

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 September 10, 2020)

**REPLY COMMENTS OF THE UTILITY REFORM NETWORK ON THE
ADMINISTRATIVE LAW JUDGE'S E-MAIL RULING ORDERING ADDITIONAL
COMMENTS AS PART OF MIDDLE-MILE DATA COLLECTION**

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I. INTRODUCTION

In accordance with the September 9, 2021 *Administrative Law Judge's E-Mail Ruling Ordering Additional Comments as Part of Middle-Mile Data Collection* (Ruling), The Utility Reform Network (TURN) respectfully submits these reply comments.¹

II. THE COMMISSION HAS THE AUTHORITY TO ENSURE OPEN ACCESS AND AFFORDABILITY REQUIREMENTS

It is well documented, and uncontroversial, that there are areas of the state without sufficient middle mile facilities and service offerings to support end-user access to necessary communications services.² The “market,” however that term may be defined, has not created sufficient opportunities and incentives for commercial middle mile networks to operate throughout California. Many of the opening comments provide clear and concrete examples of this market failure and the wide ranging impacts to a variety of urban, suburban and rural communities.³ Through its work on SB 156, along with other recent broadband initiatives, the Legislature identified, and begins to address, this market failure by directing several state agencies, including the Commission, to identify existing middle mile facilities and develop a

¹ Unless otherwise indicated, the comments cited in footnotes refer to comments filed by parties on October 1, 2021 in response to the ALJ's E-mail Ruling.

² August 8, 2021, Assigned Commissioner's Ruling at p. 2 (“The lack of available middle-mile broadband infrastructure has been a major issue in connecting California's unserved and underserved communities.”) AT&T Opening Comments at p. 2 (The Commission's work to identify middle mile network routes is necessary to bring broadband services to consumers that are currently unserved); Public Advocates Opening Comments at p. 4 (importance of open access middle mile networks to expanding affordable last mile broadband services).

³ See, for example, Santa Clara County Opening Comments, p. 1-2 (heart of Silicon Valley still has underserved and unserved communities due to lack of open access, affordable middle mile); California Community Foundation Opening Comments, pp. 2-4, 5-6 (demonstration of how digital redlining and lack of competition for middle mile services in urban areas impacts last mile service offerings); Borrego Springs Revitalization Opening Comments at p. 4-5 (lack of middle mile facilities and lack of information makes it difficult to plan last mile services to school children).

state-funded open access middle mile network.⁴ To this end, the ALJ Ruling asks questions about the Commission’s authority and the appropriate regulatory strategies to “assure durable and enforceable open-access and affordability requirements in perpetuity” to support legislative efforts to address this market failure.⁵

Comments, primarily from middle mile providers or large incumbent users of middle mile services, urge the Commission to narrow its focus and forbear from exercising necessary authority to address the known market failures and related impacts to unserved and underserved communities.⁶ However, in light of the evidence of market failure for middle mile services in many parts of the state, opening comments that call for the Commission to rely on market based mechanisms to ensure availability of open access and affordable middle mile services “in perpetuity” miss the mark. For example, Lumen suggests that the Commission should “allow the marketplace to be used as a dynamic proxy for reasonable pricing” instead of adopting regulatory measures to ensure affordability.⁷ AT&T says that any attempt to regulate middle mile networks or services “could have the unintended consequence of interfering with a fast-growing market for advanced communications services.”⁸ CETF waffles on whether tariffs and open access mandates would be appropriate, instead urging the Commission to create a competitive bidding process; yet CETF fails to address the fact that many of these areas may not attract

⁴ Govt Code 11549.52 (need for middle mile network facilities to support high speed broadband service); SB 4 (Chapter 671, October 8, 2021) Section 5 (Urgency of amendments to statute on state-funded broadband infrastructure is driven by the need to “expedite deployment of broadband infrastructure and interne services to unserved rural and urban communities”) ; SB 14 (Chapter 658, October 8, 2021) Section 1(a)(1) “The creation of a fiber optic network for ‘middle mile’ broadband service deployment and ‘backhaul’ infrastructure ...is critical to close the digital divide.” *See also*, (2) “All state agencies and departments with pertinent authority ... must be engaged and coordinated by the administration ... to coordinate actions to achieve the goals and purpose of the Internet for All Now Act.”

⁵ ALJ E-Mail Ruling Q. 1.

⁶ AT&T Opening Comments at pp. 2-6; Comcast Opening Comments at pp. 2-5; CCTA Opening Comments at pp. 2-4; CTIA Opening Comments at pp. 1-2; CENIC at p.2.

⁷ Lumen (Century Link) Opening Comments at pp. 1-2

⁸ AT&T Opening comments at p. 3

sufficient bidders.⁹ The record does not support these calls for a market-based laissez faire approach to ensuring that middle mile services are open and affordable and will offer sufficient capacity to accommodate future growth.¹⁰ The Commission must weigh the comments of those parties with a “feet on the ground” perspective against the comments of current middle mile providers that fail to demonstrate how continuing a market-based approach will yield any different results but to perpetuate a well-documented market failure.

Similarly, arguments that the Commission’s inquiry into “durable and enforceable” requirements is out of the scope of this proceeding and beyond the Commission’s authority under SB 156 should be dismissed. The Commission opened this docket to explore “short and medium term actions” to accelerate the deployment of high quality affordable internet for all Californians.¹¹ As part of this exploration, the Commission identified that the lack of open access and affordable middle mile services, including failures of middle mile to serve certain communities due to digital redlining and unaffordable access, must be addressed before the Commission, and the Governor, can reach the goal of ubiquitous broadband access.¹² The Commission’s inquiry regarding its authority and effective regulatory tools to support open access and affordable middle mile services are directly within the scope of this proceeding.

Moreover, such inquiry is also well within the scope of the Legislative mandate to the Commission from SB156. AT&T presents an unnecessarily narrow description of the Commission’s role under SB156 when it suggests that the Commission’s only requirement is to

⁹ CETF Opening Comments at p. 2-4.

¹⁰ See calls for regulatory oversight, CforAT Opening Comments at p. 2-3 (keep network publicly owned and require transfer of obligations with the facility if necessary); EFF Opening Comments at pp. 2-3 (require reporting and tariffing to monitor existing middle mile facilities); SBUA Opening Comments at p. 1-2; County of Santa Clara Opening Comments at p. 2; CalAdvocates Opening Comments at pp. 3-5 (noting that providers refused to provide information about their private contracts); Central Coast BB Consortia Opening Comments at p. 2-3.

¹¹ OIR at p. 1

¹² OIR at 2, 9-10, *citing* Governor Newsome Executive Order N-73-20 (August 14, 2020).

develop a “factual record for its recommendations regarding the location of the state’s middle-mile network.”¹³ The Commission’s duty and obligation under the statute is much broader. The statute requires the Commission to investigate, gather comment, analyze and report on many aspects of the construction and operation of the state’s middle mile facilities and services including prioritization of builds, capacity of the facilities and affordability of services, as well as other considerations that will “increase the attractiveness and usefulness” of the state middle mile network.¹⁴ Moreover, the statute makes clear that it is the obligation of “all state agencies” to work in “cooperation” with each other to develop, deliver and operate this valuable state asset that must be designed to “serve a public purpose.”¹⁵ Therefore, the Commission should dismiss any comments that argue the ALJ Ruling’s questions regarding regulatory tools to ensure open access and affordability for the long term are beyond the scope of this proceeding or the Commission’s statutory authority.

Some parties’ comments also mischaracterize the Commission’s inquiries as an attempt to tariff and regulate last mile broadband services. Without relevant and sufficient legal or factual support, these comments make well-worn arguments that the Commission cannot act here because of alleged restrictions on the Commission’s authority to regulate broadband.¹⁶ These self-serving and over-reaching comments are not only incorrect, the Commission is not proposing to regulate any last mile or end user services here, but these comments also fail to

¹³ AT&T Opening Comments at p. 2-3. See, also, Comcast Opening Comments at pp. 3-4 (Legislature didn’t intend for the Commission to use its regulatory authority), CCTA at p. 3

¹⁴ See, generally, Govt. Code §11549.54.

¹⁵ Govt. Code §11549.56 (a), (d).

¹⁶ CTIA Opening Comments at p. 4; AT&T at 3-5; Comcast at pp. 4-5.

recognize that the Commission has exercised its authority over intrastate facilities and services that support broad public policy goals of public safety and broadband access.¹⁷

The narrow focus on broadband services of these comments also ignores the Commission's authority over intrastate middle mile facilities and services, including special access and transport, as a well-established point of telecommunications regulatory law.¹⁸ The middle mile facilities at issue here, and the services offered over these facilities, will support a variety of last mile broadband service offerings, as well as wireline and wireless voice services, public safety communications, and a host of other communications capabilities. This ALJ Ruling is not asking for comment on the regulation of these end user and last mile services, but instead, it is building a record to support the Commission's statutory mandate to work with other agencies to ensure open access and affordable middle mile services to support these last mile services throughout California.

Finally, it is worth noting that there appears to be broad agreement that entities that use the state funded network to provide their own middle mile services can be subject to open access and affordability requirements as a condition of that use.¹⁹ Several parties agree with TURN that

¹⁷ OIR at pp 1-5 (outlining broad authority to address broadband issues in the context of the Governor's Executive Order; D.20-09-012 (R.18-03-011) (Rejecting carrier's preemption claims over billing relief for disaster victims for IP enabled networks); D. 21-02-029 (R.18-03-011) (Adopting rules on public safety requirements for last mile and middle mile networks); D.21-04-005 (R.11-11-007) (Supporting authority to require reporting of broadband affiliate revues and expenses), denied on rehearing D.21-08-042.

¹⁸ Sonic Opening Comments at p. 3, (Commission's authority depends on structure of middle mile network; Commission can require middle mile to incorporate dark fiber to replace lost UNE); TURN Opening Comments at 2-8 (Commission should work with other state agencies to attach requirements to facilities and use its authority over telephone corporations and intrastate facilities to support the goals of state middle mile).

¹⁹ Comcast Opening Comments at p. 3 (acceptance of funds by commercial providers may come with conditions); CCTA Opening Comments at p. 4 (TPA must ensure nondiscriminatory pricing for use of publicly funded facilities); CTIA Opening Comments at p. 4 (CDT should require technology neutral standards); CforAT Opening Comments at p. 2-3 (maintain public ownership to support goals of network); Public Advocates Opening Comments at p. 3-5 (citing existing regulations for open access middle mile networks as part of CASF funding for example); CETF Opening Comments at p. 1-3

the Commission should use its regulatory and tariffing authority to support transparency, accountability and open access terms and conditions for the use of these publicly funded networks.²⁰ Other comments question whether the Commission is the appropriate entity to enforce these conditions and if tariffs are the proper mechanism to support open access and affordability. As discussed above, the statute anticipates a collaborative approach. Under this structure it is likely that processes and procedures to support open access and affordability will come from multiple sources, each coordinated to support this public asset. For example, TURN supports comments that in some instances it may appropriate to “attach” open access and affordability obligations directly to the state funded facilities either through a lien or some other type of contract mechanism that will “follow” the facility “in perpetuity.”²¹

However, TURN also urges the Commission to find that it has authority to require telephone corporations to submit tariffs that demonstrate compliance with the open access and affordability obligations for any middle mile service it offers over this publicly funded asset.²² TURN also supports Commission authority to require tariffs, to the extent such tariffing does not currently exist, of commercial middle mile networks where the Commission has identified those networks as serving the role of an open access and affordable middle mile network under the statute. If the Commission determines that there is no need for the state agency to invest in middle mile network facilities in an area because an existing facility is identified as having sufficient capacity, affordable services, and open access, then the Commission, and other state

(administering agencies should solicit interest in middle mile network that include specific conditions and obligations for receipt of public funding).

²⁰ Borrego Springs at p. 6, 8, 10; Santa Clara at 2; Public Advocates at 4-5; SBUA Opening Comments at p. 2; Central Coast BB Consortia Opening Comments at p. 3.

²¹ CforAT Opening Comments at pp. 2-5 (Commission review to ensure continued open access)

²² TURN Opening Comments at p. 4-6; Sonic Opening Comments at p. 3 (tariffing where possible, Commission must use authority to offer dark fiber); EFF Opening Comments at p. 2-3 (require tariffs to monitor pricing on existing facilities)

agencies, must have the continued ability to monitor these commercial networks to ensure they continue to serve this purpose. To this end, the Commission should require these network providers to submit tariffs, with period updates, to confirm the continued availability of ubiquitous and affordable middle mile services from that network.

III. THE FEDERAL COMMUNICATIONS COMMISSION DECISION TO PHASE OUT ACCESS TO THE DARK FIBER SHOULD BE CONSIDERED BY THE CPUC WHEN PRIORITIZING MIDDLE-MILE ROUTES FOR THE STATE-OWNED PROJECT.

AT&T and US Telecom claim that the recent decision by the Federal Communications Commission (FCC) to phase out access to the dark fiber unbundled network element (UNE) should have no impact on the Commission's consideration of where to prioritize middle mile facilities and is irrelevant to the proceeding.²³ AT&T recites the FCC's conclusion that competitive ILECs are no longer impaired from providing service without access to a dark fiber UNE²⁴ and US Telecom states that competitive local exchange carriers (CLECs) can still "rely on ILEC infrastructure at negotiated rates and terms."²⁵

Contrary to the arguments of US Telecom and AT&T, the decision to phase out the dark fiber UNE *will* have an impact on the availability of open-access middle mile facilities and, thus, should be considered by the Commission as it determines which routes should be prioritized for construction of the state-owned middle-mile network. For its role in prioritizing potential routes, the statute directs the Commission to identify locations where "there is no known middle-mile infrastructure that is *open access*...."²⁶ [*emphasis added*] Access to dark fiber middle mile

²³ US Telecom Opening Comments at p. 2-3; AT&T Opening Comments at 6-7.

²⁴ AT&T Opening Comments at p. 7.

²⁵ US Telecom Opening Comments at p. 3.

²⁶ Gov. Code § 11549.54 (b).

infrastructure that can only be obtained by private negotiation with the infrastructure owner cannot be confirmed as “open access,” contrary to the claim of US Telecom.

Sonic’s comments provide a detailed explanation of why the loss of the dark fiber transport UNE will impede California’s broadband objectives if the Commission does not at least consider routes that are impacted by the elimination of the UNE in the course of identifying priority routes for the state-owned middle-mile project.²⁷ This UNE is currently used by CLECs to provide broadband in both urban and rural areas, and is the predominant means of CLEC provision of broadband.²⁸ It is not economically feasible for public or commercial CLECs or Internet Service Providers to just “build their own” middle-mile transport facilities.²⁹ If the state is to attain its broadband goals, the state-owned middle-mile network should replace some of the routes currently served by the dark fiber UNE.³⁰ As proposed in TURN’s opening comments, the Commission should gather data and conduct further analysis to identify the impacted routes.³¹

IV. DIRECT PROVISION OF SERVICE TO CUSTOMERS/ANCHOR INSTITUTIONS

Contrary to the opening comments of several parties that questioned the Commission’s inquiry, it appropriate and forward-looking to consider whether the state-owned middle-mile network should provide direct service to anchor institutions.³² California approved the state-owned middle-mile network in Senate Bill 156, with the intent that “the statewide open-access middle-mile broadband network [] provide an opportunity for last-mile providers, *anchor institutions*, and tribal entities to connect to [...] the statewide open-access middle-mile

²⁷ Sonic Opening Comments at p. 4-6.

²⁸ *Id.* at 5.

²⁹ *Id.* at 4-5.

³⁰ *Id.* at 5-6.

³¹ TURN Opening Comments at pp. 9-10; Public Advocates at p. 6 (Commission should investigate and consider evidence of the impact from the FCC Order)

³² SDG&E Opening Comments at p. 4; SCE Opening Comments at p. 6; Comcast Opening Comments at p. 10, Lumen Opening Comments at p. 5.

broadband network to facilitate high-speed broadband service.”³³ The Commission has been charged with “identify[ing] statewide open-access middle-mile broadband network locations that will enable last-mile service connection” for last-mile providers, anchor institutions, and Tribes.³⁴ To efficiently and effectively identify where the state-owned middle-mile network needs to be deployed, the Commission must consider the unserved and underserved anchor institutions that could benefit from direct access to the state-owned middle-mile network, and how best to achieve this.

CETF argues that connecting anchor institutions should be a “secondary benefit” of the state-owned middle-mile, which should only be considered after unserved and underserved households are connected.³⁵ TURN disagrees. CETF ignores the important role anchor institutions can play in connecting the surrounding community to broadband services.³⁶ For example, the Yurok noted that a connected anchor institution can serve as a location for residents to access broadband, but also the connected anchor institution can serve as a starting point for last-mile services to the community.³⁷ Indeed, several parties filed comments supporting the state-wide middle-mile network providing direct service to anchor institutions.³⁸

³³ SB 156 (2021), Chap. 5.8, codified as Gov. Code sec. 11549.52(a) (emphasis added).

³⁴ SB 156 (2021), Chap. 5.8, codified as Gov. Code sec. 11549.54(a).

³⁵ CETF Opening Comments at p. 12. See also, CforAT Opening Comments at p. 9 (recommending the Commission revisit this issue after construction of the state-owned middle-mile network is nearing completion).

³⁶ See, e.g., TURN Opening Comments at p. 11 (noting Tribes, local agencies, and school districts have deployed last-mile services to connect the residents in their communities).

³⁷ Yurok Opening Comments at pp. 6-7.

³⁸ Yurok Opening Comments at pp. 6-7; CVAG Opening Comments at p. 7; ITUP Opening Comments at p. 10; LAEDC Opening Comments at mimeo p. 10; Santa Clara Opening Comments at pp. 5-6; Borrego Springs Opening Comments at p. 9; Comcast Opening Comments at p. 10; AT&T Opening Comments at p. 13; Cal Advocates Opening Comments at p. 9; SANDAG Opening Comments at p. 6; SCAG Opening Comments at p. 5 (stating support with the caveat that the direct services should be economical); SBUA Opening Comments at p. 7; NDC at pp. 8-9; UNITE-LA Opening Comments at p. 4-5.

Despite strong support for anchor institutions gaining direct access to middle mile services from the state network, some parties also caution that providing direct services to anchor institutions would discourage a last-mile provider from serving a community because anchor institutions are often one of the largest customers in a community.³⁹ At the same time, several providers argue that private entities would be better suited to provide last-mile services to the anchor institutions, thus urging that the state network provide direct services under only limited circumstances.⁴⁰ These are valid points. However, the statute is clear that anchor institutions are to have the opportunity to connect to the state-owned middle-mile network. The statutory language, and this record, reflect that many anchor institutions have not had access to adequate broadband service, at least in part because of a lack of access to both middle mile and last mile facilities and affordable services.⁴¹

There is concern that even with the state-owned middle-mile deployed near a community, last-mile providers will still not serve the area because the last-mile providers do not find it economical to serve.⁴² To ensure that the state-owned middle-mile network is constructed and implemented in a manner that supports broader availability of affordable high-speed broadband to all end users, including anchor institutions, it will be important for the state project to coordinate with regional and local efforts to expand broadband service. This includes both

³⁹ CCBC Opening Comments at p. 7; US Telecom Opening Comments at p. 5.

⁴⁰ CenturyLink Opening Comments at p. 5; GeoLinks Opening Comments at p. 5; Small LECs Opening Comments at p. 2; Sonic Opening Comments at p. 11; US Telecom Opening Comments at p. 5.

⁴¹ TURN Opening Comments at p. 11.

⁴² See, e.g., Southern California Tribal Chairmen's Association presentation, CPUC CASF March 28, 2018, Workshop (R.12-10-012), available at <http://www.adminmonitor.com/ca/cpuc/workshop/20180326/>, starting at 1:58:50 (noting fiber runs across the street from a school but that the school does not have access to the fiber, and that Tribal residents do not have access to fiber that serves cellular towers). The presence of middle mile does not ensure last-mile services.

public and private potential broadband providers. The collaboration will be necessary to foster efforts to allow potential last-mile providers to work with all relevant entities to coordinate network planning, design and deployment.⁴³ For example, concurrent with this proceeding, the California Advanced Services Fund proceeding, R.20-08-021, is contemplating rules to provide technical assistance to Tribes and local agencies to deploy much needed last-mile services throughout California.⁴⁴ However, because there may be no last-mile provider who wants to serve a community, anchor institutions that could receive direct services from the state-owned middle-mile network should not be left without recourse. Therefore, TURN generally supports the ability of the state-owned middle-mile network to provide enterprise-level services directly to anchor institutions, where appropriate.⁴⁵

TURN is sensitive to the concern that last-mile providers may be discouraged from providing last-mile service to the surrounding community if an anchor institution—likely one of the largest potential customers in a community—receives services directly from the state-owned middle-mile network. Therefore, TURN is cautious about requiring that such direct service be provided “at cost” or “lower ‘wholesale’ costs” to the anchor institution.⁴⁶ Further, it is important to ensure that the state-owned network receives revenue that is sufficient to support network operations, including necessary maintenance and deployment of additional plant. Instead, TURN suggests the price of the direct services to anchor institutions be determined at a later time, once it becomes clear how many, if any, anchor institutions would want to receive direct last-mile services from the state-owned middle-mile network.

⁴³ Borrego Springs Opening Comments at p. 11; Cal Advocates Opening Comments at p. 13-14; LAEDC Opening Comments at p. 6-8, 10.

⁴⁴ TURN notes that Tribes currently have access to the Tribal Technical Assistance program.

⁴⁵ TURN Opening Comments at pp. 10-11.

⁴⁶ Cal Advocates Opening Comments at p. 9; NDC Opening Comments at pp. 8-9.

TURN notes that commenters are generally in agreement that anchor institutions should be allowed to be their own last-mile provider and connect to the state-wide middle-mile network.⁴⁷ TURN also notes that most parties who commented on the issue agree that the state-wide middle-mile network should not provide last-mile services to residential and small business customers.⁴⁸ TURN agrees with both of these positions.⁴⁹

V. THE COMMISSION SHOULD CAREFULLY EXAMINE CLAIMS ABOUT THE EXPERIENCE OF OPEN ACCESS NETWORKS CONSTRUCTED AND OPERATED IN OTHER STATES

The Ruling asked for comment on whether there are any successes or pitfalls associated with other state-wide open access network projects that California should consider. TURN acknowledges that the California middle mile network project is in many ways unique, and some of the states referenced in Question 6 of the Ruling do not have state-owned and operated middle mile networks. However, the differences in these projects do not foreclose the Commission's consideration of whether the experience in other states can provide valuable lessons for California.

Although some parties provide varying levels of detail regarding the lessons learned from other states,⁵⁰ TURN recommends that the Commission reach out directly to the entities overseeing those projects in addition to considering third-party commentary. TURN agrees with suggestions that the Commission draw experiences from Massachusetts' middle mile network,

⁴⁷ See, e.g., EFF Opening Comments at p. 8 ("Should a local government entity, such as the school district or library, wish to provide low-cost alternatives, it should lease access from the state infrastructure in the same way as any other private service provider").

⁴⁸ See, e.g., CenturyLink Opening Comments at p. 5; CETF Opening Comments at p. 12; Comcast Opening Comments at p. 10; Cal Advocates Opening Comments at p. 10; CCBC Opening Comments at p. 8; NDC Opening Comments at p. 9; Sonic Opening Comments at p. 12.

⁴⁹ TURN Opening Comments at pp. 12-13.

⁵⁰ TURN notes that CETF described "muni models" but did not provide specific examples of where these are used. See CETF Opening Comments at p. 13-14. CETF's suggestion about "take rates" or the number of subscribers compared to number offered the service, is also not appropriate here. It is unclear how areas with low population density would factor into this analysis.

MB123 network, in its outreach and collaborative efforts to work with anchor institutions that had not been previously connected.⁵¹ TURN also believes the examples described by SANDAG of other state projects that leverage existing commercial and public fiber deployments are useful to consider.⁵²

Unfortunately, some commentators suggest lessons that are derived from unreliable sources. For example, the Advanced Communications Law and Policy Institute (ACLP) provided a lengthy explanation of its impression of several state middle mile projects.⁵³ TURN is concerned that at least some of the opinion expressed misses important points, and in fact, the basis for the comments, a 2014 report⁵⁴ has been debunked by experts in this area such as the Institute for Local Self-Reliance.⁵⁵

For illustrative purposes, TURN reviewed the ACLP commentary about the Utah Telecommunications Open Infrastructure Agency (“UTOPIA”) and UTOPIA Fiber.⁵⁶ ACLP suggests that UTOPIA was “overly expansive middle-mile network,” and that it “finally found relative financial success by shifting to a more targeted deployment strategy.”⁵⁷ Based on this analysis, ACLP suggests that California should undertake a piecemeal, “iterative” approach to building its middle-mile network.⁵⁸ However, UTOPIA Fiber confirms that since 2009, it has “successfully designed, built, and operated over \$330 million worth of fiber projects, funded

⁵¹ Cal Advocates Opening Comments at p. 13.

⁵² SANDAG Opening Comments at p. 7.

⁵³ ACLP Opening Comments at pp. 3-23.

⁵⁴ ACLP Opening Comments at pp. 19-20 and note 65 (citing critiquing Charles M. Davidson, Michael J. Santorelli, New York Law School - ACLP “Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers,” (June 2014)).

⁵⁵ Institute for Local Self Reliance, “Davidson and Santorelli Report Makes Numerous Mistakes and Incorrect Conclusions,” (2014) (critiquing Charles M. Davidson, Michael J. Santorelli, New York Law School - ACLP “Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers,” (June 2014)).

⁵⁶ ACLP Opening Comments at pp. 19-20.

⁵⁷ ACLP Opening Comments at p. 20.

⁵⁸ ACLP Opening Comments at pp. 25-26.

completely through subscriber revenue, at no cost to taxpayers.”⁵⁹ A period of more than a decade of successful projects should not be quantified as “relative” financial success. In fact, UTOPIA learned from early mistakes and moved forward to design, build, and operate a highly successful network. Moreover, ACLP misses the point that a positive lesson learned from UTOPIA is the effort to work with local governments. It is in this way that UTOPIA has successfully expanded, and this was not accomplished through a piecemeal approach.

TURN also disagrees with the ACLP’s conclusions about North Carolina’s North Carolina Research and Education Network (“NCREN”).⁶⁰ ACLP suggests that NCREN has had “predictable funding streams from two outside sources—the MCNC endowment and the Golden LEAF Foundation,” to argue that along with other factors, the NCREN success “is not likely to be replicable elsewhere.”⁶¹ However, this broad statement is disputable since MCNC, the nonprofit organization that oversees NCREN, has not used the MCNC endowment to contribute to NCREN operations since 2007.⁶² In fact, NCREN’s revenues have exceeded expenses, and proceeds obtained from leasing dark fiber on NCREN have contributed to the network expansion pool that MCNC staff manages.⁶³

These two state examples cast doubt upon ACLP’s conclusions regarding other state broadband projects and the lessons to be learned from them.

In a similar vein, AT&T relies on a highly criticized 2017 study to support its contention that a group of municipal fiber projects were found to have negative cash flow, while others had positive cash flows of minimal periods that hurt the chances to recover investment.⁶⁴ Yet, this

⁵⁹ Kimberly McKinley, UTOPIA Fiber Statement.

⁶⁰ ACLP Opening Comments at p. 14-16.

⁶¹ ACLP Opening Comments at p. 16.

⁶² See statement from Joe Freddoso, MCNC CEO (2007-2014).

⁶³ See statement from Joe Freddoso, MCNC CEO (2007-2014).

⁶⁴ AT&T Opening Comments at pp. 15-16, and note 24.

2017 study has received numerous critiques about its methodology and other problems; therefore, the Commission should not give it weight.⁶⁵ Unfortunately, AT&T's cited examples also suffer from some misstated conclusions, including its reference to NCREN as discussed above and the use of endowment funds.⁶⁶

VI. SDG&E'S REQUEST FOR A BALANCING ACCOUNT IS REASONABLE

San Diego Gas and Electric (SDG&E) states that it will request to establish a balancing account for cost recovery associated with accommodating third-party attachments required for broadband deployment. These costs would include, for example, project management, engineering construction and materials.⁶⁷ TURN does not oppose the use of a ratemaking device, whether it be a balancing account or memorandum account, to capture the costs and revenues associated with third-party attachments. The Commission should make it clear that authorizing such an account would not in any way reduce SDG&E's burden of demonstrating the reasonableness of any request for costs it might seek to recover from its customers.

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⁶⁵ See e.g., Christopher Mitchell, Institute for Local Self-Reliance, "Correcting Community Fiber Fallacies, Yoo Discredits UPenn, Not Municipal Networks (June 2017)(identifying several instances that decrease the study's credibility, and referring to several cities that dispute the accuracy of their project's references; and explaining that the study reflects little familiarity with fiber-to-the-home network economics) <https://muninetworks.org/sites/www.muninetworks.org/files/fiber-fallacy-upenn-yoo.pdf>; Blair Levin, Brookings Institution, "New Report Swings and Misses on Communities and Next Generation Broadband (June 2017)(discussing study methodology problems) <https://www.brookings.edu/blog/the-avenue/2017/06/29/new-report-swings-and-misses-on-communities-and-next-generation-broadband/>.

⁶⁶ AT&T Opening Comments at p. 16.

⁶⁷ SDG&E Opening Comments at p. 3.

VII. THE ROLE OF CENIC IN THE COMMISSION PROCESS SHOULD BE CLARIFIED AND TRANSPARENT

The Corporation for Education Network Initiatives in California (CENIC) is in a unique position relative to other parties in this docket, including the parties that have commented on the state-owned middle-mile network issues posed in Commission Rulings. The statute tasks the Third Party Administrator (TPA), here CENIC, to work on behalf of the Office of Broadband and Digital Literacy (the Office), within the Department of Technology, to “manage the development, acquisition, construction, maintenance, and operation of” the statewide open-access middle mile broadband network.⁶⁸ The statute directs the Commission, in collaboration with CENIC, as the Third Party Administrator, to assist and to provide the locations for the statewide open-access middle-mile broadband network to the Office.⁶⁹ However, as CENIC is fulfilling its role as the TPA tasked with working with the Commission to provide information to the Office, it has also offered substantive comment in response to the Commission’s questions soliciting comment on issues to be addressed in the staff report and to support other assistance to the Office of Broadband and Digital Literacy. This dual-role situation—as a Third Party Administrator and as a commenting party—presents an appearance of conflict. CENIC’s role should be clarified.

CENIC has offered comment and responded to comments on issues such as leasing existing infrastructure, middle mile considerations and network design, capacity,⁷⁰ and regulatory safeguards.⁷¹ For example, CENIC opines on whether and how the Commission should address

⁶⁸ Gov. Code § 11549.52 (b)(1).

⁶⁹ Gov. Code § 11549.54 (a).

⁷⁰ See, e.g., CENIC Comments, September 3, 2021, at p. 2; CENIC Reply Comments, September 21, 2021 at pp. 2-5; CENIC Comments, October 1, 2021 at p. 2.

⁷¹ CENIC Opening Comments, at p. 2.

route capacity,⁷² and seems to reject the notion that any regulatory safeguards other than contractual requirements to ensure open access would be necessary, relying partially on itself as the Third Party Administrator to “provide sufficient controls.”⁷³ CENIC states that it expects that in CENIC’s role as the Third Party Administrator that CENIC will lead a series of roundtables with specific interest groups to work through the issues raised in comments in this proceeding. The issues specifically mentioned include operating expenditures, network management plans and technology refresh needs.⁷⁴

CENIC’s comments give the impression that important issues related to the state-owned middle-mile network, which the Commission has solicited comment on pursuant to statute, have been pre-judged by CENIC. CENIC has weighed in on this phase of the process as a party commenter and also intends to lead a different phase about these issues in its role as the Third Party Administrator. This presents the appearance of conflict. The Commission and CENIC should clarify what the role of CENIC is in this process. Is CENIC intervening as the Third Party Administrator even while as the Third Party Administrator, CENIC is supposed to rely on public comment to collaborate with the Commission on providing recommendations to the Office? Or, in offering comments in this proceeding, is CENIC representing itself as a separate entity completely outside of its designated role as the Third Party Administrator? In either case, what guarantee does the public have that CENIC, as the Third Party Administrator and the Commission will adequately consider public comment? Further, CENIC should be clear about what “specific interest groups” it is consulting with and the forum(s) in which the consultation takes place.

⁷² *Id.*, at pp. 4-5.

⁷³ *Id.*, at p. 2.

⁷⁴ *Id.*, at p 7.

VIII. CONCLUSION

TURN appreciates the Commission's continuing efforts to ensure that all Californians have access to reliable, fast, and affordable broadband Internet access services.

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Respectfully submitted,

/s/

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