Comments of the Central Coast Broadband Consortium in response to Commissioner Martha Guzman Aceves' Ruling Setting Workshops and Seeking Comment on Eligibility for and Prioritization of Broadband Infrastructure Funds from the California Advanced Services Fund

Summary

Per California Public Utilities Commission (CPUC) Resolution T-17529, the Central Coast Broadband Consortium (CCBC) is the California Advanced Services Fund (CASF) consortia grant recipient representing Monterey, San Benito and Santa Cruz Counties. The CCBC is a party to Rulemaking 12-10-012 and respectfully submits these comments in response to Commissioner Martha Guzman Aceves' Ruling Setting Workshops and Seeking Comment on Eligibility for and Prioritization of Broadband Infrastructure Funds from the California Advanced Services Fund, dated 11 July 2018.

I. Eligibility and Challenge Process

Should a census block only be CASF-eligible if the subscription rate within that census block is less than 51% of all households?

Yes.

Ongoing research conducted by the California Emerging Technology Fund[1] shows that the average penetration rate for fixed Internet access service in California is 69%. If the penetration rate in a census block is 50% or less, then it can be reasonably concluded that service is deficient and, regardless of what marketing or other claims incumbent service providers might make, the census block is unserved.

The burden of proof to show this requirement has been met should not fall on CASF project applicants, but rather upon challengers. Absent a challenge, the census block in question should be deemed eligible. An incumbent ISP that wishes to challenge the eligibility of an area for a CASF infrastructure grant should be required to provide verifiable data that proves that the fixed Internet service penetration rate in any challenged census block is 51% or greater. Otherwise, the challenge should be rejected.

Mobile subscriptions should not be counted in making this determination, however. Mobile service is an individual service and not a household service. Consequently, mobile service cannot be reckoned as serving a "household" as required by the California Public Utilities Code[2].

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[1] *Broadband Internet Connectivity and the "Digital Divide" in California – 2017*, Berkeley IGS Poll, Institute of Governmental Studies University of California, Berkeley, June 27, 2017.

[2] California Public Utilities Code, Section 281.

What should the CASF challenge process look like? Which trigger(s) should be used to start the challenge process for a CASF application? Which trigger(s) should be used to end the challenge process for a CASF application?

The current system for triggering a challenge process is completely adequate. Notice of CASF infrastructure grant applications is widely distributed and otherwise available. The trigger for closing the challenge process should be the passing of 21 calendar days from the opening of the process. No challenges should be accepted after that time.

Should the Commission create a single definitive list of CASF-eligible census blocks and a pre-application eligibility-map challenge process, as AT&T proposes?

No.

Large incumbent Internet service providers, including but not limited to AT&T, employ full time lobbyists and lawyers whose sole purpose is to protect corporate interests, regardless of the harm done to the public interest. They will engage aggressively and defensively in any statewide eligibility determination process. On the other hand, local governments, schools, community based organizations and economic development agencies do not have the resources to fight such battles on a prospective basis. Creating a process that can be easily gamed by incumbents and that effectively locks out meaningful participation by all Californian communities will defeat the purpose of the CASF program.

What should the challenger have to prove (household subscription rate and broadband service speed) during the challenge process? What information should be required of the challengers to an application, other than what is currently proposed in the Staff Proposal? What information should be required of challengers to determine eligibility as indicated on the California Interactive Broadband Availability Map?

The California Public Utilities Code[3] states that CASF infrastructure grants shall go to providers who propose to provide service "to unserved households in census blocks where no provider offers access at speeds of at least 6 mbps downstream and one mbps upstream". In order for such an offer to be valid, an incumbent provider must be capable of actually delivering service at 6 Mbps download and 1 Mbps upload speeds (hereinafter, "6/1 service") consistently to any household that subscribes to it. Although it is common industry practice to advertise service at a certain level and then condition it with a long and difficult to parse list of exceptions, there are no such exceptions in the statute. An incumbent is either capable of delivering 6/1 service to every household that subscribes to at least that level of service at all times, or it is not. If an incumbent is not

[3]California Public Utilities Code, Section 281.

capable of fulfilling an offer of 6/1 service, or better, at all times in any given census block or to any given household, then that census block or household is unserved.

In the past, incumbents have used spurious challenges to delay CASF grant applications, in some cases beyond the point where a project is viable. This kind of gamesmanship has been cost-free to challengers, who have every incentive to make unsupported claims, but face no liability when those claims are rejected. Challengers should be required to provide verifiable data under penalty of perjury and bear the cost of verification.

Consequently, whether it is in regards to a specific grant application or a general determination of eligibility such found on the California Interactive Broadband Availability Map, any challenger who disputes the eligibility of a census block on the basis of its own existing service should provide for that census block:

1. The total number of households subscribing to its Internet access service.
2. The total number of households to which it can deliver 6/1 service, or better, 100% of the time.
3. If appropriate, the date by which any federally funded service or infrastructure upgrades will be completed.
4. An affidavit signed under penalty of perjury affirming that such information is true.
5. A bond or other financial instruments of sufficient value to cover the cost of positively verifying such information.

Such declarations must be offered as absolute, with no allowance for variance for any reason except a declaration of a state of emergency by local or state officials.

Could such a pre-application eligibility map challenge partially or entirely replace the post-application challenge?

As explained above, no.

Is the 21-day Staff proposed challenge window timeline and challenge criteria also sufficient for the eligibility-map challenge process?

A 21-day window is sufficient for any incumbent to respond to any characterization of its own service, for any purpose. However, a longer period of time is required by applicants or third parties who wish to challenge eligibility determinations based on false claims submitted by incumbents. If an applicant or third party wishes to challenge a specific claim of 6/1 service or better made by an incumbent, then it should be allowed 45 days to respond, following the receipt of proper notice of such a claim.

Should the challenges vary by technology? (e.g., should the burden of proof for a fixed wireless Internet service provider submitting a challenge be different than that of a wireline provider?) Why or why not?

The burden of proof for a challenge must be technology-neutral. It might be easier for a wireline provider to determine its service levels and availability, and cheaper for CPUC Staff to verify such determinations, but this state of affairs is mere happenstance. Wireless providers should be held equally accountable for service claims and be subject to the same financial, civil and criminal liability as wireline providers.

II. Prioritizing Projects and Areas to Support

Which census blocks, census tracts or communities should be prioritized by the Commission? Two examples of previous approaches to prioritization include: Resolution T-17443 (approved by Commission 6/26/14) and the High Impact Analysis developed by Staff and included in the Supporting Materials for the May 25, 2017 CD Staff Workshop on CASF Reform. Should the Commission use methods similar to this going forward?

Yes. The CCBC strongly endorses a rigorous, quantitative approach to setting broadband development priorities. The CCBC used such an approach in developing its priority list for the purposes of Resolution T-17443, as did Staff in developing the High Impact Analysis.

In the case of the CCBC's priority determination, a total of 12 communities were identified as high priorities on the basis of social and economic development impact. This determination informed the CCBC's efforts and, via a middle mile CASF grant, participation as parties in the Charter/Time Warner proceeding (CPUC Decision 15-05-007) and private investment, our members have succeeded in bringing modern Internet access service to at least seven of those communities, and the tens of thousands of people who reside therein.

This approach should be continued.

How should the Commission treat these areas identified as priorities? i. Should these priority areas be eligible for expedited review? ii. Should these priority areas receive higher funding levels or percentages, perhaps under the argument that they contribute significantly to the program goal, one of the rationale for additional funding in statute?

The current 105-day deadline for the Commission to either approve a CASF infrastructure grant application or reject it is sufficient for any purpose. Rather than complicate the review and approval process by expediting some applications at the expense of others, the Commission should meet this current but long ignored standard. If a CASF infrastructure grant application has not been acted upon by the Commission

within 105 days (with di minimis extensions allowed to account for variable voting meeting schedules), then it should be deemed granted.

As explained in our earlier comments[4], the CCBC believes funding levels should be predominantly determined by the service levels proposed. That said, it is appropriate to grant an extra level of funding for high priority areas, but not to the degree that incentives for deploying modern Internet infrastructure are removed.

III. Providing Access to Broadband Service to Areas Adjacent to CAF II Areas

How can the Commission incentivize CAF II providers to build beyond their commitments to the Federal Communications Commission? In order to incentivize CAF II providers to deploy throughout the community and in areas adjacent to CAF II areas, should the Commission: a. Provide an expedited review process to approve supplemental grants to expand CAF II-related projects?

As noted above, expedited review processes are not necessary. Simply adhering to the reasonable, existing deadline is sufficient.

b. Should there be a separate process or set-aside of funding for these supplemental builds?

A separate process or set aside should not be necessary. CAF II providers can easily standardize and submit supplemental grant applications on their own using the established process. Since the census blocks and locations where they will build is known to them, there is no reason for them not to submit supplemental applications quickly, thus eliminating the need to set money aside.

It would be appropriate, however, to set a deadline of 180 days from the adoption of a Phase II resolution, or other infrastructure program implementing action, for submission of supplemental grant applications. Delays might advance the corporate goals of the incumbent telephone companies that have received CAF II funding, but not the public interest.

c. Should supplemental grants be tied to the release of CAF II plans? Should areas where CAF II providers do not commit to build out be reclassified as eligible?

Yes.

Build out plans made pursuant to the acceptance of public money should be treated as being in the public domain. Since CAF II and CASF money is awarded for the purpose of bringing service to unserved areas, there is no possibility of making a legitimate confidentiality claim on the basis of competitive disadvantage. The CPUC should require

[4] Comments of the Central Coast Broadband Consortium on Phase II Staff Proposal, 16 April 2018.

CAF II recipients to disclose all of their publicly subsidized build out plans under penalty of perjury, and should publish that information.

Consequently, if a CAF II recipient states that a given area or location won't be served pursuant to such funding, then that area or location should be reclassified provided other eligibility standards are met. Such a reclassification should be also be publicized, so the people and communities in question can appropriately respond.

d. How should the interests of the CAF II providers to choose which CAF II areas they build out to with federal funding while also requiring them to complete other projects in the state) be balanced with competitor interest in bidding to build out in those same communities?

To the extent CAF II providers have discretion regarding where they build out, they are entitled to make that choice. However, if they also desire subsidies from Californian ratepayers, they must accept that those ratepayers have equally legitimate interests in planning, developing and deploying modern broadband infrastructure in their communities.

CAF II providers have, in effect, a right of first refusal for the areas where they are receiving federal subsidies. If they do not exercise that right in a timely fashion, they should bear the full consequences of any ensuing competition. Mothballing entire communities, or gaming the system in order to maximize access to Californian funds as Frontier Communications did in its Desert Shores CASF project area (as described in CPUC Resolution T-17614), is pernicious and should not be allowed.

IV. Reimbursement Process

Should the CASF reimbursement process change?

No.

The current reimbursement process has proven effective in safeguarding public funds. CASF infrastructure grant recipients should be held accountable for expenditures made from the public purse. The current process helps to ensure that projects are completed as proposed. Changing the standard for release of funds from a strict reimbursement basis to, in effect, a monthly stipend would only encourage waste and delay. A monthly stipend would disproportionately benefit large incumbents, such as AT&T, who employ full time lobbyists and lawyers who can devote their days to gaming the system through endless litigation of disingenuous claims of unavoidable delays or changed circumstances.

V. Middle-Mile Infrastructure

How should the Commission verify that a middle-mile build included in a proposed project is "indispensable" to that project, as required by statute? Should Commission Staff rely on the middle-mile location information providers submitted as ordered in D.16-12-025?If middle-mile

infrastructure already exists near the proposed project area, under what circumstances may an applicant build its own middle-mile infrastructure?

Yes, Staff should rely solely on the information provided pursuant to D.16-12-025.

If no provider has submitted information that conclusively demonstrates that they 1. have middle mile facilities in a proposed project area and, 2. those facilities – including but not limited to dark fiber – are available on an unbundled and open access basis at a fair market price, then any middle mile component of a proposed project should be deemed "indispensable".

It is reasonable to allow existing middle mile providers to submit challenges as described in Section I above. However, if such a challenger provides information that should have been disclosed pursuant to D.16-12-025 but wasn't, then the challenger should be subject to the maximum daily fine applicable under CPUC rules for each day it was delinquent in fulfilling its obligations. Submission of such information in a challenge process should be considered *prima facie* evidence of non-compliance.

The conditions of any middle mile funding should include a requirement that the grantee make the subsized infrastructure and any co-terminous fiber that it owns, including but not limited to dark fiber, (e.g. long haul connections to major exchanges) available on an open access, unbundled basis at a specified price for at least five years, consistent with past CPUC precedent[5].

If middle-mile infrastructure already exists near the proposed project area, should there be a limit on how much infrastructure may be built?

Given that CASF-funded infrastructure projects are largely in rural, and often remote, areas, an arbitrary mileage limit would not be appropriate. Instead, subsidized middle mile infrastructure should be limited to the economically feasible minimum distance between the connection point(s) to the associated last mile infrastructure and the nearest point of presence where dark fiber and other unbundled middle mile services are available on an open access basis at a fair market price.

For purposes of grant funding, is leasing or purchasing middle-mile facilities for terms beyond five years (e.g., IRU for 20 years) allowable or even preferred over building new infrastructure?

Great care should be taken in allowing funding for leased middle mile facilities. Funding should not be allowed for lease/purchase of fiber from grantees or affiliated entities, regardless of how loose the affiliation might be.

[5] CPUC Resolution T-17429.

There are circumstances where long term IRUs or similar arrangements should be subsidized. These circumstances include instances where dark fiber or other unbundled middle mile facilities are available on an open access, fair market basis, in quantities sufficient to serve multiple, independent users in addition to the applicant. Otherwise, the commission should fund the construction of new middle mile facilities. Any services, e.g. lit transport, that can be technically supported by the subsidized leased fiber should be made available on an open access, unbundled basis at a specified price or on a fair market basis, as appropriate.

No middle mile operator, incumbent or CASF-subsidized, should be allowed to extract rents from the CASF program or from facilities funded by it.

Alternatively, is a challenge to the project application sufficient to prove it is not indispensable, or a lack of a challenge sufficient to prove that it is?

The mere fact that an incumbent or third party challenges an application is not a sufficient basis for any finding whatsoever. Middle mile challenges should conform to the above recommendations.

Additionally, such challenges should include a binding offer of unbundled elements and services, including dark fiber and lit transport, that are available on an open access, fair market basis in sufficient quantities to support a reasonable number of third party users, in addition to the applicant. Otherwise, the challenge should be rejected on a peremptory basis.

The lack of a challenge should be taken as indicative, but it is not necessarily conclusive. Staff should verify that the applicant or any affiliate of the applicant does not own or lease middle mile infrastructure that it would otherwise be reasonably expected to extend, upgrade, repair or connect to in the normal course of business.

VI. Line Extension Items

What are the components of a wireline technology line extension connection that should be remunerated by the program?

The line extension program should reimburse the appropriate portion of the cost of:

1. Cables extending from the designated ISP's nearest point of presence to the nearest point in the public right of way where a service drop can be feasibly constructed to the eligible household, via the shortest feasible route. Deviations should be allowed if the ISP bears the full incremental cost.
2. A drop or other service connection to the eligible household by the shortest feasible route, regardless of distance from the public right of way, provided that property

owners along such route agree to allow free and unencumbered access to and use of the route by the ISP, for any purpose whatsoever.

3. Intermediate electronic, optical or other equipment that is necessary to provision service at a level equal to the service offered by the ISP in adjacent areas. Such equipment, however, should not include customer premise equipment.

About how much on average do line extensions cost per foot? b. Is the $1,000 limit per aerial line extension and the $3,000 limit per underground drop proposed by Race Telecommunications Inc., sufficient to address properties far away from distribution facilities? Alternatively, should the Commission allow remuneration for line extensions costs incurred to serve properties several thousand feet away from distribution facilities? What should be the limit? Should there simply be a maximum length of line extension, for example the 750 feet maximum proposed by North Bay North Coast Broadband Consortium?

As with middle mile infrastructure, given that CASF-funded projects are largely in rural, and often remote, areas, an arbitrary mileage or cost limit would not be appropriate. Instead, subsidized service drops should be limited as described above.

What are the components of a fixed-wireless line extension connection that should be remunerated by the program? And how much on average do fixed wireless extensions cost? Is the $300 limit per wireless extension connection proposed by Race Telecommunications Inc., sufficient?

The notion that fixed wireless equipment fits the common industry definition of a "line extension" is a product of the legislative sausage machine rather than a reflection of reality. The $300 limit proposed by Race Telecommunications Inc. is a reasonable amount to pay for a single access point capable of serving a single household any reasonable distance from an existing point of presence.

As with wireline extensions, any subsidized wireless extension should be capable of provisioning service at a level equal to the service offered by the ISP in adjacent areas and should not include customer premise equipment. We urge Staff to subject wireless line extension proposals made by wireline operators to particular scrutiny. The residents of eligible households should not be treated as second class citizens.

Should a service provider be able to apply for line extension connection cost remuneration on behalf of the property owner requesting such line extension service connection?

No.

ISPs should not be allowed to use the line extension program as an opportunity to launder CASF grant money through private citizens or to hold them captive. If an ISP wishes to apply for a grant to serve an eligible household, then the existing infrastructure grant process, as may be amended by the Commission, is sufficient.

A household that wishes to apply for a line extension grant should have the opportunity to compare offers made by multiple ISPs, and to submit an application on an arm's length basis. If a household requires assistance submitting a line extension grant application, then such assistance can be provided by a CASF-funded regional broadband consortium or CPUC Staff or other neutral third party.

It might be argued that placing the burden of assisting individual applicants on consortia or CPUC Staff will increase the cost of administering the program. Such an argument would be valid were the current complicated and indefensibly lengthy application process to be used for the line extension program. A simplified application form, backed by standardized declarations and other information provided by the designated ISP, and a streamlined review process will make such a burden negligible. The fear of self inflicted hardship does not justify processes that do not serve the best interests of the public.

Conclusion

The CCBC greatly appreciates the work that Commissioner Guzman Aceves, Administrative Law Judge Colbert and other CPUC Staff have put into this proceeding. We respectfully request that the above recommendations be incorporated into the anticipated Phase II decision and swiftly approved.

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Respectfully Submitted,

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