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NEVADA COUNTY
SUPERIOR COURTS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NEVADA

CEQUEL III COMMUNICATIONS I, LLC
dba CEBRIDGE CONNECTIONS,

CASE NO: 70226

Plaintiff and Petitioner,

DECISION

vs.

LOCAL AGENCY FORMATION
COMMISSION OF NEVADA COUNTY,

Defendants.

Plaintiff and Petitioner CEQUEL III Communications I, LLC dba Cebridge Connections ("Cebridge") filed its petition on October 18, 2004. It sought to invalidate the approval by respondent and defendant Local Agency Formation Commission of Nevada County ("LAFCo") of the application of special district Truckee Donner Public Utility District ("TDPUD" or "district") to provide broadband services to citizens within its jurisdictional limits. In addition to TDPUD, Eagle Broadband, Inc. ("Eagle") has appeared as an interested party.¹ Relief sought by Cebridge includes a reverse validation action under **Code of Civil Procedure Sections 860 and 863**, writ of mandate, and declaratory relief.

¹ For convenience, LAFCo, the district and Eagle may be collectively referred to as respondents.

1 Trial took place on November 7, 2005, at which time the court heard oral argument and
2 all issues were submitted. The court, after careful consideration of the pleadings, the briefs,
3 the entire administrative record, and oral arguments, denies the relief sought by Cebridge for
4 the reasons set out below.

5
6 **Rulings on Requests for Judicial Notice and Objections to Judicial
Notice and to Cebridge's Appendix to Administrative Record.**

7 Petitioner's request for judicial notice filed August 1, 2005 is granted as to Nos. 1, 2
8 and 5 and denied as to No. 3 and denied in part as to No. 4. No. 3 is not part of the
9 administrative record. No. 4 is granted as to page 5 as that was not a part of the administrative
10 record and should have been. The request is denied as to the remainder of No. 4 as pages 1-4
11 and 6 are part of the administrative record at 2449-2453.

12 TDPUD's August 31, 2005 request for judicial notice of application, indemnity
13 agreement and agreement to pay forms is denied.

14 TDPUD's August 31, 2005 objection to Cebridge's appendix to the administrative
15 record is denied. For convenience, the court has utilized both versions of the record, being
16 aware that Cebridge's version omits portions of the record. Every citation referred to in this
17 ruling has been reviewed.

18 LAFCo's September 1, 2005 request for judicial notice of applications from other
19 special districts is denied.

20 Cebridge's September 16, 2005 request for judicial notice is granted.

21 LAFCo's November 7, 2005 request for judicial notice is granted.

22
23 **The Statute of Limitations has not Run on Any Cause of Action Alleged.**

24 The application process for approval of TDPUD's provision of the new service of
25 broadband began when TDPUD submitted its application to LAFCo on October 22, 1999. AR
26 4914-4919. The process for approval was completed on October 14, 2004 when LAFCo finally
27 approved the application. AR 2449-2764.

1 Although Resolution 01-01 adopted on January 18, 2001 approved the provision of the
2 services requested, the approval was conditional. AR 1-5. Not only did the conditions include
3 preparation, submission and review of key elements of the proposal, such as the Master
4 Services Element (MSE) describing services to be provided, the Risk Mitigation Plan (RMP)
5 dealing with financial and subsidization issues, and franchise agreements, it required TDPUD
6 comply with the conditions by January 18, 2003 and to provide at least one of the approved
7 services by January 1, 2005. Ultimately the time to comply with the conditions was extended
8 to January, 2005 and the time to provide services was extended to January 27, 2008. Almost
9 five years passed from submission of the application until the October 14, 2004 approval.
10 Under these circumstances, it cannot be said that the January 18, 2001 approval date began the
11 running of the statute of limitations. Instead, the court finds that the statute of limitations
12 began to run on October 14, 2004. Since suit was filed on October 18, 2004, it was timely as
13 to all causes of action alleged.²

14
15 **The Proceeding was not a Change of Organization or Reorganization**
16 **Proceeding but the Statutes, Policies and Procedures, and**
Rules and Regulations in Effect on October 22, 1999 Apply.

17 Although the availability of the reverse validation action is primarily relevant to the
18 statute of limitations issue, the determination of whether the application sought a change of
19 organization or reorganization under the governing LAFCo statutes has relevance to other
20 issues.

21 A review of the Cortese-Knox Local Governmental Reorganization Act of 1985 and
22 the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, **Government**
23 **Code Sections 56000 et seq.**, shows that this proceeding does not fit within the narrow
24 definitions "change of organization" or "reorganization" contained in the definition section of
25 the Acts.³ Instead, this proceeding seeks approval of a service to be provided by a special
26 district, as "service" is defined in **Section 56074**. Provision of service is governed by

27
28 ² LAFCo and the district conceded at the hearing that the writ of mandate cause of action is available. RT 16:15-16; 47:20-24.

³ See, for instance, **Government Code Sections 56021 and 56073**.

1 regulations enacted pursuant to **Sections 56450 et seq.** under the 1985 Act and **Sections 56820**
2 **et seq.** under the 2000 Act.

3 If this proceeding is not within the narrow definitions of change of organization or
4 reorganization, then **Section 56103** requiring a validation action to be brought does not apply.
5 The court so concludes. Therefore, the validation cause of action is dismissed and the matter
6 proceeds on the writ of mandate cause of action.

7 In its opposition to LAFCo's November 7, 2005 request for judicial notice, Cebridge
8 appears to reverse its position that the proceeding below was a change of organization or
9 reorganization and now argues that under **Section 56101** as amended in 2000, the Cortese-
10 Knox-Hertzberg Local Government Act of 2000 applies and not the Cortese-Knox Local
11 Government Act of 1985. Hence, it argues that the rules and regulations promulgated under
12 the 1985 Act do not apply and since LAFCo applied the 1985 Act, the entire approval process
13 is invalid, irrespective of the issues raised in Cebridge's petition.

14 This argument is without merit. First, Cebridge did not raise this contention in its
15 papers or oral argument. In fact, this contention contradicts Cebridge's position in its briefs
16 and argument. Second, although **Section 56101** states the 1985 Act shall apply to applications
17 for a change or organization and reorganization filed prior to January 1, 2001, it does not
18 preclude the application of the 1985 Act to applications for other approvals filed prior to
19 January 1, 2001. Moreover, here we are faced with the unique situation where the provision of
20 service was approved prior to the 2000 enactment, albeit subject to substantial conditions.
21 Third, even if the 2000 Act applies, it is concluded that LAFCo complied with its provisions
22 regarding new services.⁴

23 Based on the above, the statutes, policies and procedures, and rules and regulations in
24 effect at the time TDPUD's application was received by LAFCo, e.g. October 22, 1999, have
25 been applied.

26 ///

27 ///

28 _____
⁴ See Government Code Sections 56824.12 and amended Section 56653.

**TDPUD is Authorized under Public Utility Code Section 16461
to Provide Broadband Services.**

Although the parties have provided numerous California, out-of-state, and federal cases as guidance, no case binding on this court has determined that a California public utility district may or may not provide broadband services. This is a case of first impression.

The **Public Utilities Code, Sections 15501 et seq.**, known as the "Public Utility District Act," provides the mechanism for creation and regulation of local public utility districts. **Section 16461** sets out the limits of a public utility district's authority to provide services and works. It provides:

"A district may acquire, construct, own, operate, control, or use, within or without or partly within and partly without the district, works for supplying its inhabitants with light, water, power, heat, transportation, telephone service, *or other means of communication*, or means for the disposition of garbage, sewage, or refuse matter, and may do all things necessary or convenient to the full exercise of the powers granted in this article." (Italics added.)

Cebridge argues that **Section 16463** contains exceptions to the services described in **Section 16461**; hence, the types of services or projects allowed cannot be expanded beyond the specific ones listed in **Section 16463**. The court disagrees. It concludes that the projects listed in **Section 16463** do not limit **Section 16461**. Instead, "other means of communication" authorizes a public utility district to provide non-enumerated services within its definition without reference to **Section 14643**.

Cebridge also argues that the enactment authorizing Kirkwood Meadows Public Utility District to operate cable television supports its contention that **Sections 16461** and **16463** do not authorize TDPUD to provide broadband services. The court disagrees. While it has been shown that the Kirkwood enactment was intended to clarify the district's authority to provide cable television, that does not lead to the conclusion that local public utility districts do not have the power to provide broadband absent such enactment.

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1 The respondents rely on 40 Ops. Ca. Atty. Gen. 25 (1962) and 54 Ops. Cal. Atty. Gen.
2 135 (1971). These opinions, while helpful, are not binding on this court, and do not answer
3 the precise question posed.

4 Cebridge relies on numerous California, out-of-state and federal authorities for the
5 proposition that broadband is not a utility service and does not come within the meaning of
6 "other means of communication." While the court has read and considered all of the
7 authorities cited, they do not answer the precise question posed.⁵ To the contrary, the cases
8 relied upon by Cebridge have one thing in common: they involve statutes or regulations that
9 do not apply to this case. While they are generally helpful in defining the issue, they do not
10 answer it.

11 **California Public Utility Code Section 10001** defines a utility as:

12 "...the supply of a municipal corporation alone or together with its inhabitants,
13 or any portion thereof, with water, light, heat, power, sewage collection,
14 treatment, or disposal for sanitary or drainage purposes, transportation of
persons or property, *means of communication, or means of promoting the*
public convenience." (Italics added.)

15 Although this definition applies to municipal corporations, it is more helpful in
16 interpreting **Section 14641** than state and federal authorities interpreting unrelated statutes.

17 There is no question that TDPUD's powers are limited to powers that are expressly
18 granted. **PUC Section 15701**. However, there is also no question that **Section 16461**
19 expressly grants TDPUD the power to provide "other means of communication."

20 The court has found one case interpreting the Act when it was originally passed in
21 1921, **In re Bonds of Orosi Public Utility District** (1925) 196 Cal. 43.⁶ Holding the Act
22 constitutional, the California Supreme Court stated at page 48 that a district formed under the
23 Act had the power to acquire, hold and dispose of personal and real property necessary to the:

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25
26 ⁵ These include but are not limited to **Television Transmission, Inc. v. Public Utilities Commission** (1956) 47
Cal.2d 82; **Orange County Cable Communications Co. v. San Clemente** (1976) 59 Cal.App.3d 165; **Cantu v.**
27 **P.G.&E.** (1987) 189 Cal.App.3d 160; **Turlock Irrigation District v. Hetrick** (1999) 71 Cal.App.4th
948; **Greening v. Johnson** (1997) 53 Cal.App.4th 1223; **Nixon v. Missouri Municipal League** (2004) 541 U.S.
125; **National Cable & Telecommunications Assoc. v. Brand X Internet Services** (2005) 125 S.Ct. 2688.

28 ⁶ This case was not cited by the parties, but they were alerted to the case by the court prior to oral argument and
argued the case at the hearing.

1 "...full and continued exercise of its power, to acquire, construct, own, operate,
2 control, or use works for supplying the inhabitants of the district with light,
3 water, power, heat, transportation, telephone services, or other means of
4 communication, or means for the disposition of garbage, sewage or refuse
5 matter, and to do all things necessary or convenient to the full exercise of the
6 powers granted by the act."

7 The appellant contended that the purpose for which the District in that case was formed
8 was not municipal and the district did not possess the essential characteristics of a municipal
9 corporation. The court stated that while the argument would apply to special assessment
10 districts, the legislature has the power to create districts by general law that are not vested with
11 all government powers but with those powers the Legislature deems appropriate.

12 With this power in mind, the court then looked to the districts contemplated by the Act.
13 It first cited the 1911 amendment to the Constitution, Art. XI, Section 19.⁷ Article XI, Section
14 19 applied to municipal corporations and also included the language "telephone service, or
15 other means of communication." At page 55 the court referred to legislative materials sent to
16 the voters explaining why the amendment was sought. The materials stated the conditions
17 which prevailed with regard to the operation of public utilities in 1879 had materially changed
18 and an entirely new situation existed. The statement continued:

19 "The proposed amendment is designed to provide for conditions as they now
20 are, *and they will doubtless continue to be in the future.*" (Emphasis added.)

21 The remedy to a lackluster response to the public need was "to encourage the furnishing of
22 these public necessities by municipal corporations themselves."

23 The Supreme Court went on to state that in enacting the Public Utility District Act, the
24 legislature intended to benefit persons living in unincorporated areas to the same extent as
25 persons living within the city limits "through the operation of the same kind of utilities."⁸ The
26 court stated that legislative intent was shown by following so closely the same language of the
27 1911 constitutional amendment that applied to municipalities. The court was convinced that

28 ⁷ Article XI, Section 19 was repealed June 2, 1970. Article XI, Section 9 was adopted June 2, 1970. Hence, the
different references in **Orosi** and the attorney general opinions. The current language in Section 9 provides a
municipality may provide "light, water, power, heat, transportation, or means of communication."

⁸ *Ibid*, at pages 55-56.

1 the legislative intent was to create public corporations of a quasi-municipal character with the
2 power to carry on the particular functions committed to them. Districts such as those created
3 under the Act are for municipal purposes.⁹

4 Based on the legislative materials supporting the constitutional amendment, the
5 Supreme Court's statements in **Orosi** concerning the constitutional amendment and the Act,
6 and the language of both, it is concluded that while the District is limited to powers
7 enumerated in the Act, those powers include providing means of communication similar to
8 those a municipality can provide. Moreover, it is concluded that the legislature contemplated
9 the provision of services that were not in existence at the time the constitutional amendment
10 and the Act were enacted. Otherwise, the "other means of communication" language would be
11 rendered meaningless. If the Legislature had intended to limit services to those known at the
12 time of the enactments, it would not have included the language.

13 Finally, a reasonable interpretation of the phrase "other means of communication" in
14 **Section 16461** in relation to the rest of the section is that the language does not refer back to
15 the enumerated services of light, water, power, heat and transportation because they are not
16 commonly understood as a means of communication, but does refer to a means of
17 communication other than telephone service, that is, in addition to telephone services. **Section**
18 **16461** allows the district to acquire, et cetera, "works for supplying...other means of
19 communication." That would include the infrastructure and methods of supplying a
20 communication source other than a telephone service.

21 Although the two California attorney general opinions are not directly on point, they
22 support this conclusion.

23 40 Ops.Ca.Atty.Gen. 25 (1962) opined that the "other means of communication"
24 language in **Section 16461** authorized a public utility district to construct and operate a
25

26 ⁹ Cf. **Turlock Irrigation District v. PG&E** (1999) 71 Cal.App.4th 948, cited by petitioner, holding a district
27 could not expand its services to provide natural gas on the ground it was a municipal corporation as its enabling act
28 did not authorize the district to provide those services. Petitioner also cites **Crawford v. Imperial Irr. Dist.**
(1927) 200 Cal. 318 and **People ex rel. City of Down v. Downey County Water Dist.** (1962) 202 Cal.App.2d
786. Each involved the limited powers of water districts, governed by a different enabling statute. In the within
case, the enabling provisions contain the same language for both municipal and district entities.

1 translator television installation to rebroadcast television signals. In so concluding, it looked
2 to the similar language in Article XI, Section 19 applying to municipalities. The opinion cites
3 **In re Cattalini** (1946) 72 Cal.App.2d 662 for a definition of "communication" and concludes
4 that television is a means of mass communication falling within the broad definition of "other
5 means of communication."

6 54 Ops.Ca.Atty.Gen. 135 (1971) opined that cable television is a public work to furnish
7 citizens with "means of communication" within the meaning of Article XI, Section 19. **U.S.**
8 **v. Southwestern Cable Co.** (1968) 88 S.Ct. 1994 is cited for the proposition that cable
9 television involves communications under the federal Communications Act of 1934. The
10 opinion also concludes that cable television fits within the definition of utility under **Public**
11 **Utility Code Section 10001.**

12 There are four types of services approved in Resolution 01-01: cable television, internet
13 access, data transfer and telephone service transmitted via optical fiber, co-axial cable, and
14 intra-system wireless links. The court concludes that each of those services are "means of
15 communication" within the meaning of **Section 16461** and therefore LAFCo properly
16 approved the provision of such services by TDPUD to citizens within its service area.

17 **LAFCo Did Not Violate Its Statutory Duties in Approving the Project.**

18 The standard for review on this issue is prejudicial abuse of discretion. Prejudicial
19 abuse of discretion is established "if the court finds that the determination or decision is not
20 supported by substantial evidence in light of the whole record." **Government Code Section**
21 **56107; Morro Hills Com. Services District v. Board of Supervisors** (1978) 78 Cal.App.3d
22 765, 779. The substantial evidence rule requires the trial court to start with the presumption
23 that the record contains evidence to sustain every finding. Petitioner bears the burden to show
24 there is no substantial evidence whatsoever to support the findings. **Pescosolido v. Smith**
25 (1983) 142 Cal.App.3d 964, 970. The trial court does not rule on the wisdom of LAFCo's
26 quasi-legislative decision. It does not weigh the evidence or substitute its judgment. Instead,
27 it confines itself to a determination whether LAFCo's decision was arbitrary, capricious, or
28

1 entirely lacking in evidentiary support. **Shapell Industries, Inc. v. Governing Board** (1991)
2 1 Cal.App.4th 218, 230-231.

3 Cebridge claims LAFCo violated its statutory duties and its own policies in four major
4 areas: the indemnity agreement, need, subsidization and fiscal soundness.¹⁰

5
6 **1. LAFCo Did Not Violate Its Duties by Entering into the Indemnity Agreement.**

7 Cebridge argues the indemnity agreement entered into between LAFCo and TDPUD
8 whereby the district indemnifies LAFCo robbed LAFCo of its independence contrary to Policy
9 IB4(b). Petitioner recognizes these agreements have been upheld when a private entity
10 indemnifies a public entity¹¹ but claims indemnity agreements where a public entity
11 indemnifies another public entity are invalid. It cites no authority for this conclusion nor does
12 it provide cogent reasoning on the issue. Respondents argue indemnity clauses are contained
13 in every LAFCo application and not illegal. See AR 2473. In its reply, Cebridge points out
14 that the subject indemnity agreement is not the standard form, but a specially drafted
15 indemnity agreement.

16 The indemnity agreement in this case recognizes there was an issue concerning
17 TDPUD's legal authority to provide the services for which it sought approval. It requires
18 TDPUD to indemnify and hold LAFCo harmless for damages incurred, including legal fees,
19 due to legal proceedings against LAFCo in connection with the application. AR 4276.

20 Petitioner claims **No Oil, Inc. v. City of Los Angeles**, *supra*, 196 Cal.App.3d at 250
21 distinguishes indemnification by a public entity. That case upheld an indemnity agreement
22 whereby an oil drilling company indemnified the city for landslide damage to third parties
23 resulting from its drilling. It held the agreement did not constitute a violation of **Civil Code**
24 **Sections 1668 or 2782(b)**. The language cited by petitioner is not from **No Oil, Inc.** but from
25 **County of San Joaquin v. Stockton Swim Club**, *supra*, 42 Cal.App.3d 968. Not only is the

26
27 ¹⁰ Petitioner cites Government Code Sections 56301, 56375(a)(i) and (j), and 56841(a)(c)(d) and LAFCo's
policies IC3, VB 6 and 8, VC1 and 3 in its OB at pages 22-23.

28 ¹¹ Citing **Topanaga Association for a Scenic Community v. City of Los Angeles** (1989) 214 Cal.App.3d 1348;
County of San Joaquin v. Stockton Swim Club (1974) 42 Cal.App.3d 968; **No Oil, Inc. v. City of Los**
Angeles (1987) 196 Cal.App.3d 223.

1 language quoted from **Stockton Swim Club** dicta, but also the case did not question the
2 legality of indemnity agreements between public entities. Instead, it questioned the propriety
3 of an agreement that would relieve a public entity of liability to members of the public. As in
4 the **Stockton Swim Club** case, the indemnity agreement in question does not exculpate
5 LAFCo from liability to third parties for its decision but merely requires TDPUD to indemnify
6 it if members of the public assert claims against it.

7 See also 59 Ops.Cal.Atty.Gen. 665 (1976), cited by TDPUD, opining that it was legal
8 for a county to enter into an indemnity agreement with the State of California, stating among
9 other things, that such an agreement would be upheld if it serves a public purpose.

10 Nor has Cebridge shown a prejudicial abuse of discretion.

11 It cites AR 5155:6-10 as showing LAFCo accepted the agreement as a condition of
12 approval. The record merely indicates that LAFCo's attorney recommended the agreement be
13 approved so LAFCo could approve of the application. While it does appear that entry into the
14 application was conditional, that does not show LAFCo was robbed of its independence or that
15 the condition was a prejudicial abuse of discretion. In fact, the cases relied upon by Cebridge,
16 including **Stockton Swim Club**, also involved approval conditioned upon entry into indemnity
17 agreements. Other portions of the record cited are AR 1927:3-16, 4275, 4428, and 5136-5137.
18 These citations merely confirm entry into an indemnification agreement based on the
19 ambiguity concerning TDPUD's authority to provide the services in question.

20 Based on the above, it is concluded that Cebridge has failed to meet its burden of proof
21 showing a prejudicial abuse of discretion on the issue of the indemnification agreement.

22 **2. LAFCo' Made Sufficient Findings of Need for Broadband Services.**

23 Cebridge argues LAFCo made an inadequate finding of need, claiming need was
24 determined in 2001 and the finding was not updated in 2004. It argues there were more
25 service providers in 2004 and there was no need for entry into the market by TDPUD at that
26 time. Respondents argue that need was discussed in 2004 as well as 2001.

27 Cebridge contends the following LAFCo policies were violated: VB1-VB4. It asserts
28 that LAFCo applied its procedures for formation of districts to this application, referring to

1 Policy VC1. That provision in the Exhibit 1 policy and procedures states formation rules are
2 used for consolidations and mergers. That provision in the Exhibit 2 policy and procedures
3 states formation standards will be applied to the provision of new services. The November 16,
4 2000 staff report refers to both the 1985 and 2000 Acts and states it is utilizing the formation
5 rules and that **Government Code Section 56653(b)** criteria applies. AR 4420. The October
6 14, 2004 certification of completion confirms formation rules were utilized. AR 2714. The
7 November 16, 2000 report also refers to the LAFCo policies applied. AR 4422. Although
8 specific numbered paragraphs are not set out, the report refers to the same policies listed by
9 Cebridge, e.g., unmet needs (VB1), sphere of influence (VB2), consistency (VB3) and
10 conflicts (VB4).¹²

11 Cebridge does not show how LAFCo violated each of the listed specific policies with
12 reference to the record. Instead, its argument focuses on lack of evidence on the issue of
13 "need."

14 It is concluded that the two policies most relevant to this discussion are unmet needs
15 and conflicts. Policy VB1 entitled "Unmet Needs" states:

16 "LAFCo will encourage special district formations in areas that demonstrate a
17 need for such services and where no existing agency can adequately or
efficiently provide such services."

18 Policy VB4 entitled "Conflicts Not Allowed" precludes approval of district formations
19 when the Master Service Elements conflict with master service elements of other agencies
20 "unless higher quality, more efficient service provision will occur as determined under Section
21 IV.B above." Section IV.B states LAFCo is to determine the most efficient overall service
22 provider, not the affected agencies.

23 Although not addressed by the parties, it would seem that given definitions contained
24 in both the 1985 and 2000 Acts and the context of the policy and procedures, the words
25 "agency" or "agencies" refer to public agencies and not private entities such as Cebridge, SBC
26 and other service providers. If that interpretation is correct, then LAFCo had to consider under
27

28 ¹² These are the policies contained in Cebridge's August 1, 2005 RJN, Exhibit 1; similar policies are contained in Exhibit 2, at VB in addition to other portions of Exhibit 2.

1 the 1985 Act and the applicable policies and procedures whether there was a "need for such
2 services." That does not include a specific finding of need or findings that no existing private
3 entity "can adequately or efficiently provide such services" or a private entity can provide a
4 "higher quality, more efficient service." At most, Policies VB2 and VB4 require LAFCo to
5 consider "unmet needs."

6 In sections of their briefs other than the "needs" section, the parties also refer to Policy
7 IC3, stating one of the legislature's major policy elements requires LAFCo to "exercise its
8 authority to ensure that affected populations received adequate, efficient and effective
9 governmental services."

10 Whether the criteria is "needs" or "unmet needs" with or without the additional criteria
11 of "adequate, efficient and effective governmental services," there is substantial evidence
12 supporting the finding that the citizens within TDPUD's jurisdiction needed the broadband
13 services in question. Cebridge has not met its burden of proof showing a lack of substantial
14 evidence. No showing has been made that LAFCo's decision constitutes a prejudicial abuse of
15 discretion on the need issue.

16 **a. 2001 Approval.**

17 While Cebridge argues LAFCo did not consider need in 2004 and should have, and
18 respondents argue the need issue was decided in 2001 and LAFCo was not required to address
19 it in 2004, the record shows need was addressed in 2001 and 2004. In both instances, staff and
20 the ad hoc committee considered need, pre-hearing evidence and hearing evidence on need was
21 addressed, and LAFCo made findings on need.

22 The January 18, 2001 staff report refers to and incorporates the November 16, 2000
23 staff report. AR 4419. The 2000 staff report indicates the TDPUD plan is to install fiber optic
24 cable to its electric poles with coaxial cable distribution lines installed to residences and
25 businesses from the fiber optic lines. It states fiber optic lines can accommodate a very wide
26 band of data and can support an entire range of specific communications services. Specific
27 services to be provided are: data transfer services, cable television service, internet access
28 service and local telephone service. AR 4419. It indicates fiber optics technology is not

1 currently available in the community and sets out the criteria to be considered pursuant to
2 **Government Code Section 56653(b)**. Issues of need are covered in Paragraphs 2 and 4. AR
3 4423.

4 In a November 2, 2000 letter from TDPUD to LAFCo, it is stated that Truckee lacked
5 access to advanced communications and that neither USA Media (Cebridge's predecessor) nor
6 Pacific Bell (SBC) were supplying advanced communications. At the time, USA Media was
7 deploying a very limited enhancement to its cable television system and would offer only
8 limited internet service through another provider. It indicated SBC was investing in larger
9 markets and could invest in Truckee but not in the foreseeable future. AR 4430.

10 The 2001 report, commencing at AR 4277, addressed need under the "public benefit"
11 heading at AR4280. It stated:

12 "The fiber optic infrastructure will provide capabilities either not currently
13 available or not planned by existing service providers within the near future.
14 Broadband services enhance retail opportunities for commercial businesses,
15 strengthen communication and data-sharing capabilities between public
agencies, and can also improve educational and entertainment opportunities for
members of the community."

16 At the January 18, 2001 hearing, a spokesman for USA Media attacked the project.
17 The commissioners then considered the issue of whether or not the requested services were
18 already available in the Truckee area. One commissioner indicated some services were
19 available and some were not. Another commissioner indicated one of the criteria to be
20 considered was whether the services would benefit the community. AR 4272.

21 A Pacific Bell spokesman questioned the propriety of public agency competition with
22 private entities and indicating Pacific Bell "can" provide many of the services. A
23 commissioner responded that given the scattered locations where services are required in the
24 community, private entities weren't vigorously pursuing efforts to provide wideband, high-
25 speed telecommunications services; he suggested TDPUD was attempting to fill a vacuum left
26 by the private sector. Pacific Bell's response was to state the services could be provided if
27 users were willing to pay the costs. AR 4272.

1 Numerous members of the public spoke on behalf of themselves and others in support
2 of the project, some indicating dissatisfaction with services available from USA Media and
3 Pacific Bell. Other members of the public opposed the project. Several USA Media
4 employees spoke in opposition to the project. AR 4272-4273; 5211-5271.

5 The verbatim record of the January 18, 2001 hearing shows the subcommittee and
6 hence the LAFCO commissioners considered the fact that "broadband have-nots" exist because
7 their locations are not deemed a priority by service providers. It was stated that lack of
8 broadband capability limits operations of professionals, retail establishments, service
9 companies and corporations, concluding that the full scope of broadband communication may
10 be essential to a strong economic future for the community. AR 5171. The subcommittee and
11 hence the commission considered current availability of services. It was recognized that USA
12 Media had download internet capabilities and television services, but there was no wideband
13 area network for data transfer services. Also DSL was limited because it only extended a
14 couple miles, leaving citizens outside its range without DSL. A member of the subcommittee
15 concluded that although the issue was arguable, there was room for more current capabilities
16 and advanced technology. AR 5188.

17 The Vectren Communications Study submitted September 29, 2000 supported the 2001
18 decision. AR 4433-4528. Among other things, the study discusses the Macro-Environmental
19 Situation at Paragraph 5.2, including the over market system, video, voice and data (AR 4496-
20 4502) and the Micro-Environmental Situation at Paragraph 5.3 (AR 4502-4503). The study
21 conducted both residential and business surveys covering telephone service, personal
22 computers and internet service, and television and cable television service, including the
23 likelihood of switching services to TDPUD. AR 4444-4486. In the business survey section, a
24 list of telecommunications needs not being met was set out. This list included but was not
25 limited to: high speed (TI or DSL), inter-office connectivity, integration of services,
26 bandwidth/economic bandwidth, a variety of choices, telephone services offered over the
27 internet, and service offerings available to everyone. AR 4472. The business community was
28 very positive about TDPUD providing the needed services. AR 4473. Although the residential

1 survey is not absolutely clear, it appears there was no DSL at the time, only dial up. AR 4449.
2 There was high satisfaction with TDPUD and low satisfaction with the cable television
3 provider. There was relatively high satisfaction with the telephone service and internet service
4 providers. AR 4454. 65% of cable television subscribers indicated they would be somewhat
5 likely/likely/very likely to switch their cable television provider if the price remained the same
6 but the service was better and 49% indicated the same for internet services. AR 4456. 61%
7 stated they were likely to purchase cable television and internet services from one provider.
8 AR 4457. Residents likely to purchase cable television, local telephone and internet from
9 TDPUD ranged from 50-55%. AR 4458.

10 **b. 2004 Approval.**

11 Cebridge points to USA Media's president's comments at June and July, 2004 meetings
12 wherein he stated the marketplace had changed since 2001 and indicating USA Media had
13 completed its "re-build" and was providing hybrid fiber-coax internet service to 1000
14 customers in the Town of Truckee and cable television to 7000 subscribers. He noted SBC
15 provided bundled video service with DSL. He indicating they were marketing a fully two-way
16 interactive, high-speed, heavy-download-capability service to businesses. R 240-243.

17 Through written comments and at the meetings occurring on August 11, 2004,
18 September 16, 2004 and October 14, 2004, need was again addressed.

19 Written comments from the public and other interested parties can be found out AR
20 2074-2076, 2349-2418 (see in particular 2352, 2360, 2376, 2402), and 2423-2431. Public
21 comments at the meetings can be found at AR 1961-1984. Although not all dealt with need
22 and not all were favorable to the project, there was substantial evidence presented on the issue
23 of need.

24 TDPUD spokesman Jim Mass pointed out in the August 11, 2004 meeting that the
25 DSL now provided by SBC only reached customers within three miles from its switch. He
26 also addressed need for the high speed transmittal of data provided by broadband. AR 1950.
27
28

1 Both Cebridge and SBC spoke at the meetings. Cebridge also provided information in
2 writing prior to the meeting. Both Cebridge and SBC claimed need had diminished since
3 LAFCo approved the plan in 2001.

4 Specifically, at the August 11, 2004 meeting, one of Cebridge's representatives stated
5 they were going to supply broadband "as early as next week" and it was "ready to make a
6 substantial investment in the community." AR 1955. He did not go into specifics. At the
7 August 11, 2004 hearing and in September 23, 2004 correspondence Cebridge claimed it
8 provided about 10% of the market with high speed internet to 1200 out of 12,000 homes. It
9 stated it had 58% of the cable television market in Truckee and would be investing \$1.0
10 million to enhance that service. Other planned services were detailed. AR 1955, 2504.¹³

11 A speaker from SBC stated DSL was not available at the time of the 2001 approval but
12 now 74% of the population had access to it from SBC. As to the remaining 26% of the
13 population who did not have access to DSL, SBC would "continue to look at options." The
14 representative did not state what those specific options were. He indicated SBC's partnership
15 with Echo Star Dish TV allowed for bundling of television, telephone and internet services.
16 The SBC representative stated its parent company was going to begin investing in fiber-to-the-
17 home in 2005 but could not predict when Truckee would be included in the plan. AR 2233-
18 2234. SBC said it and Cebridge were in competition and claimed the service proposed by the
19 district would be duplicative.

20 The Fiber to User Business Plan, at AR 1668 et seq., states the federal
21 Telecommunications Act of 1996 encourages communities to provide broadband.¹⁴ AR 1329.
22 The plan indicates Cebridge uses digital converter boxes with microwave transmission of local
23 stations. This results in poor television reception with frequent outages and poor service. It

24
25 ¹³ Cebridge indicates in footnote 32, page 28, of its opening brief, that it currently provides cable television and
broadband service to 12,000 homes. This is not a part of the record and does not represent the status in 2001 or
2004. Footnote 32 has not been considered.

26 ¹⁴ In its reply, Cebridge objects to TDPUD's reference to the business plan on this issue, indicating it is not
evidence. The court has reviewed and considered each reference to the administrative record made by the parties
27 as each was available as a basis for LAFCo's exercise of its discretion. There are two July 30, 2004 business
plans in the record, one commencing at AR 1668 and one commencing at AR 1326. It appears that the one
28 commencing at AR 1668 is the final version, although the parties cite to the earlier one. The court follows the
parties' citations.

1 indicates there are two direct satellite-to-home services. These are unavailable to all customers
2 and local programming, including weather forecasts, are not offered in all cases. AR 1335.
3 The plan also discusses internet services. Reference is made to existing dial-up and DSL
4 services. The plan recognizes that Cebridge now offers internet services. It refers to the
5 slowness of dial-up and the limitation of customers' access to DSL. It also indicates that there
6 can be no assurance that the district's service will be faster than Cebridge's or SBC's service
7 but notes the district's dedicated bandwidth will be provided both upstream and downstream.
8 AR 1336. The Vectren study is summarized at AR 1347-1348.

9 TDPUD refers to the August 11, 2004 report at AR 1996-2002. However, that report
10 indicates the provision of services would not be considered in light of the 2001 decision. The
11 report does not specifically address need for the services. It also refers to an October 7, 2004
12 LAFCo committee report wherein the prior decision was reviewed. Reference is made to the
13 finding that the proposed range of broadband telecommunications services to be unavailable to
14 most of the district's customers and the private entities providing services were inadequate or
15 unreliable. AR 2628.

16 **c. Conclusion re Need.**

17 At trial, Cebridge was asked to describe what evidence should have been included to
18 support a finding of need. It stated there were two categories of evidence that should have
19 been considered. One category was evidence that the services were essential, e.g. a utility
20 service. That has been addressed in the authority section of this ruling. The second category
21 was the availability of services from other providers. Cebridge conceded there were very few
22 services available in 2001, but argued Cebridge had since made cable and high speed internet
23 available to 12,000 homes. It also referred to SBC providing DSL to 74% of the community.
24 It concluded there were three providers in the area including SBC, wireless and satellite in
25 video services. It stated none of that was taken into account. RT 50:23-52:13.

26 LAFCo pointed out in response that Cebridge's current level of services is not relevant
27 to the earlier decisions and probably was in response to LAFCo's decision. RT 56:11-21. It
28 pointed out that at the time the decisions were made, the district was making a commitment to

1 provide a qualitatively faster form of broadband than Cebridge or SBC was offering in 2004
2 and to provide those services to all citizens. RT 56:22-57:15.

3 The district argued Cebridge was ignoring the evidence presented in 2004 concerning
4 the availability of high speed internet at that time and Cebridge belittled the amount of public
5 comment made on the issue in 2004. RT 61:10-62:4. It also referred to AR 2472, a portion of
6 the October 14, 2004 committee report. RT 62:5-12. This portion of the report addresses
7 fiscal solvency, although it does refer to public support for the district and the new service.

8 At the time of its 2001 decision, LAFCo was not required by any statute, policy,
9 procedure or regulation to make a specific finding of need although Policy VBI addressing
10 unmet needs stated LAFCo was to encourage special district formations in areas that
11 demonstrate a need.

12 In 2001 LAFCo applied **Government Code Section 56653(b)** then in effect. AR 4420.
13 **Subdivision (b)** required that a plan for providing services include all of the following
14 information: (1) an enumeration and description of the services to be extended; (2) the level
15 and range of those services; (3) an indication of when those services could feasibly be
16 extended to the affected area; (4) an indication of improvements or upgrading; and (5) an
17 indication of how those services will be financed.¹⁵ Factors (1) - (3) could be said to relate to
18 need. Each of these issues was addressed in 2001 as well as 2004.

19 A review of the January 18, 2001 hearing transcript shows LAFCo reviewed and
20 considered both its subcommittee's report and recommendations (AR 4332-4334) and the
21 report and recommendation of staff (AR 4275-4317).

22 In 2004, LAFCO also addressed unmet needs in its certificate of compliance under
23 findings and determinations. It determined under Policy IIL that need for services was
24 consistent, indicating need had been determined by Resolution 01-01 but nevertheless the
25 subject area was already urbanized. AR 2716. It determined under Policy VB1 that unmet
26 needs was consistent, indicating the level and scope of services was not provided as of 2001
27 nor at the present time. AR 2717.

28

¹⁵ The 2000 amendment to **Section 56653(b)** requires the same information.

1 The court is unaware of any authority that precludes competition between private and
2 public entities or precludes a special district from providing services where a private entity is
3 providing some services but not all or where existing services provided by a private entity are
4 not of the quality the special district can provide.

5 There is evidence in the record that there were gaps in services available to all citizens
6 and businesses within the district, especially in regard to broadband internet and related
7 services. There was evidence that many citizens were not satisfied with the level of service
8 Cebridge provided to cable television customers. At the time of the 2001 decision, neither
9 Cebridge nor SBC was providing broadband internet services. There was evidence that SBC,
10 while providing DSL in 2004, only reached 74% of the population. It was undisputed that
11 DSL could not reach any citizens who resided more than 3 miles from SBC's switching station.
12 Although a SBC representative indicated at the 2004 meeting SBC desired to reach a greater
13 share of the population, he did not present a concrete plan on how SBC would achieve that.

14 There was evidence that many members of the community supported the district's
15 proposal. There was evidence that not all members of the public were dissatisfied with
16 existing services and that some members of the public did not support the district's proposal.
17 However, it is obvious that LAFCo can exercise its discretion in favor of a project even though
18 it is not supported by all citizens. There was substantial evidence that the services were
19 needed and that the services would benefit members of the public. Cebridge has not met its
20 burden of showing that substantial evidence does not support LAFCo's decision on the issue of
21 need. There is no showing that the decision was arbitrary or capricious.

22 **3. LAFCo Did Not Fail to Consider Past and Future Subsidization.**

23 Cebridge argues that LAFCo authorized subsidization in three areas in violation of
24 **Public Utility Code Section 16467**. These are: acceptance of the indemnification agreement,
25 lease of TDPUD's fiber run at a fraction of its value, and allowing TDPUD to spend
26 \$2,000,000 to finance start-up costs of the broadband services.

27 ///

1 Cebridge refers to Policy VC3 providing LAFCo will not approve a proposal for a new
2 service if it is reasonably likely that existing ratepayers and/or taxpayers will have to subsidize
3 the new services. It claims LAFCO failed to determine whether it was reasonably likely that
4 ratepayers would have to subsidize the broadband services.

5 **Section 16467** provides in part that only revenue producing utilities shall be acquired
6 and "so far as possible" the board is to fix such charges for commodities of service as will pay
7 all expenses or that apportioned for a particular utility. It states the intent of the section is that
8 each public utility owned by a district shall be self-sustaining.

9 To the extent Cebridge is claiming LAFCo failed to consider the subsidization issue,
10 that argument is without merit. The record is so replete with references to LAFCo's
11 consideration of subsidization that there is no need to set out each and every citation. A few
12 will suffice.

13 Resolution 01-01 provides that "ratepayers will not be required to subsidize the new
14 services." AR 1. The certificate of compliance prohibits the district from directly or indirectly
15 subsidizing the new services with electrical and water resources. AR 2713. Resolution 01-01
16 required the district to prepare a risk mitigation plan (RMP) dealing with this issue. The RMP
17 ultimately adopted the requirement that any installment payments due for the broadband
18 services be paid from broadband revenues only and not from other assets. AR 1470, 1473.
19 The RMP contained an opinion from district bond counsel that current ratepayers would be
20 protected. His opinion is part of the RMP. AR 1482-1483. LAFCo retained independent
21 bond counsel to determine if ratepayers were protected. AR 1998, 2000, 2030-2031.
22 Independent counsel's opinion (AR 2008-2013) was considered by the committee in their
23 August 11, 2004 report (AR 2000, 2030) and hence by the commission at the August 11, 2004
24 and October 14, 2004 hearings. LAFCo retained an independent CPA to review the financing
25 documents. AR 1998, 2000. That report (AR 2014-2022) was considered by the committee
26 and the commission (AR 2000, 2030-2031). The report recommended modification of the
27 financing documents to further protect current ratepayers. AR 2014-2023; 2030. The
28 committee found the RMP would adequately protect electric and water ratepayers from

1 incurring debt from the broadband unit. AR 2457, 2630. This finding was adopted by the
2 commission via its adoption certificate of compliance. AR 2713, 2727.

3 **4. LAFCo Did Not Abuse Its Discretion on the Issue of Subsidization.**

4 **a. Indemnification.**

5 Cebridge argues LAFCo accepted the indemnification agreement from TDPUD
6 knowing litigation was likely and ratepayers would have to subsidize broadband services by
7 defending LAFCo in this action. It has already been held that the indemnification agreement is
8 valid. **Section 16467** applies to revenue producing utilities and prohibits one utility in a
9 district from subsidizing another utility in a district. The indemnification agreement is not a
10 utility nor is it revenue producing. It is an agreement whereby the district agreed to pay
11 LAFCo's defense costs if LAFCo's decision approving the district's application was contested.
12 **Section 16467** does not apply to this agreement.

13 **b. Lease of the Fiber Run.**

14 At the August 11, 2004 meeting, district board member Maas recited the history of
15 acquisition of the fiber run. He stated the district now owns a fiber optic run from Reno to
16 Sacramento. It acquired the fiber optic run as a result of granting easements to Williams
17 Communications to string its conduit through the district from Salt Lake City to Sacramento.
18 The district paid the Town of Truckee for the town's share for about \$123,000 to \$126,000.
19 He stated the run had a potential value of \$5,000,000. AR 1945-1946, 1954. Cebridge asserts
20 the district originally agreed to transfer the fiber run for \$185,000.¹⁶

21 After objections were raised by Cebridge, the district modified its business plan to
22 provide that the electric department would retain ownership of the conduit and lease it to the
23 broadband department for \$9529 per year for twenty years. AR 2336. This was reflected in
24 various "final final" financial projections dated October 3, 2004. These projections covered a
25 twelve-year period based on debt of 8%, 10% and 12%. AR 2297, 4249-4253. The
26 projections included the lease cost as "other costs of operation." AR 4251. At \$9529 for 20
27 years, the total lease payment would be \$190,580. Although this figure is not contained in the

28 ¹⁶ Cebridge's citations to the record are to materials submitted by Cebridge to LAFCo. AR 2111, 2850.

1 projection model, the figure of \$114,348 is included in the twelve-year projection after the first
2 year. This figure equals 12 times the annual rental rate of \$9,529.

3 In its October 14, 2004 report, the committee understood this to be book value as
4 opposed to fair market value. AR 2336, 2636. It indicated Cebridge had placed a fair market
5 value on the rental at \$82,660 to \$120,347 annually. AR 2636, 2698. Elsewhere, Cebridge
6 placed a value of \$28,000 per month but appeared to reduce it a few days later to the lower
7 figures of \$6,888 to \$10,029 per month or \$82,660 to \$120,347 annually. AR 2501, 2698. See
8 also the staff report attached to Resolution 04-15. AR 2747, 2762. The staff report indicates
9 the district originally intended to transfer the asset for no compensation. It refers to the
10 allocation plan contained in the business plan and indicates it is to be applied to all its shared
11 assets and resources. It also refers to a memorandum of district counsel submitted September
12 10, 2004. The committee found the method of allocation reasonable, it was not designed to
13 favor the broadband unit, and it did constitute not constitute an unfair subsidization. AR 2762.

14 Cebridge questions changes in the October 14, 2004 committee report findings and the
15 findings modified at the October 14, 2004 hearing, arguing the commission ignored the
16 "significant threshold" criteria set by the committee. AR2453, 2474, 2698. The first version
17 of the report did contain a proposed finding that the likelihood that the approved methodology
18 for allocation resulted in unfair cross-subsidization "is determined to be less than significant."
19 AR 2636. However, after due consideration, the alternative finding set out above (AR 2762)
20 was presented and adopted.¹⁷

21 The district notes LAFCo relied upon an opinion of counsel for the district that the
22 transfer at book value was reasonable and lawful. AR 2825-2827. That opinion states that the
23 district had a long-standing practice of allocation between utilities on an actual cost basis. AR
24 2826. It refers to the district's 2002 and 2003 financial statements with the independent
25 auditor's reports attached as Appendix A to the business plan. It indicates that the statements
26

27 ¹⁷ This so-called "significant threshold" was not a statute, policy or regulation that bound the commission but
28 represents a discussion and recommended finding that the commission reviewed and rejected in favor of the
alternate finding. In any event, Cebridge has made no showing that the lease exceeded this "significant
threshold."

1 do not show the utility units as separate or distinct legal entities and to treat transferred assets
2 at fair market value would overstate the district's overall financial condition. AR 2827, 1729-
3 1761.

4 Cebridge presents no legal authority for the proposition that basing the monthly fiber
5 optic rental at book value as opposed to market value was illegal or generally improper. Its
6 position on fair market value was inconsistent in that it presented two different values within a
7 matter of days. It does not appear that it provided any evidence to the commission on book
8 value. It is noted as well that in documents submitted for the September 16, 2004 meeting,
9 Cebridge argued the district valued the fiber run at \$5,000,000 to \$7,000,000 and therefore a
10 transfer to the broadband unit amounted to a \$6,800,000 subsidization. AR 2850. It also
11 argued the district business plan contemplated a \$5,000,000 to \$7,000,000 gift of fiber assets
12 to Eagle. AR 2856.

13 It is interesting that Cebridge does not argue that the district illegally expended district
14 funds to purchase the fiber optic run in that the primary purpose of fiber optics is not to
15 provide electrical or water services but to provide telecommunications, including broadband.
16 It seems to this court that the district showed good business judgment in acquiring an asset
17 potentially worth \$5,000,000 to \$7,000,000 in exchange for a grant of a right of way and
18 payment of \$123,000 to \$125,000 in contemplation that it might provide broadband and other
19 telecommunications services in the future.

20 The acquisition of the fiber run and lease of the fiber run from the electrical unit to the
21 broadband unit is not subsidization within the meaning of **Section 16467**. If a special district
22 has authority to provide a new service, then it has the authority to incur debt to finance that
23 new service. Would it make economic sense that the district incur debt to acquire a fiber run
24 at a cost in the millions as opposed to utilizing one it already owns and obtained at a fraction
25 of the cost? Cebridge has not shown that the lease arrangement between the two utility units is
26 prohibited or amounts to a subsidization within the meaning of **Section 16467**.

27 In particular, Cebridge has not shown that LAFCo abused its discretion in approving
28 the lease at \$9,529 per year. The commission considered the various financial projections

1 presented by the district, including the revisions presented at the October 14, 2004 meeting. It
2 was aided by its subcommittee and expert opinions. It took into account the revision to
3 include the lease. After reviewing all the information before it, the commission exercised its
4 discretion. Its decision was not arbitrary, capricious or entirely lacking in evidentiary support.
5 Instead, there was substantial evidence supporting the decision that \$114,348 total lease
6 payments for a twelve-year period and \$190,580 for a twenty-year period did not amount to
7 subsidization when the original cost of the asset was between \$123,000 and \$125,000 and no
8 contrary evidence was presented that the \$9,529 yearly lease payment was grossly below book
9 value.

10 **c. \$2,000,000 Start-up Costs.**

11 Cebridge merely states in its opening brief that the delay in LAFCo's approval process
12 cost the district's ratepayers \$2,000,000. It argues without citation of authority or cogent
13 argument that LAFCo, in allowing such a delay and allowing the district to run up these costs
14 "conflicted with LAFCo's mandate under the Act, its Policies, and the interests of the
15 ratepayers." It concludes LAFCo approved the proposal even though the district's ratepayers
16 "are being asked to foot this bill." It is assumed for purposes of this discussion that Cebridge
17 is objecting on the ground of subsidization.

18 LAFCo and the district argue a plan for repayment of the start-up costs was approved.
19 The approval process included consideration of advice by independent experts. AR 1470-
20 1832, 2000, 2008-13. The district also argues the 2001 conditional approval necessitated a
21 great expenditure of funds to complete the master services element, the risk management plan
22 and occurred after the conditional approval. Ultimately, the start-up costs were determined to
23 be part of a reasonable financing plan. AR 1470-1832, 2000. LAFCo cites **County of Fresno**
24 **v. Malaga County Water District** (2002) 100 Cal.App.4th 937 for the proposition that it is
25 implicit an entity can expend funds to comply with an application process. Both entities cite
26 **Government Code Section 56824.12.**

27 As indicated previously, LAFCo required the district to prepare a risk mitigation plan
28 to insure that ratepayers would not be subsidizing the new venture. The risk mitigation plan

1 sets forth the financing structure to be utilized. Certificates of participation will be used to
2 finance the project. Repayment of the certificates of participation shall be from broadband
3 revenues only. The risk management plan provides that a portion of the proceeds of the sale of
4 the certificates of participation will pay the \$2,000,000 start-up costs. It further provides that
5 the district is not to make any additional advances or interfund loans to pay for broadband
6 capitalization or operating expenses. AR 1471, 1512, 1604, 2011.

7 The \$2,000,000 was a necessary cost to complete the application process. The
8 application process included preparation of a business plan and risk management plan. This
9 included in depth financial analyses that were necessary to LAFCo's decision-making process.
10 Whether under the statutes and policies in effect in 2001 or under **Government Code Section**
11 **56824.12**, the district did not have authority to provide a new service without LAFCo
12 approval. LAFCo had the duty to take all steps necessary to obtain the information needed to
13 approve or disapprove the project. It is unclear to the court and Cebridge has not explained
14 what process should have been carried out. Should LAFCo have approved the application in
15 2001 without the conditions? Should it have denied the application in 2001 without giving the
16 district the opportunity to present additional information? Should it have imposed conditions
17 in 2001 and then forbidden the district from expending money to supply the information
18 needed to satisfy the conditions? And, how does the delay in the application process translate
19 into subsidization? As stated above, if a special district has the authority to provide a new
20 service, then it has authority not only to expend money to obtain approval of the new service
21 but also to incur debt to finance start-up costs. This is not subsidization, especially where the
22 financing package includes a pay back of the start-up costs upon receipt of funding.

23 **4. LAFCo Did Not Abuse Its Discretion on the Issue of Fiscal Soundness.**

24 In its opening brief Cebridge spends less than half a page arguing LAFCo failed to
25 independently determine whether the broadband proposal was fiscally sound. Cebridge refers
26 to VB6 (8-1-05 RJN, Ex. 1) and IB4(b), VB8 and VC1 (8-1-05 RJN, Ex. 2). On one hand,
27 Cebridge claims LAFCo did not perform its own financial analysis but relied upon analyses of
28 CPA Julia Burt, a member of the law firm representing the district. On the other hand, it

1 claims in the next sentence that LAFCo did analyze and critique the district's financial models
2 but did not conduct an independent analysis. It isolates one statement in the August 11, 2004
3 committee report that the plan "could be a workable plan," concluding no finding was made
4 the proposal was fiscally sound. AR 2001.

5 Policy VB6 requires an applicant to present a fiscal analysis which projects services to
6 be provided, costs to service to recipients, and revenue and expenses for a period of at least
7 five years. It provides LAFCo will not approve an application unless the financial analysis
8 demonstrates the district can provide the needed services and remain fiscally solvent.

9 Policy VB8 refers to **Section 56800** of the 2000 Act and requires the executive officer
10 to prepare a comprehensive fiscal analysis of the fiscal condition of a new city. It appears that
11 Cebridge cited this section and Policy IB4(b)¹⁸ to give the impression that LAFCo was
12 required to prepare its own comprehensive fiscal analysis when a special district wishes to
13 offer new services. Policy VB8 does not apply to this case, is in conflict with policies
14 specifically applicable to the provision of new services, and has not been considered.

15 Policy VC1 deals with the provision of new services. Policy VCI provides that LAFCo
16 will evaluate a proposal for a new service using the policies and standards applicable to the
17 formation of a new district. Policy VC2 requires the proposal to include a plan for services
18 and to address the matters identified in **Section 56633**.

19 There is no question that LAFCo used and complied with the policies and standards
20 applicable to formation of a new district, it required a plan for services, and it addressed the
21 matters in **Section 56663**.

22 There is nothing in the applicable policies that require the LAFCo itself to prepare its
23 own financial analysis. Instead, the applicable policies require the applicant to prepare a
24 financial analysis and it requires LAFCo to review and consider it in light of the policies and
25 statute set out previously.

26
27
28 ¹⁸ This policy provides that LAFCo is to be neutral, independent and balanced in representing special districts. It does not require an LAFCo to prepare its own fiscal analysis of proposals made by special districts.

1 This ruling has already set out numerous references to the record regarding LAFCo's
2 consideration of fiscal issues. Included in those references is the certificate of compliance.
3 AR 2713. It adopted and attached proposed findings contained the October 14, 2004
4 committee report. That report, commencing at AR 2456, addressed the fiscal soundness issue.
5 It indicated the committee had reviewed much data from the district, Cebridge and SBC
6 regarding the viability of the business plan. It stated at AR 2457:

7 "The Committee believes that the District's assumptions are reasonable and
8 provide an adequate basis for the Commission to determine that the District can
provide the service on a fiscally solvent basis."

9 At pages AR 2470-2472, the study set out a finding in relation to Policy VB6. That
10 proposed finding addresses each issue raised. That finding was adopted in the certificate of
11 compliance at AR 2723-2725. Contrary to Cebridge's assertion that no finding was made, the
12 commission specifically found in its overall finding at AR 2725 that:

13 "...the business plan demonstrates that the service can be fiscally solvent as
14 required by our policies. The assumptions of the plan are reasonable despite the
15 differing assumptions of the objecting parties. With strong support for the
16 District and for this new service in the Truckee community, evidenced in the
public testimony, the Commission believes that the District can make the plan a
success."

17 The finding also concludes that the structure of the financing for the new service
18 provides an additional safeguard in that by assuring the district's other assets are protected, the
19 risk of failure for the new service is largely assumed by the lender. If the bond market is not
20 convinced the plan is viable, the service will not be financed and will not go forward.

21 While Cebridge isolates a statement made in the committee's August 11, 2004 report
22 that the business plan "could be a workable plan," (AR 2001), it and the other parties cite to
23 substantial evidence supporting LAFCo's finding that the project was fiscally sound.¹⁹

24 Cebridge refers to a July 30, 2004 independent analysis by LAFCo's own CPA Kim
25 Zwick regarding the financial analysis provided by the district's CPA. AR 1923:9-17; 2014-

26
27 ¹⁹ The citations to the record in footnote 44 to Cebridge's opening brief have been reviewed as well. The
28 comment from Commissioner Nulph was made at the August 11, 2004 meeting and the comment of attorney
Browne was made four years earlier, in November, 2000. These comments are not findings and must be viewed
in light of substantial evidence showing LAFCo applied the correct standards in its ultimate decision.

1 2022; 2030. It refers to an October 7, 2005 committee report responding to Cebridge's request
2 for reconsideration wherein the committee indicated it had independently analyzed fiscal
3 soundness and concluded the business plan was sound, consistent and achievable within the
4 bounds of good business practices and management and the proposal provides a plan of
5 providing services on a fiscally solvent basis. AR 2434.

6 LAFCo refers generally to the entire agenda packet dated August 11, 2004 wherein the
7 committee reviews the history of the RMP. AR 1996-2082. It then referred to specific
8 citations within the agenda packet including: the entire committee report (AR 1996-2031); a
9 report of findings attached to the Zwick analysis (AR 2021-2023); a portion of the committee
10 report outlining its process in reviewing the district's plan, including review of the analysis of
11 the district's CPA and retention of Zwick to provide an independent analysis (AR 2030); the
12 history of the proposal, the standard of review and the executive summary regarding the
13 submitted documentation (AR 1997-1999); the legal opinion of independent bond counsel (AR
14 2008-2013); the Zwick analysis (AR 2014-2022); correspondence from Cebridge including the
15 report of their expert (AR 2033-2055); and recommendations by the committee (AR 1996).

16 LAFCo also cites to committee agendas showing consideration of review and revision
17 of the risk management plan and business plan on June 25, 2004, July 23, 2004 and August 2,
18 2004, September 21, 2004, September 29, 2004, and October 6, 2004. AR 305, 1019, 1844,
19 2096, 2288 and 2337. These meetings included the opportunity for public comment (AR
20 1019, 2288 and 2337); review and revision of the master service element, risk mitigation plan,
21 and business plan and preparation of committee report, recommendations and proposed
22 certificate of compliance (AR 1844); discussion regarding scope and direction of findings in
23 light of Cebridge's request for review (AR 2096); and review of Cebridge's request for
24 reconsideration, report and recommendations to the commission and public comment (AR
25 2096, 2337).

26 LAFCo cites the October 14, 2004 committee report on Cebridge's request for
27 reconsideration which summarizes, reviews, responds and recommends on all issues raised,
28

1 including the issue of fiscal solvency (AR 2455-2460) and the attached findings on the issue
2 (AR 2470-2472).

3 In addition to LAFCo's citation to the record, the district also cites to LAFCo's
4 response to Cebridge's accusation that LAFCo had abdicated its responsibility to determine
5 fiscal solvency. In its October 7, 2004 response, LAFCo indicated that it had noted that the
6 ultimate implementation of the business plan would be the responsibility of the district and
7 that this is a statement of a future fact, not an improper shifting of LAFCo's duty to determine
8 fiscal responsibility to the district. AR 2633. It also refers to the committee's response in the
9 same document to Cebridge's charges that LAFCo did not conduct an independent review of
10 the business plan, only conducted a minimal review, and disavowed "representation of the
11 sufficiency of the procedures that were used to prepare it." The committee stated it had
12 independently reviewed the business plan as well as all other documents submitted by the
13 district, USA Media, Cequel III, Cebridge Connections and their attorneys and consultants. It
14 stated said review was in-house and extensive. It then goes into great detail about exactly what
15 it did. AR 2634-2635.

16 It is not this court's role to weigh the evidence presented during the administrative
17 process or to second guess LAFCo's decision on fiscal soundness or any other issue. LAFCo's
18 determination on the issue of fiscal soundness is supported by substantial evidence. Cebridge
19 did not meet its burden of proof of showing the decision is not supported by substantial
20 evidence. In each of the four categories discussed within this subdivision, Cebridge did not
21 show the determination was arbitrary, capricious or entirely lacking in evidentiary support.

22 23 **Conclusion**

24 The request for issuance of a peremptory writ of mandate is denied.

25 Judgment is to be entered in favor of respondents on the reverse validation cause of
26 action in that said cause of action is not available for the within proceeding.

27 Judgment is to be entered in favor of respondents on the declaratory relief action for the
28 reasons set forth above.


1 Since the parties did not request a statement of decision prior to submission of this
2 matter, the court renders the above decision. Counsel for LAFCo shall prepare a proposed
3 judgment pursuant to **Code of Civil Procedure Section 632** and **California Rule of Court**
4 **232.**

5 Costs are awarded to respondents.

6 Respondents are determined to be prevailing parties.

7 An award of attorneys' fees, if any, shall be determined by the same motion procedures
8 that apply to civil actions generally.

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10
11 DATED: December 16, 2005


ALBERT P. DOVER
Judge of the Superior Court²⁰

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28 ²⁰ The court wishes to acknowledge the invaluable support of Ms. Patricia Hamilton, Research Attorney, in the preparation of this Decision. Ms. Hamilton spent more than considerable time in review of the voluminous Administrative Record in this case and in the research and drafting of this Decision.

DECLARATION OF SERVICE BY MAIL

I, **G. SEAN METROKA**, Court Executive Officer, County of Nevada, being a citizen of the United States, a resident of the County of Nevada, and not a party to the cause, do hereby certify that I mailed copies of the

DECISION

of which the original is on file in case #**70226**, to the following named persons:

Richard R. Patch, Esq.
Gregg M. Ficks, Esq.
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and that the envelope with prepaid postage was sealed and placed for collection and mailing in the United States Post Office at Nevada City, California on

December 16, 2005.

G. SEAN METROKA
Court Executive Officer
Nevada County Superior Court

By 
Court Services Assistant