

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to  
Consider Modifications to the California  
Advanced Services Fund.

Rulemaking 12-10-012  
(Filed October 25, 2012)

**REPLY COMMENTS  
OF THE DIVISION OF RATEPAYER ADVOCATES  
ON THE ORDER INSTITUTING RULEMAKING  
TO CONSIDER MODIFICATIONS TO  
THE CALIFORNIA ADVANCED SERVICES FUND**

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## I. INTRODUCTION

Pursuant to Rule 6.2 of the California Public Utilities Commission's Rules of Practice and Procedure (Rules), the Division of Ratepayer Advocates (DRA) respectfully submits these Reply Comments on the Order Instituting Rulemaking (OIR) to Consider Modifications to the California Advanced Services Fund (CASF).<sup>1</sup> The OIR proposes to adopt rules that will permit non-telephone corporations (as defined by Cal. Pub. Util. Code § 234) to apply for CASF infrastructure loans and grants. These new rules are contingent on legislative action to change the current rules defined by statute in Cal. Pub. Util. Code § 270(b). If the Legislature acts, the Commission has stated that it then intends to issue draft rules to implement the proposal.<sup>2</sup>

This rulemaking is premised on an assertion that the CASF thus far has been less successful than anticipated in reaching unserved and underserved areas, and that significantly more areas of the state could benefit from CASF support.<sup>3</sup> Additionally, the OIR contends that last mile projects have not been adequately undertaken pursuant to the current CASF eligibility requirements. DRA continues to strongly support the CASF goals of ubiquitous broadband deployment and adoption in California. These Reply Comments are offered to further program goals by addressing the following:

- The limited specificity about how entities without a Certificate of Public Convenience and Necessity (CPCN) or Wireless Identification Registration (WIR) would use CASF funds, which makes the likelihood for strong projects from these entities questionable;
- Parties' comments about the risks of expanding CASF eligibility, such as poor past experience with American Resource and Recovery Act (ARRA) applicants<sup>4</sup> and lack of details in the OIR for demonstrating how non-licensed applicants would provide sufficient evidence that they will deliver sound projects;<sup>5</sup> and
- Concerns with the Small Local Exchange Carriers' (LECs') proposal for oversight responsibilities to prevent duplication between CASF funding and Carrier of Last Resort (COLR) obligations as well as their request for a "right of first refusal" to

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<sup>1</sup> Order Instituting Rulemaking 12-10-012 (issued Oct 25, 2012).

<sup>2</sup> OIR, at 2.

<sup>3</sup> OIR, at 10.

<sup>4</sup> *See, e.g.*, Frontier Comments, at 4.

<sup>5</sup> *See, e.g.*, TURN Comments, at 2.

bring broadband to their areas once a CASF application has been submitted.

Finally, in response to parties' opening comments that further illustrate the risks of opening up CASF funding eligibility, DRA stresses the importance of Commission oversight if Commission does decide to move in this direction.

## **II. THERE IS NO EVIDENCE THAT EXPANDING CASF ELIGIBILITY WILL RESULT IN STRONG PROJECTS**

### **A. Commercial Broadband Providers Without a CPCN/WIR Provide Little or No Information About Potential Projects and Do Not Support Expanding CASF Eligibility.**

DRA notes that the opening comments of the commercial broadband providers have little to no specificity as to how non-licensed providers would use CASF funds. The OIR asked commercial providers of broadband services to provide information as to how they might put CASF funds to use (i.e., whether they would upgrade last mile or middle mile projects or build new infrastructure); what technology they currently use or would use to provide broadband service; where they provide service in California; and to what types of entities they provide service.<sup>6</sup> Non-CPCN/WIR providers have the most to gain financially from the potential expansion of eligibility rules, yet only two such providers (Fire2Wire and Winters Broadband) responded to the OIR's questions, providing only very general and limited information indicating they would like access to the CASF for matching funds to extend middle mile infrastructure with fixed wireless service.<sup>7</sup> Neither made specific proposals or described projects under development for areas that need broadband.

Nonetheless, DRA agrees with parties' comments about the need for more flexible and cost-effective solutions in areas with challenging terrains and lower population density<sup>8</sup> as well as the need for funding for fixed wireless -- which Fire2Wire views as the only economical option for extending broadband into rural areas.<sup>9</sup> However, given that no specifics regarding geographic areas or proposed projects were provided, there is no evidence or even indication that

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<sup>6</sup> OIR, at 21, Question #1.

<sup>7</sup> Fire2Wire Comments, at 1; Winters Broadband Comments, at 1-2.

<sup>8</sup> See, e.g., Winters Broadband Comments, at 2.

<sup>9</sup> Fire2Wire Comments, at 1.

strong projects will result from broadening subsidy eligibility. There also seems to be no indication that expanding eligibility would result in more last mile projects, as the OIR had hoped. The overall lack of specificity underscores DRA's cautions about opening up CASF eligibility and concern over these entities' lack of technical expertise to implement broadband projects, as well as the need for safeguards as described in DRA's Opening Comments if the Commission decides to go forward with this idea.

**B. Responses From Governmental Entities, Anchor Institutions, Other Nonprofits, and American Indian Tribes Lack Specificity as to How CASF Funds Would be Used and Do Not Support Expansion of CASF Eligibility.**

The OIR asked governmental entities, anchor institutions, other nonprofits, and American Indian Tribes whether they would consider participating in the CASF program if eligibility requirements were changed.<sup>10</sup> The OIR further asked how they would put CASF funds to use, what technologies they would use, and whether they would seek to provide broadband service on their own or in conjunction with a commercial provider.<sup>11</sup> Eight entities representing cities, schools, consortia, and other nonprofits responded to the OIR's question indicating they would like to participate in the CASF program if eligibility is opened up, but for the most part did not discuss specific projects or areas in need that they want to serve.<sup>12</sup> These parties did indicate they would mainly work in partnerships comprised of wireless internet service providers (WISPs) or other small entrepreneurs, nonprofit community organizations, and/or government entities such as a city or university.

However, there was no discussion on the particulars of how such partnerships would work. None of the parties identified a desire to also partner with telephone or wireless corporations. In fact, some entities pointed out that forging such a partnership is unworkable because WISPs are often their competitors.<sup>13</sup> DRA respectfully suggests that in order to achieve

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<sup>10</sup> OIR, at 21.

<sup>11</sup> OIR, at 21-22.

<sup>12</sup> See, Regional Council of Rural Counties Comments, Access Humbolt Comments, California State University of California, Monterey Bay Comments, Tulare County Office of Education Comments, Valley Vision Comments, California Partnership for the San Joaquin Valley Comments, San Diego Imperial County Consortium Comments, City and County of San Francisco Comments.

<sup>13</sup> San Diego Imperial County Consortium made the observation that WISPs have particular difficulty forging partnerships with CPCN/WIR entities because they are often competitors. San Diego Imperial County Consortium Comments, at 2.

broader rural broadband deployment and adoption, the Commission consider in another proceeding new requirements or incentives to improve the competitive environment for broadband in remote areas of California so that consumers have needed broadband access. For example, given their control over middle mile facilities, one area that could be explored would be a framework for open access for telephone corporations to share middle mile facilities with other entities that provide broadband services.

In its comments, the Tulare County Office of Education proposes to use the CASF as a source of matching funds for schools to leverage Federal Communications Commission (FCC) E-Rate funding.<sup>14</sup> As they note, the FCC E-Rate program has been a catalyst for state-of-the-art connectivity in schools across the country since its inception in 1996, but schools may not have the necessary matching funds. While DRA supports robust internet connectivity in rural schools, opening the CASF for this category of broadband investment could distract from its primary goals of bringing broadband to customers in underserved and unserved areas. The Commission should prioritize the deployment of broadband facilities and the adoption of broadband in unserved and underserved areas of California first through the CASF, before expanding the CASF program in this manner. Further, expanding the scope of programs funded by the CASF is beyond the scope of this OIR which is focused on expanding CASF eligibility to non-CPCN and non-WIR entities.

### **III. OTHER PARTIES SHARE DRA'S CONCERNS ABOUT THE RISKS OF EXPANDING ELIGIBILITY**

#### **A. Additional Safeguards, Clarifications and Requirements Would Be Necessary if the Commission Decides to Expand Eligibility.**

Various commenting parties discussed their recommendations about the importance of safeguards if the Commission opens up CASF eligibility.<sup>15</sup> TURN, in particular, asks the Commission to clarify how it will determine that an applicant possesses the necessary capabilities to successfully construct and operate a broadband system, in order to protect ratepayer funds from waste, fraud and abuse.<sup>16</sup> DRA supports this request and urges the

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<sup>14</sup> Tulare County Office of Education Comments, at 3.

<sup>15</sup> In addition to DRA, parties that commented on the need for safeguards (in response to OIR question #3) were TURN, Citizens Telecommunications Company (Frontier), Small LECs, Cable and Telecommunications Association (CTA), and Winters Broadband.

<sup>16</sup> TURN Comments, at 2.

Commission to clarify accordingly, if the Commission does indeed decide to expand CASF eligibility. DRA also shares the concerns raised in some of the comments that note that there have been challenges with non-CPCN holders receiving grants and not following through on them.<sup>17</sup> Frontier, for example, is against opening the CASF program up to additional parties due to poor past experience with American Recovery and Reinvestment Act (ARRA) applicants.<sup>18</sup> These concerns underscore DRA's position that there are too many risks associated with expanding CASF eligibility. However, if the Commission decides to go forward with expanding eligibility, then DRA strongly urges the Commission implement additional safeguards and requirements in order to fully vet non-telephone corporation capabilities to implement CASF projects during the application process and ensure proper oversight of awards to non-CPCN/WIR entities. As DRA and other parties stated, the Commission should also require performance bonds to reduce risks if eligibility is expanded.<sup>19</sup>

**B. Commission Oversight is Necessary to Encourage More Broadband Investments and Prevent Duplication of CASF Funding.**

The Small LECs describe the possibility of overlap and/or confusion between funds they receive to carry out COLR obligations and CASF funds in building broadband infrastructure, particularly in unserved areas.<sup>20</sup> The Small LECs also commented that they receive state and federal funding to ensure they are positioned to provide service in response to reasonable requests for broadband and voice service in their areas.<sup>21</sup> Accordingly, the Small LECs suggest they should have a major role in preventing this by being responsible for showing the Commission whether:

- A proposed CASF project area already has sufficient infrastructure;
- The construction plans will actually improve speeds; and

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<sup>17</sup> See, e.g., Small LECs Comments, at 1; Frontier Comments at 4.

<sup>18</sup> Frontier Comments, at 4.

<sup>19</sup> See, Frontier Comments, at 5; Small LECs Comments, at 2; California Cable & Telephone Association Comments, at 2; TURN Comments, at 2.

<sup>20</sup> Small LECs Comments, at 2, 3-4.

<sup>21</sup> Small LECs Comments, at 2.

- Whether current facilities can be upgraded to meet applicable standards at a lower cost than the requested CASF amount.<sup>22</sup>

DRA agrees that clear requirements are needed to prevent unnecessary duplication and notes that the current CASF rules allow challenges to an application if a proposed project area is already served or is not considered to be underserved or unserved.<sup>23</sup> Thus, Small LECs already have the ability to challenge proposed CASF projects with the Commission if they believe a project is flawed in this regard. In addition, the Small LECs may also apply for funding for CASF projects consistent with the current program criteria. DRA's position is that the Commission should require CD staff, not the Small LECs, to assess potential duplication of CASF funding.

Further, the Small LECs are essentially asking the Commission for the "right of first refusal" to bring broadband to their areas once a CASF application has been submitted.<sup>24</sup> As an initial matter, giving the Small LECs the right of first refusal may be anti-competitive because the Small LECs have an understandably vested interest in protecting their territories for their future broadband investments, and thus they may view projects presented in CASF proposals as a sign of market opportunities. Ultimately, this proposal constitutes a request to change CASF guidelines that goes beyond the scope of this OIR (which is about expanding broadband eligibility to non-licensed entities). It does, however, underscore the need to reexamine and revise current CASF program requirements prior to expanding CASF eligibility. Accordingly, DRA reiterates the need for the Commission to establish both a framework and timeline to review any CASF challenges, prevent duplicative funding, and ensure cost-effective projects to provide the optimum choices to ratepayers (particularly in unserved areas).

#### **IV. CONCLUSION**

As discussed above, and outlined in DRA's Opening Comments, DRA is concerned that expanded CASF eligibility will not lead to sufficiently strong and widespread broadband projects. Further, the comments gave no evidence that last mile projects will result as the OIR envisions, because future partnerships are unlikely between telephone corporations who control the middle mile network and the unlicensed entities that need access to their facilities. DRA

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<sup>22</sup> Small LECs Comments, at 2.

<sup>23</sup> See, D.12-02-015, *mimeo*, at 33-34, and Appendix 1, at 17-18.

<sup>24</sup> Small LECs Comments, at 3.

recommends that the Commission not expand CASF eligibility at this time, and instead focus on fine-tuning current CASF guidelines, including requiring open access, to ensure more last mile projects and to help California get closer to ubiquitous broadband. If the Commission does move forward in gaining needed legislative changes and expanding funding eligibility instead, DRA recommends added oversight and safeguards to help guard against fraud, waste, and abuse of ratepayer funds.

Respectfully submitted,

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