

January 27, 2020

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VIA EMAIL AND U.S. MAIL

Cynthia Walker
Director, Communications Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102-3298

**Re: Comments of Charter Communications Operating, LLC
on Draft Resolution T-17864 (Redding)**

Dear Director Walker:

Pursuant to Rule 14.5 of the Commission's Rules of Practice and Procedure, Charter Communications, Inc. ("Charter") submits the following comments regarding Draft Resolution T-17684 (the "Draft Resolution"), which approves funding from the California Advanced Services Fund ("CASF") Broadband Public Housing Account ("BPHA") to the grant application of Northern Valley Catholic Social Service ("NVCSS") to "construct an inside broadband network with both wired and wireless components in order to connect the planned (not yet built) Woodlands Apartments II Development to broadband Internet services" ("Development").¹

Charter requests that the Commission: (a) correct several errors of law and fact in the Draft Resolution and deny BPHA funding to the Development since Charter has already demonstrated it can provide service to the Development and the Commission erred in deeming it unserved and eligible for funding; and (b) reconsider, as a matter of law and policy, its denial of Charter's challenge.²

Charter refers the Commission's attention to Charter's July 26, 2019 initial challenge and its September 17, 2019 challenge to the amended application. Charter also incorporates by reference both of its prior challenges, including all confidential exhibits thereto.

¹ Draft Resolution at 1.

² Under Rule 14.5, comments are allowed within 20 days of the date of notice of a draft resolution in the Commission's Daily Calendar. The Draft Resolution was first noticed on January 6, 2020. The twentieth day was Sunday, January 26, 2020. Under Commission Rule of Practice and Procedure 1.15, when a due date falls on a day the Commission is closed, the due date of these comments is automatically extended to the first day the Commission is open, in this case falls on Monday, January 27, 2020.

A. BACKGROUND

On July 12, 2019, Communications Division Staff (“Staff”) published the proposed project description submitted by NVCSS for funding under the BPHA to provide service to 2900 Polk Street, Redding, CA, a low-income housing development known as the Woodlands Apartment.

On July 26, 2019, Charter submitted its timely challenge of the funding indicating that it already served this building and provided evidentiary support for its challenge including a list of all serviceable addresses in the building and redacted billing from a customer in the building. Charter also explained that NVCSS had mischaracterized the contractual arrangement with Charter and further that Charter was ready, willing and able to provide both wired and wireless service to the property.

NVCSS did not file a reply to the challenge. Instead, on August 23, 2019, NVCSS corrected and resubmitted its application then indicating it was seeking funding for a yet to be constructed building at 2950 Polk Street, Redding CA, referred to as Woodlands II. The new building is on the same parcel of land as the existing building and part of the same Woodlands complex. In all other ways, the application was identical to the original application.

On September 17, 2019, Charter submitted a challenge to the amended application. In the challenge, Charter indicated that the new building was part of the same complex and that once built, Charter would serve the entire complex.

NVCSS again did not file a reply to the comments (or if it did so, did not serve Charter with such comments).

On January 6, 2020, Staff issued the Draft Resolution in which it recommended the grant of funding to NVCSS and the denial of Charter’s challenge. In doing so, Staff indicated its disagreement with Charter on the following grounds:

- Staff contended that the new building will be managed separately and owned by a separate limited partnership. Staff acknowledges that NVCSS is the general partner of both limited partnerships.
- Staff finds that an unbuilt building cannot be served and, thus, found that the non-existent building is “unserved.”
- Staff indicates, with no record support, that the applicant acquired a different contract from Charter to serve the new building, and such contract is only to bring the circuits to the minimum point of entry (“MPOE”).

B. COMMENTS

Charter respectfully disagrees with the conclusions in the Draft Resolution and requests that funding be denied for the Development.

1. The Communications Division Staff Erred in Finding that the Development is Unserved Under the Plain Language of the Statute and BPHA Rules

The Staff recommended that this project should be approved via Resolution “because the issue of ‘unserved’ for a building that is still under construction was not specifically addressed in the existing BPHA rule.”³ Staff then purports to find a rationale to approve funding for an unbuilt building arguing that it was impossible to serve an unbuilt building and, thus, the unbuilt building was ‘unserved.’⁴ Staff’s finding is inconsistent with the Statute and BPHA rules, which require denial of the application in this instance. Specifically, an “unserved” housing development is:

...a housing development where at least one housing unit within the housing development is not offered broadband Internet service. A housing unit is not offered broadband Internet service if the unit does not have access to a commercially available broadband Internet service, such as Digital Subscriber Line (DSL), a cable modem, or another protocol, available at the unit.⁵

The plain language of the Statute and BPHA guidelines contemplate an existing “housing unit” for a development to be eligible for funding. Put another way, a housing unit must exist for Staff to be able to determine whether commercially available broadband service is offered to the unit. As Staff noted, no housing units or structures exist at the proposed address. Yet, even without housing units, Charter has demonstrated that it can serve the Development because it already provides service to the contiguous Woodlands Apartments and its network already passes the Development. Indeed, applicant admits that it intends to rely on Charter’s existing network and Charter’s services to serve customers in the Development once it is built.

Using circular logic, Staff incorrectly determined that because there are no housing units to which Charter could provide access, the same theoretical housing units therefore have no access to commercially available broadband. Under Staff’s analysis, however, no challenge could ever succeed for this type of application because a challenger could never show that non-existent subscribers have access to its broadband service. Such an illogical outcome denies Charter its due

³ Draft Resolution at 3.

⁴ Draft Resolution at 4.

⁵ D.18-06-032, App. 2 at 3.

process to meaningfully challenge an application under the Statute and Commission guidelines. Accordingly, the Commission should deny the application in its entirety because it seeks funding for an unbuilt development that cannot be eligible for funding.

2. The Additional Stated Bases for Denial of Charter’s Challenge are not Supported by the Facts or the Law

a. Staff’s Reliance on the Ownership and Management Differences Between the Existing Woodland Complex and the Development is Flawed and Not Relevant

Staff asserts that since “property ownership and management are different than the apartment development on the contiguous property, Staff concludes that the Woodlands Apartments II Development is not an extension of the existing housing development.”⁶ The sole support for this conclusion cited by Staff is an email from Stephanus Malaihallo (identified in the application as an engineer employed by the lead contractor, Palm Communities) to Staff explaining that the legal entity is different from the legal entity that owns the contiguous Woodlands project.⁷ This argument is completely misplaced. NVCSS is the applicant for this project and is the General Manager for the various limited partnerships associated with the Woodlands Development. The creation of limited partnerships is common practice in real estate developments for financing and liability purposes. Here, the parties to the limited partnerships are the same with the applicant, NVCSS, the general manager.

Moreover, the ownership of the Development is irrelevant to the present review.⁸ While there may be different entities involved in the financing or administrative aspects of the private funding component for 2950 Polk Street than those for 2900 Polk Street, both addresses have NVCSS and PC Redding in common. The fact that the two addresses may have a different mix of entities involved in building or financing the properties is not dispositive of whether the Development is part of the Woodland Apartments Complex. Nor is it dispositive of whether PC Redding has authority to bind the Development to a contract for ISP service (it does and has) or whether NVCSS is the entity responsible for renting units for both addresses (it is). Indeed,

⁶ Draft Resolution at 3.

⁷ Draft Resolution, p. 4, n. 10.

⁸ Nor do the different dates of construction between the two Woodland structures have any bearing on whether the structures are intended to be part of a single complex.

publicly available information illustrates that the two addresses are being marketed as part of a uniform complex by NVCSS.⁹

In any event, Staff's statement ignores the point that the Development is "contiguous" to the Woodland Apartments that are already served by Charter. Since Charter's network passes the Development, Charter is clearly capable of providing broadband within standard installation intervals once the housing unit is actually built and ready to be served, regardless of the ownership structure of the new building.

b. The Fact that the Building is Unbuilt Does Not Justify Funding

As discussed in Section B.1. above, applicant has not demonstrated that the Development is "unserved" precisely because no housing units currently exist on the property. Staff's finding that the Development is "unserved" because the "building is under construction" is not only contrary to law but creates bad public policy. The Development has no existing units that could be funded. Funding housing units that exist based on actual evidence rather than the absence of evidence (such as here) would better ensure that finite public resources would be allocated to projects that could use the funds now. And, should the Commission decide to award BPHA funding to the Development, it would create disincentives for existing providers like Charter to build to such developments in the future.

c. The Applicant Has Failed to Identify a Bandwidth Source at the MPOE

The applicant is required to identify a bandwidth source at the MPOE. Charter is not aware of any agreement with applicant or PC Redding that would require Charter to bring its facilities to the MPOE of the Development for resale as the Draft Resolution and application suggest. Indeed, this is not a service Charter typically offers.¹⁰ But Charter is, of course, willing to discuss services that would fit NVCSS' needs once the property is built. Charter is also committed to serving the State's low-income customers. To that end, Charter offers its low-cost

⁹ See https://www.co.shasta.ca.us/index/hhsa_index/food_and_financial_help/housing_programs/the-woodlands. See also, <https://www.cityofredding.org/home/showdocument?id=10721> (where PC Redding Apartments is listed as the entity that obtained a permit from the City of Redding for 2950 Polk Street, Redding). See also <https://www.treasurer.ca.gov/ctcac/meeting/2018/20180919/staff/6/ca-18-096.pdf>. (PC Redding also appears to be have applied for federal tax credits in CA for the 2900 Polk Street address. That application also lists NVCSS as a partner). Clearly, PC Redding and NVCSS are the entities who own and manage the Woodlands Complex, which includes 2900 and 2950 Polk Street.

¹⁰ Staff itself recognized that the manner in which applicant proposes to provide service to the Development is "atypical" for BPHA grants. See Draft Resolution at 5.

Spectrum Internet Assist broadband program to residential customers meeting eligibility requirements.

On this point, the Draft Resolution appears to rely improperly on extra-record and inaccurate information. At page 4 of the Draft Resolution, Staff states that “the applicant acquired a different contract from Charter to serve the Woodlands Apartments II Development than the Charter contract for service on the contiguous property.” Staff provides no citation or source for this statement. To the best of Charter’s knowledge, applicant did not submit a reply to Charter’s challenge making it even less clear where Staff may have obtained this information. Significantly, Charter is not aware of any contract between it and Woodlands II making reliance on this unsupported statement even more questionable and improper.

3. The Application Does Not Meet Other Requirements of D.18-06-32 for BPHA Applications

In addition to the numerous other flaws in the application and the Draft Resolution, the application fails to even meet the basic standards for an application. First, applicant is unable to verify that it has not denied an ISP access to its property.¹¹ Indeed, the application summary states (without providing any reason) that the applicant has denied ISP access.¹² And Staff does not address this deficiency in the Draft Resolution. This alone should have resulted in the rejection of the application and funding request.

Even if Staff were to assume (without evidentiary support) that applicant’s statement regarding denial of access was a typo or in error, applicant would be unable to verify that it has not denied an ISP access to its property. Both the Statute and the BPHA guidelines put the burden on the applicant to verify that it has not denied an ISP access to its property in order to provision broadband service to any unit. Thus, an ISP can challenge an application on the grounds that the property proposing to be served by the CASF grant is already served or that the ISP has been denied access without cause. It is impossible for Charter to seek access to a housing unit that does not exist and, in turn, for NVCSS to verify that it has not denied such access. Indeed, aside from the fact that the application states that applicant has denied access, applicant’s assertion that Charter would agree to bring its network only to the MPOE further confirms that applicant intends to deny access to Charter for inside wiring of the Development. On this ground alone, the Development must be deemed ineligible for funding and the application must be denied.¹³

¹¹ Pub. Util. Code, § 281(i)(3)(A); *See also*, D. 18-06-32, App. 2 at 4.

¹² Application Summary at 2. [In response to the application question of whether the ISP was denied access, applicant responded “True” and provided “0” for the reason.]

¹³ 2 Cal. Pub. Util. Code § 281(i)(3)(B)(ii)

Second, the BPHA guidelines refer to the “current condition” of the property to be funded.¹⁴ Specifically, an “applicant must attest that ... the buildings included in the application meet standards for acceptable basic living conditions as determined under HUD’s Uniform Physical Condition Standards or similar guidelines provided by other housing funding agencies in the States.”¹⁵ It is unclear how applicant could have made such an attestation when no buildings exist on the property that could conceivably be inspected. Since the rules contemplate an existing structure, the application by NVCSS is premature and should have been denied.

C. CONCLUSION

For the foregoing reasons, the Commission should reject Staff’s recommendation in the Draft Resolution to grant NVCSS’ application because the Development does not constitute an “unserved project” given that no housing units exist and because once built, the housing units will have access to Charter’s broadband service. Moreover, the applicant failed to meet the requirements of the application process. As such, granting NVCSS’ application would violate state law. Such an award would also fail to advance the public interest and sound public policy, given that such funding would be entirely arbitrary and constitute a waste of state resources.

Respectfully submitted



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cc: Selena Huang, CPUC Communications Division (via email)
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¹⁴ See D. 18-06-32, App. 2 at 8.

¹⁵ *Id.*