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11/27/23
04:59 PM
R2302016

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Proceeding to Consider Rules to Implement the Broadband Equity, Access, and Deployment Program	R.23-02-016 (Issued February 23, 2023)

OPENING COMMENTS OF

CALAVERAS TELEPHONE COMPANY (U 1004 C)
CAL-ORE TELEPHONE CO. (U 1006 C)
DUCOR TELEPHONE COMPANY (U 1007 C)
FORESTHILL TELEPHONE CO. (U 1009 C)
HAPPY VALLEY TELEPHONE COMPANY (U 1010 C)
HORNITOS TELEPHONE COMPANY (U 1011 C)
KERMAN TELEPHONE CO. (U 1012 C)
PINNACLES TELEPHONE CO. (U 1013 C)
THE PONDEROSA TELEPHONE CO. (U 1014 C)
SIERRA TELEPHONE COMPANY, INC. (U 1016 C)
THE SISKIYOU TELEPHONE COMPANY (U 1017 C)
VOLCANO TELEPHONE COMPANY (U 1019 C)
WINTERHAVEN TELEPHONE COMPANY (U 1021 C)
(the "Small LECs")

ON ADMINISTRATIVE LAW JUDGE'S RULING ISSUING STAFF PROPOSAL

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November 27, 2023

I. INTRODUCTION.

In accordance with the timelines established in the November 7, 2023 Administrative Law Judge's Ruling Requesting Comments on the Staff Proposal (the "Ruling"), Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C), Foresthill Telephone Co. (U 1009 C), Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C), Kerman Telephone Co. (U 1012 C), Pinnacles Telephone Co. (U 1013 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Volcano Telephone Company (U 1019 C), Winterhaven Telephone Company (U 1021 C) (the "Small LECs") hereby submit these comments addressing Staff's Initial Proposal contained in Attachments A (Volume I) and B (Volume II) to the November 7, 2023 Ruling (the "Initial Staff Proposal"). The Small LECs appreciate the California Public Utilities Commission's ("Commission") expeditious work to analyze the options for processing Broadband Equity, Access, and Deployment ("BEAD") grant proposals. As recognized in the National Telecommunications and Information Administration's ("NTIA") Notice of Funding Opportunity ("NOFO"), the BEAD program will play a critical role in promoting "digital equity" by supporting fiber deployment in some of the highest-cost areas of California, with a goal of "ensur[ing] that affordable, reliable, high-speed internet is accessible at every location within their jurisdictions."[1] The Initial Staff Proposal correctly recognizes that "[f]iber to the premises should be prioritized and funded to the extent possible."[2] The Commission should view its development of the BEAD program rules with these objectives in mind.

In most respects, the Initial Staff Proposal presents a reasonable framework for implementing the BEAD program, grounded in NTIA's guidance. However, the Initial Staff Proposal should be improved in several key areas. *First*, additional detail should be provided regarding the computation and mechanics of the Extremely High Cost Per Location Threshold ("EHCPLT"), which defines the "cost per unit" at which alternative technologies to fiber will be considered. The Small LECs support the more flexible, reactive approach reflected in "Option 1" of the Initial Staff Proposal, but the methodology by which the EHCPLT will be computed should be set forth with greater precision, even if the calculation will not be performed until the

[1] NOFO at 7-8.
[2] *See* Initial Staff Proposal, Volume II at 16.

initial round of proposals is submitted. *Second,* to avoid the many potential overbuilding problems that have arisen in connection with the Federal Funding Account ("FFA") grants, the Commission should not adopt either of the "DSL modifications" in the Initial Staff Proposal. These "modifications" will only encourage unnecessary broadband projects that duplicate existing broadband-capable infrastructure rather than focusing BEAD grants on the truly unserved and underserved locations for which it is intended. *Third,* the preexisting "enforceable commitments" aspect of the Initial Staff Proposal focuses exclusively on state funding commitments, overlooking key federal commitments that could also constitute "duplication" of potential BEAD projects. *Fourth*, the Initial Staff Proposal presents an overly prescriptive approach to pricing of BEAD-funded projects. While $30 per month, "inclusive of all fees" may be reasonable in some circumstances, the Commission should not foreclose applicants from making their best offers for affordable pricing, even if they do not fit this specific range.

The Small LECs address each of these issues in the following discussion. The Commission should adopt the refinements to the Initial Staff Proposal offered herein. The Small LECs also reserve the right to respond to other parties' suggestions on the Initial Staff Proposal.

II. FURTHER CLARIFICATIONS WOULD BE HELPFUL TO CONFIRM THE OPERATION OF THE "EXTREMELY HIGH COST PER LOCATION THRESHOLD."

The Small LECs appreciate the Initial Staff Proposal's confirmation that the "the CPUC will prioritize an EHCPLT as high as feasible," consistent with the requirements of the NOFO.[3] In addition, the Small LECs support the judgment reflected in the Initial Staff Proposal that the EHCPLT should be established "once [the Commission] has received all grant applications" rather than trying to arbitrarily assign this threshold without evaluating the full range of proposals.[4] As the Initial Staff Proposal anticipates, this more reactive, flexible approach will allow the Commission to encourage fiber projects without prematurely allocating funding to secondary technologies such as fixed wireless, which will not provide the long-term, scalable benefits that will keep rural communities on the right side of the digital divide. By pursuing this "Option 1" under the Initial Staff Proposal, the Commission can also foster a robust "negotiation

[3] *See* Initial Staff Proposal, Volume II at 42; NOFO at 31 ("NTIA expects Eligible Entities to set the Extremely High Cost Per Location Threshold as high as possible to help ensure that end-to-end fiber projects are deployed wherever feasible.").
[4] *See* Initial Staff Proposal, Volume II at 42.

phase" of the BEAD grant process, exploring options collaboratively with applicants to optimize the benefits and reduce the associated costs to the extent feasible.[5] Based on the discussion during the BEAD workshop on October 26, 2023, the Small LECs understand that several other states have deferred identification of the EHCPLT until after the receipt of initial applications, and the same approach is appropriate in California.

While the Initial Staff Proposal correctly assesses the benefits of a deferred consideration of the EHCPLT, the Initial Staff Proposal does not provide sufficient detail regarding the mechanics of the process. The Initial Staff Proposal notes that the EHCPLT "will be developed using the proposed grant funding amounts in the applications received and may be adjusted during the Negotiation Phase based on feedback and outcomes from the negotiation process."[6] The Initial Staff Proposal also contains a series of sequential "steps" describing how the Commission would "utilize" the EHCPLT once it is established,[7] but it is unclear how the number would be set. To avoid confusion, the Small LECs suggest that the Commission adopt the following methodology:

1. Solicit proposals for all project areas, considering both fiber and alternative technology solutions to determine whether the totality of the fiber projects, fit within the $1.86 billion budget. If fiber projects cover all target areas, the EHCPLT could be set at one dollar above the cost of the proposal with the highest-cost per household. In effect, the EHCPLT would not be operative in this scenario.[8]

2. If the proposed fiber projects would exceed the program budget, perform a calculation of how many of the highest-cost projects would have to be converted to fixed wireless or other alternative platforms to fit within the budget. This process would start with the project with the highest cost per household and continue evaluating each next-highest cost proposal in order until the Commission reaches an overall set of grant proposals that fit within the budget. For example, if the full range of fiber proposals is $2 billion, and converting the two highest-cost per household projects to fixed wireless would bring the total cost down to the $1.86 billion budget, the EHCPLT should be provisionally set at the "per household" cost of the lower of those two projects.

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[5] *See* Initial Staff Proposal, Volume II at 24 ("the CPUC believes that flexibility to take the necessary steps during the Negotiation Phase is an essential element of securing the best, fairest, and most competitive outcome for the BEAD process").
[6] Initial Staff Proposal, Volume II at 42.
[7] Initial Staff Proposal, Volume II at 43.
[8] As part of this review process, the Commission could also account for the impacts of competing and/or overlapping fiber projects to determine whether there is a combination of fiber proposals that would fit within the budget.

3. Even after the EHCPLT is provisionally established, the Commission should negotiate with the fiber project applicants who are above the threshold to see if changes can be made to fit the fiber deployments within the budget. The Commission should begin these negotiations with the project with the lowest "per household" figures that is provisionally above the threshold, and the Commission should explore ways to reduce the proposed costs or narrow the project to areas where fiber could be installed to fit within the budget, assuming all other project proposals are adopted as presented. As part of the negotiation process, the Commission should identify all federal and state funding sources that are available to equip the same locations with fiber. If this negotiation process produces revisions that allow fiber to reach all target locations, the EHCPLT could be raised to a higher level based on the revised project costs.

Only after this evaluation and negotiation process should the Commission confirm the EHCPLT. This process will maximize the opportunities for fiber projects, consistent with the NOFO guideline to set the EHCPLT "as high as possible."[9]

Even if the Commission does not adopt this exact proposal, it should adopt something similar that will produce similar opportunities to encourage viable fiber projects. Regardless of what methodology the Commission selects, it should explain it in advance in a step-by-step way, not just focusing on how the EHCPLT will be applied, but also how it will be developed.

III. THE COMMISSION SHOULD NOT DECLARE DIGITAL SUBSCRIBER LINE CONNECTIONS AS CATEGORICALLY INCAPABLE OF DELIVERING 25/3 MBPS.

The Initial Staff Proposal recommends modifying the NTIA Challenge Model to create an irrebuttable presumption that a location is underserved when broadband service is delivered by digital subscriber line ("DSL"), even if the location is capable of receiving broadband service at 25/3 Mbps. The Initial Staff Proposal further recommends that a presumption should be made that a location is unserved if the reported speed at the location is 30/5 Mbps or lower (the Initial Staff Proposal does not indicate whether the presumption is rebuttable).[10]

The Commission should not adopt these proposed modifications to the NTIA Challenge Model. While the Small LECs agree that fiber is a preferred technology to support the delivery

[9] Initial Staff Proposal, Volume II at 41.
[10] Initial Staff Proposal, Volume I at 8.

of broadband services, the scarce funding represented by the BEAD program[11] should not be used to overbuild networks that are capable of delivering broadband services at speeds up to 100/20 Mbps, including DSL in certain circumstances. Furthermore, while the Initial Staff Proposal draws an unsupported conclusion that there are "low prospects" that carriers will maintain their copper networks,[12] such a conclusion is absolutely false for the Small LECs. These companies are committed to the deployment of broadband Internet access, whether that means deploying fiber in their networks or maintaining and upgrading their existing copper networks to deliver the Internet access speeds that regulators and customers demand. Instead of adopting the DSL presumptions set forth in the Initial Staff Proposal, which would increase the likelihood that BEAD funds are used to overbuild networks capable of providing advanced broadband services, the Commission should rely on the federal broadband maps as the starting point and base the qualification determination on the speeds indicated in those maps, irrespective of whether DSL is the technology delivering those speeds.

IV. THE LIST OF "ENFORCEABLE COMMITMENTS" THAT WOULD OBVIATE THE NEED FOR BEAD GRANTS SHOULD INCLUDE OBLIGATIONS UNDER FEDERAL PROGRAMS.

Section IV.B.7.a.ii. of the NOFO states that an Eligible Entity may not fund a project covering a location or area already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband. As required by the NOFO, Appendix 5 to Volume I ("Appendix 5") summarizes the programs leading to "Enforceable Commitments" that the Commission will review when removing locations from eligibility for BEAD funding to avoid duplication of funding.

However, Appendix 5 does not address the full range of programs that the Commission must consider to avoid funding duplication. At a minimum, the Commission should add the following three programs to Appendix 5:

1. <u>Federal Funding Account</u>. Pursuant to rules established in D. 22-04-055, the Commission is in the process of awarding $2 billion in grants for the deployment of broadband infrastructure to communities without access to Internet service at sufficient and reliable speeds.

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[11] The Initial Staff Proposal acknowledges the possibility that California's BEAD allocation will be fully committed simply by proposals seeking to deploy to unserved areas, leaving small likelihood that projects aimed at underserved areas will receive BEAD funding. *See* Initial Staff Proposal, Volume I at 9.
[12] Initial Staff Proposal, Volume I at 8-9.

2. USDA ReConnect Loan and Grant Program. The ReConnect Loan and Grant Program furnishes loans and grants to provide funds for the costs of construction, improvement, or acquisition of facilities and equipment needed to provide broadband service in eligible rural areas. The ReConnect Loan and Grant program requires recipients to commit to deploying broadband facilities to unserved or underserved locations. Incumbent local exchange carriers in California are recipients of these funds and have made these commitments.[13]

3. Enhanced Alternative Connect America Cost Model ("A-CAM"). The Federal Communications Commission ("FCC") administers federal universal service support, and one of the programs distributing a form of universal service support is A-CAM. In a decision released on August 30, 2023, the FCC announced a new track of the A-CAM program ("Enhanced A-CAM") whereby carriers electing to participate will receive a new amount of financial support provided that they commit to serve locations in their service areas with at least 100/20 Mbps.[14] Funding locations with BEAD awards which are already subject to an Enhanced A-CAM election would run afoul of the non-duplication standard set forth in the NOFO.

V. TO MAXIMIZE PARTICIPATION IN THE BEAD PROGRAM, THE COMMISSION SHOULD NOT ADOPT PRESCRIPTIVE PRICING REQUIREMENTS FOR GRANT RECIPIENTS.

The Initial Staff Proposal contains several different recommendations regarding the price charged for Internet access over facilities funded by BEAD. In one instance, the Initial Staff Proposal indicates that projects will be evaluated and receive a point allocation based on a commitment to pricing that a project proponent makes in its application.[15] The Small LECs do not oppose pricing as a factor in the evaluation of BEAD applications.

However, in another instance, the Initial Staff Proposal recommends that every BEAD recipient shall be required to offer a " . . . Low-Cost Broadband Service Option that results in no cost to ACP-eligible customers . . .."[16] The Small LECs oppose mandatory rate regulation pertaining to the delivery of Internet access as applied to the BEAD program for several reasons. First, the Small LECs generally offer wholesale Internet access services over their facilities through a tariff administered by the National Exchange Carrier Association ("NECA"). The

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[13] *See, e.g.,* D.23-05-007 (Volcano Telephone Company); D.23-06-034 (The Ponderosa Telephone Co.).
[14] See *Connect America Fund et al.*, *Report and Order, Notice of Proposed Rulemaking, and Notice of Inquiry*, WC Docket No. 10- 90 et al. (rel. August 30, 2023).
[15] *See* Initial Staff Proposal, Volume II at 31 (proposing a benchmark of $50 per month for symmetrical 1 Gigabit per second service and $30 for 100/20 Mbps service).
[16] *See* Initial Staff Proposal, Volume II at 193.

wholesale rates set by NECA in most cases mean that an Internet service provider purchasing the NECA-tariffed wholesale service from a Small LEC would lose money on each subscriber if the Internet rate were set to yield a zero rate after taking into account ACP funding. Rather than prescribing a specific per month rate, the Commission should allow companies to propose an economically feasible rate and factor that rate into the award process.

Second, the Commission should not leverage BEAD funding to expand its jurisdictional reach. The FCC has determined that ISPs should be free from "public-utility style" or "common carrier" regulations that could "stifle[] innovation and deter[] investment.[17] Applying a rate mandate on BEAD recipients would potentially subject the Commission to conflict preemption, and the Commission should not risk delaying the deployment of BEAD funding by injecting a rate regulation element into the BEAD eligibility determination.

Third, instead of over-stepping its regulatory jurisdiction by proposing to mandate a price for ISP service, the Commission should continue to investigate programs that can assist low-income families who need financial assistance to be able to subscribe to broadband service. The Commission has begun this process with its California LifeLine Pilot Programs.[18] Instead of applying an inflexible, regulatory price mandate across the board, the Commission should create programs that assist those truly in need.

Finally, if the Commission nonetheless adopts the rate mandate as part of the distribution of BEAD funding, the Commission should revise the Initial Staff Proposal to clearly articulate the reach of that mandate. Given the proposal's focus that the rate mandate achieves a zero price for ACP-eligible subscribers, the Commission should specify that the Low-Cost Broadband Service Option only applies to eligible low-income subscribers. Consistent with this determination, the Commission should rename the option as the "Low-Income Broadband Service Option."

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[17] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, *Declaratory Ruling, Report and Order*, FCC 17-166 (rel. Jan. 4, 2018) ("*Restoring Internet Freedom Order*") at ¶ 1, *petition for review granted in part on other grounds and denied in part by Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 35 (D.C. Cir. 2019) (upholding the FCC's classification of broadband Internet access as an "information service").

[18] *See* D.23-06-003.

VI. CONCLUSION.

The Small LECs support the objectives of the BEAD funding, but those limited funds should not be used to overbuild existing networks currently delivering advanced broadband services. To avoid this outcome, the Commission should modify the Initial Staff Proposal as outlined above before submitting it to the NTIA for approval.

Respectfully submitted this 27th day of November, 2023.

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