>28</sup> Once again, the Commission’s Order Denying Rehearing of Decision (D.) 20-07-001 in the Disaster Relief proceeding is instructive. In that proceeding, wireless providers argued that conflict preemption prohibited the Commission from imposing backup power requirements for wireless networks.<sup>29</sup> However, the Commission noted that a

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<sup>22</sup> *Mozilla Corp., et al. v. Federal Communications Commission, et al.*, 940 F.3d 1 (D.C. Cir. 2019).

<sup>23</sup> D.21-10-015 (R.18-03-011, Disaster Relief).

<sup>24</sup> D.21-10-015 (R.18-03-011, Disaster Relief), at pp. 13-14.

<sup>25</sup> AT&T Opening Comments at p. 4.

<sup>26</sup> *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

<sup>27</sup> *Onoek, Inc. v. Learjet, Inc.*, 575 U.S. 373 (“Since the parties have argued this case almost exclusively in terms of field pre-emption, we consider only the field pre-emption question”).

<sup>28</sup> 435 U.S. at pp. 171-172.

<sup>29</sup> D.21-10-015 (R.18-03-011, Disaster Relief) at p. 12.

determination of conflict preemption is a case-by-case, fact-specific analysis that must identify a specific federal objective that conflicts with the Commission’s regulation.<sup>30</sup> The Commission found that the wireless providers had “not performed a fact-specific analysis of their conflict preemption claims”<sup>31</sup> and that the wireless providers could “cite to no express delegated authority that would prevent the CPUC” from adopting battery backup requirements.<sup>32</sup> Accordingly, the wireless providers failed to demonstrate that the Commission’s requirements were subject to conflict preemption.<sup>33</sup>

Similarly, in this proceeding, AT&T has not provided a fact-specific analysis of its conflict preemption claims. Additionally, AT&T does not cite to any express delegated FCC authority that could cause that hypothetical conflict preemption. Accordingly, the Commission should reject provider arguments regarding conflict preemption.

C. The Commission Should Create Specific, Observable, Enforceable Measurements To Determine Whether An ISP’s Middle-Mile Network Is Truly Open Access.

As CforAT has previously argued, the Commission should prioritize action that will support the key goal of keeping any newly constructed elements of the state-funded middle-mile network publicly owned.<sup>34</sup> CforAT agrees with commenters who emphasized that “the obligations to provide open access services and affordable offerings must remain as part of the terms and conditions of the lease arrangement or potential sale” of any portion of the state-owned middle-mile infrastructure.<sup>35</sup> Additionally, CforAT supports commenters who recommended that the Commission impose open access requirements for *all* state-funded middle

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<sup>30</sup> D.21-10-015 (R.18-03-011, Disaster Relief) at p. 13.

<sup>31</sup> D.21-10-015 (R.18-03-011, Disaster Relief) at p. 13.

<sup>32</sup> D.21-10-015 (R.18-03-011, Disaster Relief) at p. 14.

<sup>33</sup> D.21-10-015 (R.18-03-011, Disaster Relief) at p. 14.

<sup>34</sup> CforAT Opening Comments at p. 2.

<sup>35</sup> TURN Opening Comments at p. 3.



mile projects.<sup>36</sup>

In order to develop and maintain a true open access network across the state, increased transparency regarding the existing network will be needed. Several commenters suggest that the Commission create a process for ensuring that providers that currently claim to offer open access actually do so.<sup>37</sup> CforAT supports such a process. Creating specific, observable, enforceable measurements to determine whether an ISP's middle-mile network is truly open access will result in a more efficient use of state funding and avoid unnecessary delays.

In addition to improvements with transparency, the Commission should ensure that open access commitments remain enforceable. EFF recommends that any existing middle-mile network provider that asserts that it offers open access to its middle-mile infrastructure should be required to voluntarily submit to Commission jurisdiction for a significant period of time.<sup>38</sup> EFF's recommendation has merit. If the Commission does implement this solution, it should keep in mind the historic unwillingness of providers to acknowledge, much less submit to, the Commission's authority. For example, when the Commission's review of the Sprint/T-Mobile proceeding was not moving swiftly enough for the applicants, the applicants attempted to simply

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<sup>36</sup> Cal Advocates Opening Comments at p. 3.

<sup>37</sup> CETF Opening Comments at p. 2; EFF Opening Comments at p. 2.

<sup>38</sup> EFF Opening Comments at p. 2.

declare that the Commission did not have jurisdiction to review the merger.<sup>39</sup> The Commission should be highly skeptical of providers who have repeatedly refused to acknowledge the Commission's jurisdiction, increasing the importance of steps that enhance the Commission's ability to enforce open access requirements. By adopting these recommendations, the Commission would appropriately use its regulatory authority in support of the state policy goal of creating and maintaining an open-access middle mile network that reaches customers who are currently unserved or underserved.

CETF suggests an alternative pathway to expand middle mile access, recommending that the Commission use a "Request for Partnership" (RFP) process which, CETF claims, would be "more enforceable legally (more binding) than regulations."<sup>40</sup> CETF claims that such a process will allow the Commission to identify "which ISPs are willing to work in support of the State's goal to achieve ubiquitous broadband deployment."<sup>41</sup> CETF further argues that the RFP could act as a proxy for a right of first refusal, stating: "It is intended that the RFP will be structured such that those ISPs that do not respond to the RFP will have voluntarily and officially 'stepped aside' without rights to future challenges to new entrants."<sup>42</sup>

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<sup>39</sup> Joint Applicants, Motion of Joint Applicants to Withdraw Wireline Application, A.18-07-011 & A.18-07-012, In the Matter of the Joint Application of Sprint Communications Company L.P. (U-5112) and T-Mobile USA, Inc., a Delaware Corporation, for Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a), A.18-07-011 & A.18-07-012, (July 13, 2018); *see also*, Assigned Commissioner's Ruling in response to the letter dated March 31, 2020, from G. Michael Sievert, President Chief Operating Officer of T-Mobile, A.18-07-011 & A.18-07-012 (July 13, 2018); Decision Approving Settlement, In the Matter of the Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc. (U5429C), Verizon California, Inc. (U1002C), Verizon Long Distance LLC (U5732C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications, Application 15-03-005 (March 18, 2015), citing CETF Petition to Modify Decision No. 15-12-005 to Compel Frontier Communications to Comply with Memoranda of Understanding).

<sup>40</sup> CETF Opening Comments at p. 2.

<sup>41</sup> CETF Opening Comments at p. 2.

<sup>42</sup> CETF Opening Comments at p. 2.

CETF's recommendations are misplaced. As a threshold issue, there is no basis for CETF's assertion that a contract would somehow be more "enforceable" than Commission regulations. Additionally, CETF fails to acknowledge that providers have a less than stellar record when it comes to providing full compliance with their own agreements.<sup>43</sup> Finally, CETF's proposal would not result in a path for expanded middle-mile deployment that is not meaningfully different than the regulatory landscape that was in place prior to the passage of SB 156. CETF's vision would continue to rely on incumbent providers, who would effectively be given a "right of first refusal" to provide middle-mile infrastructure in their service territories. This is effectively the same formula that has failed to develop a ubiquitous and affordable network to date. While CforAT appreciates CETF's intentions, incumbent providers would almost certainly abuse this process as a delaying tactic.

D. The Commission Should Treat Any Communities Impacted By The Removal Of Unbundled Network Elements As Eligible Locations For The State-Funded Middle-Mile Network.

As CforAT has previously noted, the Commission should not identify providers' middle mile infrastructure as open access where the Federal Communications Commission is eliminating open access requirements.<sup>44</sup> In opening comments, a number of commenters, including CforAT, expressed concerns about the FCC's deregulation of unbundled network elements.<sup>45</sup> CforAT supports Sonic's suggestion that "[w]hether these facilities are tariffed or

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<sup>43</sup> See, e.g., Assigned Commissioner and Assigned Administrative Law Judge's Ruling Directing T-Mobile USA, Inc. to Show Cause Why It should not be Sanctioned by the Commission for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure, In the Matter of the Joint Application of Sprint Communications Company L.P. (U-5112) and T-Mobile USA, Inc., a Delaware Corporation, for Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a), A.18-07-011 & A.18-07-012, (July 13, 2018);

<sup>44</sup> CforAT Reply Comments on Phase III issues at p. 10.

<sup>45</sup> CCF Opening Comments at p. 7-8; CETF Opening Comments at p. 4; EFF Opening Comments at pp. 3-4; Sonic Opening Comments at pp. 3-6. TURN Opening Comments at pp. 9-10; UCAN Opening Comments at p. 1.

not, the Commission should require that open-access networks make available all services on a nondiscriminatory basis, with the same terms, conditions, and pricing for all parties.”<sup>46</sup>

Additionally, CforAT agrees that in the absence of FCC regulation of unbundled network elements, the Commission should consider creating its own unbundled network element rules<sup>47</sup> and should treat any communities impacted by the removal of unbundled network elements as eligible locations for the state-funded middle-mile network.<sup>48</sup>

E. The Commission should Consider Input from a Wide Variety of Providers.

In its Opening Comments, Verizon continues to hold itself out as the voice for all commercial internet service providers.<sup>49</sup> As CforAT has previously noted, Verizon’s input is not the only perspective on what would be attractive and useful to carriers.<sup>50</sup> The Commission must make sure that it does not view input from large incumbents as representing the position of small carriers and potential new entrants to the market.

F. The Commission Should Require That All Middle-Mile Infrastructure Built Using SB 156 Funds Be Subject To A 72-Hour Backup Power Requirement.

Small LECs oppose the adoption of backup power requirements,<sup>51</sup> as does Frontier.<sup>52</sup> Previously in this proceeding, Frontier argued the importance of the Commission’s prioritizing public safety when determining locations for the state-owned middle-mile network, arguing that “public safety should be a paramount objective for the Commission and the most significantly weighted factor for identifying priority areas.”<sup>53</sup> However, in this most recent round of

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<sup>46</sup> Sonic Opening Comments at p. 3.

<sup>47</sup> EFF Opening Comments at p. 4.

<sup>48</sup> Cal Advocates Opening Comments at p. 6; CforAT CforAT Reply Comments on Phase III issues at p. 10.

<sup>49</sup> Verizon Opening Comments at p. 4.

<sup>50</sup> CforAT Opening Comments at p. 7.

<sup>51</sup> Small LECs Opening Comments at p. 3.

<sup>52</sup> Frontier Opening Comments at p. 4.

<sup>53</sup> Frontier Opening Comments on August 6, 2021 Assigned Commissioner’s Ruling at p. 6.

comments, Frontier effectively contradicts its own arguments on the importance of public safety by arguing that the Commission should not order additional backup power requirements, which are intended to support public safety during emergencies and power outages, because the Commission only recently implemented existing backup power requirements.<sup>54</sup> Frontier argues that “the Commission should monitor performance of fiber networks for at least several years after implementation of the 72-hour backup power requirement before deciding whether additional requirements are necessary”<sup>55</sup> instead of maintaining its focus on enhanced safety from backup power. While Frontier may downplay the importance of ubiquitous backup power, the Commission should not. As the Commission has previously noted, during natural disasters, public safety power shutoffs, or other emergencies, it is critical that customers be able to access a dial tone, receive emergency alerts, and access critical information, even when the power is out.<sup>56</sup> Similarly, “maintaining our telecommunications capability in disasters is an absolute necessity for effective response in recovery operations.”<sup>57</sup> The Commission should require that *all* middle-mile infrastructure built using SB 156 funds be subject to a 72-hour backup power requirement

G. The Commission Should Postpone Any Consideration of Frontier’s Recommendation that the Commission Impose COLR-Style Obligations on Providers.

Frontier proposes that the Commission impose a COLR-like “duty to serve” on providers that access the state network: “[a]ny carrier requesting access to the state-owned middle mile network should be required to serve a minimum number of unserved households adjacent to the

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<sup>54</sup> Frontier Opening Comments at p. 4.

<sup>55</sup> Frontier Opening Comments at p. 4.

<sup>56</sup> D.21-02-019 (R.18-03-011, Disaster Relief) at p. 41.

<sup>57</sup> D.21-02-019 (R.18-03-011, Disaster Relief) at p. 42, citing Order Instituting Rulemaking Regarding Emergency Disaster Relief Program to Support California Residents November 20, 2019 Prehearing Conference Transcript at 14-15, lines 24—28.

state's network.” CforAT supports measures that incentivize private providers to serve unserved and underserved households. However, if the Commission does impose such a requirement, there is a risk that doing so could benefit incumbents and larger providers to the detriment of smaller providers and/or new entrants to the market. For example, if the Commission set a high minimum number, it would be easier for incumbents and larger providers to absorb the costs of serving that minimum number of households, but it might be too expensive for smaller providers or new entrants who do not have the same economies of scale. Additionally, if the Commission does impose a “duty to serve” requirement, that requirement should apply to all providers, not only those providers that access the statewide network. While CforAT supports the imposition of requirements mirroring the COLR duty to serve, we recommend that the Commission postpone consideration of this issue until parties are able to provide the Commission with concrete proposals and provide feedback on other parties’ proposals.

### **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,  
October 15, 2021

/s/ Paul Goodman  
PAUL GOODMAN

Center for Accessible Technology  
3075 Adeline Street, Suite 220  
Berkeley, CA 94703  
Phone: 510-841-3224

Fax: 510-841-7936  
Email: [service@cforat.org](mailto:service@cforat.org)