

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

**RESOLUTION T-17634
September 12, 2019**

RESOLUTION

**Resolution T-17634: Denying Velocity Communications, Inc.'s Petition
for Modification of Resolution T-17548**

I. SUMMARY

The Request for Modification of Resolution T-17548 (or "Petition"), submitted by Velocity Communications, Inc. ("Velocity"), is denied.¹ In T-17548, the Commission approved \$46,709,036 in California Advanced Services Infrastructure Account funding ("CASF") for Inyo Networks, Inc.'s ("Inyo Networks") grant application to construct the Digital 299 Broadband Project (Digital 299), which includes middle-mile facilities along or near HWY 299 in Shasta, Trinity and Humboldt Counties, and last-mile facilities in Lewiston. In its Petition, Velocity asserts that it serves Lewiston and requests the Commission modify T-17548 to exclude all served households in Lewiston, along with other requests.

II. BACKGROUND

On March 23, 2017, the Commission approved Resolution T-17548, awarding \$46,709,036 in CASF Infrastructure Account grant funding to Inyo Networks to build the Digital 299 project. Digital 299 will provide backhaul infrastructure and interconnection points to portions of Shasta, Trinity, and Humboldt Counties along the Highway 299 corridor. Of the \$46,709,036 awarded, the resolution earmarks \$1,455,215 for last-mile connection to 307 households in Lewiston.

On March 23, 2018, approximately 12 months after the Commission issued Resolution T-17548, Velocity submitted its Petition for Modification (Petition).

In its Petition, Velocity alleges that the Commission is biased against fixed wireless technology and Resolution T-17548 allowed overbuilding, even though Velocity demonstrated they were already serving the Lewiston area with fixed wireless technology. The company also asserts that, pursuant to D.12-02-015 and D.16-05-052,

¹ Velocity submitted a document titled "Re: Request for Modification of Resolution T-17548." The document may be considered as a Petition for Modification.

households served by Velocity should have been removed from the Digital 299 project area. Additionally, Velocity's Petition speculates that Inyo Networks was using the Digital 299 project to support a separate project involving an international cable landing near Humboldt Bay.

Inyo Networks submitted its response on April 18, 2018, making two main assertions:

1. The company did not receive service of the Velocity Petition as required by Rule 16.4(c), and thus this Petition should be dismissed as defective. Rule 16.4(c) requires a petitioner to file and serve the petition for modification "on all parties to the proceeding or proceedings in which the decision proposed to be modified was made."
2. Inyo Networks asserts that a significant portion of Velocity's Petition is duplicative, and the information provided by Velocity does not constitute a new fact, but instead is speculation. Without any real new facts, Inyo Networks asserts that the Petition fails to meet the standard for a petition for modification under Rule 16.4.

Inyo Networks argues that "the Petition wastes the Commission's scarce resources, and should be dismissed immediately."²

Velocity also submitted a reply to Inyo Networks' response on May 3, 2018.

III. DISCUSSION

In its Petition, Velocity requests the following:

- 1) The Commission modify Resolution T-17548 to clarify that Velocity's fixed wireless service is suitable and the company provides Internet service at served speeds;
- 2) The Commission remove all households and areas where Velocity demonstrated it offered Internet service at speeds based either on customer subscription lists or speed tests;
- 3) The Commission exclude funding for 120 miles of fiber cable to a cable landing station in Humboldt Bay and ensure that no other CASF funds are expended to benefit the cable landing project; and

² On April 18, 2018, Inyo Networks submitted a document titled "Response of Inyo Networks, Inc. to Request for Modification of Resolution T-17548 by Velocity Communications, Inc., dated March 23, 2018." The document will be referred to as "Inyo Networks' Response."

- 4) The Commission modify Resolution T-17548 to require Frontier to provide details of any construction it has completed or has scheduled in Hayfork, Weaverville and Willow Creek. If Frontier cannot demonstrate that it provides broadband service in these three areas, or that it has concrete plans to use CAF II funds to build broadband facilities as it promised, the Commission should modify Resolution T-17548 to allow Velocity to submit speed tests and customer lists to demonstrate that those areas are already served (note that Resolution T-17548 provides a grant to Inyo Networks, not Frontier).

Velocity submitted its Petition for Modification under Rule 16.4 of the Commission's Rules of Practice and Procedure. Rule 16.4 sets forth the standard for a Petition for Modification of a Commission Decision filed in a formal proceeding.

Rule 16.4(a) states: "A petition for modification asks the Commission to make changes to an issued decision." Rule 16.4(b) states: "A petition for modification of a Commission decision must concisely state the justification for the requested relief..." and "Allegations of new or changed facts must be supported by an appropriate declaration or affidavit."³ A petition for modification seeks "'changes to the text of an issued decision' typically due to new or changed facts' since the decision was issued."⁴ Further, Rule 16.4(b) requires a petitioner to support, by declaration or affidavit, allegations of new or changed facts that warrant the relief requested. To the extent that Velocity provides new or changed facts, properly supported by the appropriate declaration or affidavit, the Commission will consider issues raised in the Petition. The Commission will not, however, consider issues which are simply re-litigation of issues previously decided.⁵

The Commission previously ruled on Velocity's requests: first in Resolution T-17548, and in D. 18-06-036, when it heard Velocity's Application for Rehearing; and second in

³ *Order Instituting Rulemaking on the Commission's Own Motion to Develop Standard Rules and Procedures for Regulated Water and Sewer Utilities Governing Affiliate Transactions and the Use of Regulated Assets for Non-Tariffed Utility Services* [D.11-10-034], (2011), p. 5, "To the extent that CWA has provided new or changed facts, properly supported by the appropriate declaration or affidavit, we will consider issues raised in the Petition." See also, *Order Instituting Rulemaking for Adoption of Amendments to a General Order and Procedures to Implement the Franchise Renewal Provisions of the Digital Infrastructure and Video Competition Act of 2006* [D.17-12-006] (2017), pp. 9-11, "Pursuant to Rule of Practice and Procedure 16.4(b) ..., the Petition must be denied because it has failed to demonstrate a new fact, material change in conditions, or misconception that would create a "strong expectation" that the Commission would have reached a different result based on the new information."

⁴ *Opinion Denying the Petition for Modification of Greenlining Institute Decision* [D. 06-12-026], (2006) p. 2

⁵ See D.11-10-034, p. 5

D.19-06-039, Velocity's Application for Rehearing of D. 18-06-036. Velocity's Petition does not comply with the procedural requirements of Rule 16.4, as the Petition does not raise any new factual issues that warrant modification of the Resolution.

Resolution T-17548, D. 18-06-036 and other Commission rulings provide a very clear record on the constraints of fixed wireless Internet service due to line-of-sight requirements. In

D. 18-06-036, the Commission notes that, "...evidence in the record confirms that line-of-sight factors may affect Velocity's coverage." This evidence includes emails from Velocity's CEO and Velocity's own website, which stated that its line-of-sight signals "may be affected by weather, foliage, terrain, and man-made structures."⁶

Velocity asserts that it discovered that other providers (Velocity specifically references only wireline providers) make service disclaimers similar to those found in its website to "avoid legal liability for service quality problems and not as a technical assessment of a carrier's service or as a fair basis to conclude that any one carrier's service is inadequate as compared to another."⁷ While all wireline providers will have network management challenges, including traffic, content provider server capacity, internal network management factors, device capabilities and usage, as would any Internet service provider, Velocity either ignores or omits that none of the providers listed as examples in its Petition claim line-of-sight factors, the issue cited by Staff in Resolution T-17548. Wireline Internet service is not impacted by line-of-sight. Additionally, line-of-sight is not a network management issue, but rather, a direct impediment to a fixed wireless provider offering Internet service to certain potential subscribers requesting service. Thus, although Velocity may cite its discovery of other providers' service disclaimers as a new or changed fact, the underlying issue of limitations with Velocity's service is a previously decided issue.

The third and fourth requests raised by Velocity are not germane to its challenge of Inyo Networks' Digital 299 application. Regarding its third request, Velocity fails to explain how connecting an international cable landing site in Humboldt Bay, well over 100 miles away from Lewiston, the area comprising the company's challenge, in any way relates to its claims of being able to serve Lewiston at the time it submitted its challenge. Further, the company fails to explain how previous indications in Resolution T-17548 that the cable landing site is not part of the CASF project⁸ are insufficient to ensure that ratepayer

⁶ D. 18-06-036, p. 16.

⁷ Petition, p 7-8.

⁸ See Res. T-17548 at p. 13 "...outside the scope of work proposed in this application, project proponents are working with other agencies to create an offshore cable landing site at or near Humboldt Bay to secure a California-based solution for terminating trans-Pacific broadband cables..." (emphasis added) Finding 2 "The project would... also provide a starting point for further privately funded economic benefits in the area, such as a potential trans-Pacific cable landing." (emphasis added)

funds do not fund that project. This does not constitute new information, as required in Rule 16.4.

Regarding its fourth request, Velocity provides references to news articles discussing Frontier's financial health and rumors that Frontier may sell its network in California. Based on that speculation, Velocity asserts that if Frontier cannot prove that it serves or intends to serve the communities of Hayfork, Weaverville, and Willow Creek (note that the approved grant does not provide funding for last-mile service in these communities), the Commission should modify Resolution T-17548 to allow Velocity to submit speed tests and customer lists to demonstrate that those areas are already served.

To begin, Resolution T-17548 does not address last-mile service in Hayfork, Weaverville, and Willow Creek. Additionally, Velocity's argument is based on speculation about Frontier, which is not even the grantee. Inyo Networks is the sole grantee in Resolution T-17548. Velocity fails to explain how Frontier's service in Hayfork, Weaverville, and Willow Creek impact its challenge, which focused on service in Lewiston.

Further, Velocity's requested relief is not based on how served status is determined. CASF eligibility is determined on an annual basis relying on data submitted to the Commission in April of each year (and validated by Communications Division Staff). CASF analysts further investigate questions of service availability during the application challenge process. Asking the Commission to circumvent this process for one provider, based solely on speculation submitted by that same provider, is not a reasonable request.

Staff recommends denying Velocity's Petition in its entirety. In summary, Velocity's Petition attempts to re-litigate issues the Commission has already decided and raises no new factual issues that warrant modification of Resolution T-17548.

In its response, Inyo Networks requests that the Commission "consider whether Rule 1.1 sanctions may be appropriate as to Velocity."⁹ The Commission agrees that the Petition raises no new or changed facts and merely re-litigates issues already decided by Resolution T-17548. However, the Commission does not apply sanctions at this time.

IV. COMMENTS ON DRAFT RESOLUTION

In compliance with Public Utilities Code, §311(g), a notice letter was emailed on August 8, 2019, informing all parties on the CASF Distribution List of the availability of the draft of this Resolution for public comments at the Commission's documents website at <http://www.cpuc.ca.gov/documents/>. This letter also informed parties that the final

⁹ Inyo Networks' Response p. 11.

conformed Resolution adopted by the Commission will be posted and available at the same website.

V. FINDINGS

1. On March 23, 2017, the Commission approved Resolution T-17548, awarding \$46,709,036 in CASF Infrastructure Account grant funding to Inyo Networks to build the Digital 299 project.
2. Commission Staff ruled against Velocity's claim that it offered served speeds.
3. In approving Resolution T-17548, the Commission agreed with Staff's determination to not uphold Velocity's claim.
4. Since approving Resolution T-17548, the Commission has ruled against Velocity on two other occasions, D. 18-06-036, when it heard Velocity's Application for Rehearing, and in D.19-06-039, when Velocity filed an Application for Rehearing of D. 18-06-036.
5. Velocity's Petition for Modification of T-17548 offers no new or changed facts or subsequent change in law that justify granting the relief requested in the Petition.
6. A notice letter was e-mailed on August 9, 2019, informing all parties on the CASF distribution list of the availability of the draft of this Resolution for public comments at the Commission's website <http://www.cpuc.ca.gov/documents/>. This letter also informed parties that the final confirmed Resolution adopted by the Commission will be posted and available at this same website.

THEREFORE IT IS ORDERED THAT:

1. Velocity's Petition for Modification of T-17548, submitted on March 23, 2018, is denied.
2. The effective date of this order is today.

I hereby certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting held on _____, the following Commissioners approved it:

ALICE STEBBINS
Executive Director