

**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

**CALIFORNIA CABLE AND TELECOMMUNICATIONS ASSOCIATION
COMMENTS ON ELIGIBILITY FOR AND PRIORITIZATION OF
BROADBAND INFRASTRUCTURE FUNDS FROM THE CALIFORNIA
ADVANCED SERVICES FUND**

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Pursuant to the *Administrative Law Judge’s Ruling Requesting Comments on the Eligibility For And Prioritization Of Broadband Infrastructure Funds From The California Advanced Services Fund* dated September 5, 2018 (“ALJ Ruling”) in the above-captioned Order Instituting Rulemaking (“OIR”), the California Cable and Telecommunications Association (“CCTA”)¹ hereby submits comments to the California Public Utilities Commission (“Commission”) on the six questions in the ALJ Ruling.

QUESTION 1. How should the Commission determine whether a CASF project application should be eligible for 100 percent funding?

The Commission should determine the level of funding for a CASF infrastructure grant application in accordance with the plain meaning of Section 281 of the Public Utilities Code,² as amended by AB 1665 (Garcia 2017). This bill added a new paragraph (13) to subdivision (f) of Section 281, which authorizes full or partial funding of a CASF grant and requires the Commission to make a case-by-case determination of each grant’s funding level with

¹ CCTA is a trade association consisting of cable providers who have collectively invested more than \$36 billion in California’s broadband infrastructure since 1996 and whose systems pass approximately 96% of California’s homes.

² All further Section references are to the Public Utilities Code.

consideration of factors including, but not limited to, the location and accessibility of the area, the existence of communication facilities that may be upgraded to deploy broadband, and whether the project makes a significant contribution to achievement of the program goal. It is a principle of statutory construction that this “including, but not limited to” language means that the specified items are illustrative and not exhaustive.³ Thus, in answer to Question 1-b, yes, the Commission should and must consider other factors because the plain language of Section 281 requires it.

Also instructive are other rules of statutory construction that require an agency implementing a statutory provision to harmonize it with other provisions of the statute and in furtherance of the overall legislative purpose and intent.⁴ In this regard, Section 281(b)(2)(B) expressly directs the Commission, in awarding infrastructure grants, to give a preference to projects in areas lacking any wireline or wireless broadband service, i.e. completely unserved areas. This direction aligns with the statutory program goal in Section 281(b)(1)(A) to award funds to provide broadband access to at least 98% of households in each consortia region by December 31, 2022. Accordingly, it follows that the Commission should consider whether a project area is completely unserved as an extremely relevant factor in its full funding determination under Section 281(f)(13).

CCTA does not object to any specific factor as being potentially relevant to the full funding determination for any particular application, including low-income status of households in the proposed project area. However, given that the Legislature has so clearly specified that completely unserved areas warrant priority treatment in the infrastructure grant program, the other potentially relevant factors should not be given precedence over that factor.

³ See, e.g., *City of San Jose v. Superior Court*, 2 Cal.5th 608 (2017).

⁴ See, e.g., *Leider v. Lewis*, 2 Cal.5th 1121 (2017).

Because the three factors listed in Section 281(f)(13) are merely illustrative and not exhaustive, CCTA urges the Commission to refrain from adopting overly prescriptive one-size-fits all numerical criteria for defining these three factors. For example, Question 1-a-4 proposes using 300 households as a threshold for indicating “significant contribution.” But this number is arbitrary and undercuts the requirement of a case-by-case determination for each application. Moreover, attributes of households, rather than the number, may be more relevant. A project providing first-time broadband access to 200 completely unserved households in a consortia region with less than 98% of households already served would arguably make a more significant contribution to the program goal than a project serving 300 households in an area that already has some level of broadband service.

In addition, to ensure a CASF grant recipient’s commitment to an approved project, the Commission should require all applicants to have some “skin in the game.” Nothing in Section 281(f)(13) requires 100% funding for any CASF project. It merely provides that the Commission “*may* award grants to fund *all or a portion* of the project” (emphasis added). Thus, in order to preserve CASF infrastructure funds to achieve the program goal, award of full funding should generally not be available for a project to households that are not completely unserved.

QUESTION 2. Should the Commission require CASF grantees to offer affordable broadband service plans as a condition of receiving CASF funding?

The Commission cannot require CASF grantees to offer broadband service at a specific rate as a condition of receiving a CASF infrastructure grant for several reasons. First, the Commission does not have legal authority to set rates for broadband services. Second, nothing in Section 281 or in the legislative history of AB 1665 provides a basis for this proposed requirement. Section 281 includes an express statutory preference for low-income communities

for grants from the broadband *adoption* program.⁵ But the statutory eligibility requirements for CASF infrastructure grants specified in Section 281(f)(5) do not include a similar mandate, much less an affordable broadband service requirement or pricing mandate.

Importantly, the Commission has alternative means to ensure reasonable pricing for CASF-funded broadband. As CCTA pointed out in its April 16, 2018 Opening Comments (“CCTA Opening Comments”), in the context of the 2-year price freeze requirement, the Commission can simply require that applicants offer access to broadband service on the same rates, terms, and conditions as for comparable services offered to all other customers in the state.⁶

QUESTION 3. Should the Commission eliminate the current scoring criteria and replace it with a different evaluation process focused on eligibility, minimum performance standards, and funding level determinations?

As demonstrated in the record of this proceeding and Commission resolutions awarding CASF grants, scoring criteria are of practical use only when the Commission has competing applications – which has rarely happened in the history of the program. Moreover, the record in this proceeding and legislative history of AB 1665 demonstrate that an uncertain, complex, and burdensome application process is a major disincentive for potential applicants to participate in the program. Thus, CCTA believes that adopting a new and complex application scoring scheme will only discourage participation. As stated in CCTA’s Opening Comments, providing higher funding amounts would be a more effective approach to generate more program participation.⁷

Moreover, the proposal on pages 5 and 6 of the ALJ Ruling, including the chart, is not clear and does not include corresponding changes to the proposed infrastructure grant rules in

⁵ Section 281(j)(5) (“The commission shall give preference to programs in communities with demonstrated low broadband access, including low-income communities...”).

⁶ CCTA Opening Comments at 8.

⁷ CCTA Opening Comments at 10.

Appendix C to the *Amended Scoping Memo and Ruling of Assigned Commissioner* issued February 14, 2018, in this OIR. Thus, CCTA looks forward to further illumination from other parties' comments and offers only these initial observations at this time.

First, any “minimum performance requirements” that operate as infrastructure grant “eligibility” requirements cannot exceed the eligibility requirements established in statute. While the proposed requirement to deploy service at speeds of at least 10/1 is in statute, the proposed requirement to offer an affordable monthly plan is not. Second, any scoring or prioritizing of applications must be consistent with statutory provisions, such as the preference for projects in completely unserved areas. Proposals to provide projects serving low-income areas with extra funding or ministerial review are not based in any statutory preference in the infrastructure program. Moreover, such proposals raise concerns regarding the transparency and reliability of the data source for establishing low-income status.⁸

Third, and most significantly, CCTA opposes the proposed “ministerial” process that authorizes staff award of a grant without a Commission resolution. As discussed in CCTA’s Opening Comments, the proposed ministerial review constitutes an unlawful delegation of authority and raises due process issues.⁹ Moreover, a ministerial process that eliminates the opportunity for a challenge (and therefore may result in an overbuild) would directly contravene the Legislature’s clear direction prohibiting use of CASF funds to overbuild.¹⁰ The challenge process to identify instances of overbuilding is especially critical given the substantial evidence in the record of this proceeding of inaccuracies with the Broadband Availability Map indicating what areas are served or not.

⁸ See, e.g., CCTA Opening Comments at 18 (discussing the need to clearly identify the data sources utilized to make a determination of whether an area is low-income).

⁹ CCTA Opening Comments at 9 to 10.

¹⁰ AB 1665, (Ch. 851, Stats. 2017) Section 2(c) (“It is the intent of the Legislature that California...not use moneys in that fund to overbuild the broadband infrastructure.”).

Further, Section 281 as amended by AB 1665, clearly contemplates that CASF infrastructure grants are to be awarded by Commission resolution. The new paragraph (10) of subdivision (f) of Section 281 requires specified public notice of a CASF application and amendments at least 30 days before the Commission publishes “the corresponding resolution” to award the grant. The new subdivision (k) of Section 281 requires the Commission to post, among other items, all “application challenge deadlines.” Moreover, AB 1665 retained the following provision now in subdivision (f)(8), which clearly contemplates both an opportunity for a challenge and *commission* review of each infrastructure application:

The commission shall provide each applicant, and any party challenging an application, the opportunity to demonstrate actual levels of broadband service in the project area, which the commission shall consider in reviewing the application.

A ministerial review process would contravene these clear provisions of law governing the CASF infrastructure grant program.

QUESTION 4. Should the Commission limit a CASF grantee’s administrative expenses to 15 percent of total project costs?

The ALJ Ruling does not specify what facts or policy rationale underlie this proposal. The CASF program currently reimburses grantees upon submission of verified invoices of costs already incurred. It is difficult to define “administrative expenses” without knowing the other categories to which all project costs would be assigned. CCTA supports the Commission’s efforts to ensure that CASF funds are spent on infrastructure. However, at this point, CCTA merely cautions against an approach that may create more bureaucratic barriers to program participation.

**QUESTION 5: How should the Commission treat CAF providers seeking CASF funds?
How should the Commission treat satellite broadband service?**

Regarding Connect America Fund (“CAF”) providers, CCTA urges the Commission to follow the plain meaning of the key statutory provision – Section 281(f)(12), which prohibits a CASF grant from funding broadband infrastructure already funded by CAF.¹¹ In addition, rather than make assumptions about any proposed project, the Commission should rely on the factual information submitted by the applicant and – importantly -- information about existing facilities in the proposed project area provided in any corresponding challenge.

Regarding satellite providers, CCTA reemphasizes the portion of its Opening Comments that explain why satellite providers should not be eligible applicants for CASF infrastructure grants.¹² Question 5-b-2 correctly raises the corollary issue of making satellite providers eligible CASF applicants – shouldn’t availability of satellite service also be considered in determining what areas of California are unserved? If satellite service is currently available throughout California, then no otherwise “unserved” area would remain eligible for a CASF infrastructure grant. CCTA also points out that in AB 1665 the Legislature added paragraph (1) to subdivision (f) of Section 281, which requires the Commission to award CASF infrastructure grants “on a technology-neutral basis, including both wireline and wireless technology.” Neither the plain language of AB 1665, nor the legislative history, mention satellite technology.

QUESTION 6. Should the Commission require additional information in project summaries?

CCTA is not aware of a problem with the information currently required in CASF project summaries. Moreover, CCTA is concerned that the proposed additional project summary requirements would result in public disclosure of information that is confidential, proprietary and/or includes Critical Network Infrastructure. This could create further disincentive for a

¹¹ CCTA notes that the ALJ Ruling cites to Section 281(f)(13), apparently intending to cite Section 281(f)(12).

¹² CCTA Opening Comments at 2 to 3.

provider to participate in the program and create security risks. Moreover, public disclosure of the detailed equipment and infrastructure plans in an applicant's project summary would be entirely inconsistent with Section 281(f)(4)(B), which prohibits public disclosure of similar infrastructure plans submitted to the Commission as part of a "Right of First Refusal" filing.

The most significant purpose of a CASF project summary is to provide public notice of the location of the proposed infrastructure so it can be determined if the project area is already served. This enables an existing provider to challenge the application and ensure compliance with the statutory prohibition against award of CASF funds for an overbuild. AB 1665 recognized the significance of public notice of CASF applications and the challenge process by adding requirements for Internet posting and service to the service list of all applications and all amendments to applications at least 30 days prior to publishing a draft resolution awarding an infrastructure grant.¹³ The Commission should avoid any change to the project summary requirements that would complicate or impede full compliance with these important public notice requirements that are essential to compliance with the statutory prohibition on funding overbuilds.

Respectfully submitted,

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¹³ See subdivisions (f)(10) and (k) of Section 281.