

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 ADMINISTRATIVE LAW JUDGE'S RULING SOLICITING  
ADDITIONAL COMMENTS ON ISSUES IDENTIFIED IN ORDER  
INSTITUTING RULEMAKING 12-10-012**

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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 Administrative Law Judge's Ruling Soliciting Additional Comments on Issues Identified in Order Instituting Rulemaking 12-10-012 (ALJ Ruling), filed in this proceeding on March 18, 2013. The ALJ Ruling seeks to supplement the record on what safeguards should be applied to unregulated entities applying for California Advanced Services Fund (CASF) grants and loans, given that they are not subject to the Commission's regulatory authority.

Only four parties, including DRA, filed opening comments on the ALJ Ruling.<sup>1</sup> DRA notes the lack of specificity and evidence in the comments regarding reasonable and appropriate safeguards that should be applied to unregulated entities if eligibility for the CASF program is expanded. In general, commenting parties appear to struggle to provide recommendations and responses to the questions posed in the ALJ Ruling. More specifically, there is a lack of concrete data and information concerning appropriate performance bond and liquidity requirements sufficient to protect ratepayers in the event the Commission expands eligibility to unregulated entities. There was also little or no analysis from other parties about the Commission's continuing jurisdiction over unregulated entities and its ability to maintain oversight over CASF funds. Given the paucity of data, as well as concerns about the Commission's ability to maintain adequate oversight over CASF funds, DRA continues to urge the Commission not to expand CASF eligibility to unregulated entities. Instead, the Commission should focus on improving the cost-effectiveness and outcomes related to current CASF funding parameters.

Although DRA does not support expanding eligibility, we understand that the Commission may in fact do so. As such, DRA offers responses and recommendations regarding the requirements for unlicensed entities and Commission enforcement authority. These comments, which should not be construed as support for expanding eligibility, emphasize the following:

- Commenting parties have conflated their positions and logic in making recommendations on performance bonds and liquidity requirements, but these safeguards serve different purposes and should not be tied together.

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<sup>1</sup> Comments were filed by CCTA, Small LECs, AT&T, and DRA.

- In order to protect ratepayers, performance bonds should be based on a reasonable amount tied to the project cost rather than set at a flat amount of \$25,000 as the Small LECs recommend;
- DRA agrees with CCTA that a reasonable liquidity requirement proportionate to the grant amount is important towards protecting ratepayers and ensuring that the entity is capable of meeting start-up expenses for the specific grant project.<sup>2</sup> A liquidity requirement of at least \$100,000 for two years following CASF project construction would be reasonable, rather than for one year as the Small LECs propose; and
- As the Small LECs recommend, the Commission should clarify that its enforcement authority applies to CASF applicants, not just to grantees. Further, DRA recommends additional measures to ensure the truthfulness of the information submitted on applications and recommends an applicant's Fiscal Agent should sign an affidavit, under penalty of perjury and subject to the Commission's authority to enforce Rule 1.1, that to the best of their knowledge all the statements and representations made in the application are correct.

## II. DISCUSSION

### A. Performance Bond and Liquidity Requirements Are Not and Should Not Be Tied Together

Commenting parties have intermingled their positions and logic in making recommendations on performance bonds and liquidity requirements, but these safeguards serve different purposes and should not be tied together. For example, the Small LECs claim that if the Commission requires a performance bond during construction of a CASF-funded project, it does not need to impose a separate liquidity requirement for that time period. The Small LECs further recommend that if the bond amount is reduced to \$25,000 or less upon project completion then the Commission should impose an ongoing liquidity requirement.<sup>3</sup> DRA does not share the perspective of the Small LECs that performance bonds and liquidity requirements are linked or

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<sup>2</sup> CCTA Comments, at 2.

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

are somehow a function of one another. These requirements serve different purposes. The performance bond holds grantees to post-construction commitments, whereas liquidity requirements ensure that an entity has sufficient cash to cover start-up operations. There is no evidence that the Commission intended a connection between these requirements and on a practical level it does not make sense to connect them by making one requirement inversely proportionate to the other, for example.

### **B. Performance Bond Requirements for Unlicensed Entities**

If the Commission expands eligibility to unlicensed entities, DRA continues to urge the Commission not to eliminate or reduce the amount of post-construction CASF performance bonds, which are needed for the Commission to uphold its continuing obligation to ensure compliance with terms and conditions of CASF awards for the three years following construction.<sup>4</sup> As an initial matter, a review of the comments fails to elucidate that there is even a problem with unlicensed entities obtaining performance bonds (or meeting liquidity requirements). Indeed, no party/provider filed comments confirming the alleged difficulty in obtaining the requisite performance bonds. Like the Small LECs, DRA similarly has difficulty in accepting the premise in the ALJ Ruling that “few, if any, unregulated providers will be able to obtain a performance bond...”<sup>5</sup> DRA agrees with the Small LECs’ assessment that if a bond is specific about the items that would make it callable and is for a reasonably defined term, it should be possible to obtain.<sup>6</sup>

As for the performance bond requirement, the Small LECs also propose that upon completion of a CASF project, it would be reasonable to reduce the performance bond requirement to the "minimum performance bond" level currently imposed upon Non-Dominant Inter-Exchange Carriers (NDIECs) in the registration process set forth in D.10-09-017.<sup>7</sup> As DRA stated in its opening comments, DRA does not believe it is appropriate or prudent to reduce the amount of post-construction performance bond. However, if the Commission does decide to reduce the bond amount, any reduction should only occur in the post-construction phase. Further, the Small LECs note that:

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<sup>4</sup> DRA Comments, at 4.

<sup>5</sup> Small LECs Comments, at 2.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, at 3.

Under D. 10-09-017, NDIEC registrants are subject to a performance bond requirement in the amount of \$25,000 or 10% of their intrastate revenues, whichever is greater. D.10-09-017, at p.58 (Ordering Paragraph ("O.P.") 5). Since much of the revenue derived from services provided over CASF funded infrastructure may be from interstate or unregulated services that are beyond the Commission's jurisdiction, it is not appropriate in this context to base the amount of the performance bond upon a contingency linked to intrastate revenue. The \$25,000 alternative amount included in the recent NDIEC performance bond decision (D.10-09-017) is an appropriate proxy for the level of bond that a CASF applicant should retain following completion of a project.<sup>8</sup>

In DRA's view, a \$25,000 performance bond amount to be retained following completion of a project may not be sufficient to prevent fraud, waste and abuse of ratepayer funds, and ensure that CASF commitments are met. DRA agrees with the Small LECs that a performance bond linked to intrastate revenues is not an appropriate proxy for determining performance bond amounts; this difficulty coming up with a reasonable proxy is another reason why it does not make practical sense to expand eligibility to unlicensed entities. However, if the Commission moves forward with expanding eligibility and decides to reduce the amount of a post-construction performance bond for unlicensed entities, the amount should be a function of the project size in some manner and it should not be a flat figure since some projects may receive very large grants (e.g., over \$1 million) and \$25,000 may not be sufficient to protect ratepayers. DRA proposes that the performance bond amount following project completion should be at least \$25,000 or 50% of project costs, whichever is greater.

### **C. Liquidity Requirements for Unlicensed Entities**

In the event that the Commission moves forward with expanding eligibility, the Small LECs' proposal for an ongoing liquidity requirement, in which a CASF grant recipient should maintain at least \$100,000 in unencumbered cash for a minimum of one year following completion of its grant project,<sup>9</sup> is reasonable in terms of the amount. The Small LECs note that this would track the Commission's current practice of requiring CLEC applicants to commit to holding at least \$100,000 in unencumbered cash for at least one year following issuance of a

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<sup>8</sup> *Ibid.*, at 2.

<sup>9</sup> Small LECs Comments, at 3.

CPCN.<sup>10</sup> DRA generally supports the amount of \$100,000, but recommends that the timeframe be extended to two years in order to ensure adequate cash flow. DRA believes the extended timeframe is appropriate given the limited jurisdiction the Commission would otherwise have over unlicensed entities.

**D. Enforcement of CASF Conditions and Penalties for Failure to Comply with Commission Rules and Orders**

As the Small LECs and CCTA correctly point out, even if there is legislative authority allowing the Commission to expand CASF eligibility to unlicensed entities, those entities would not be subject to all Commission “rules and statutes” by virtue of participating in the CASF program.<sup>11</sup> DRA agrees with this assessment, and finds it consistent with DRA’s observation that the extent of the Commission’s ability to exercise enforcement powers via Pub. Util. Code § 2111 depends on the extent of legislative authority granted to the Commission over these entities.<sup>12</sup> If CASF eligibility is expanded to unlicensed entities, DRA further agrees with the Small LECs’ recommendation that the Commission clarify that the Commission’s enforcement authority applies to CASF applicants, not just to grantees. The submission of truthful information on CASF applications is critical to the success of the program. Not only does the truthfulness of the information submitted on applications affect the Commission’s ability to adequately assess an applicant’s qualifications and proposals, it ultimately is critical to the protection of the public funds used to build CASF infrastructure. For this reason, DRA recommends that as part of the application, an applicant’s Fiscal Agent should sign an affidavit, under penalty of perjury and subject to the Commission’s authority to enforce Rule 1.1, that to the best of their knowledge all the statements and representations made in the application are true and correct. The applicant should specifically agree to comply with Rule 1.1 of the Commission’s Rules of Practice and Procedure.

DRA further recommends that the Commission incorporate language comparable to that of an application for Certification of Public Convenience and Necessity. DRA notes that the Commission implemented both of these recommendations in the Decision Implementing

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<sup>10</sup> *Ibid.*

<sup>11</sup> *See* Small LECs Comments, at 4; CCTA Comments, at 2.

<sup>12</sup> *See* DRA Comments, at 6.

Broadband Consortia Grants, D.11-06-038. That decision required Regional Consortia to certify within the affidavit that:

No member, officer, director, partner of a Consortium or its Fiscal Agent has: 1) filed for bankruptcy; 2) was sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with any regulatory statute, rule, or order; nor 3) has been found either civilly or criminally liable by a court of appropriate jurisdiction for violation of § 1700 et seq. of the California Business and Professions Code, or for any action which involved misrepresentations to consumers, nor is currently under investigation for similar violations.<sup>13</sup>

Finally, the other parties' comments are silent on whether they support the use of a contractual arrangement to obtain compliance of CASF rules by unregulated entities, or whether the Commission may rely on Pub. Util. Code § 2111 as a means of exercising continuing enforcement powers. DRA reiterates that the use of contractual arrangements to obtain compliance would be costly and burdensome, and ultimately unnecessary. If the Commission has jurisdiction to award grants and loans and impose conditions and requirements on CASF applicants, be they telephone corporations or unregulated providers, then it should have continuing *regulatory* (not contractual) jurisdiction to monitor and enforce those conditions.

### **III. CONCLUSION**

For the reasons discussed above, DRA remains concerned about expanding CASF eligibility to unregulated entities. The extremely limited data for performance bond and liquidity policies, combined with the lack of analysis from other parties about the Commission's continuing jurisdiction over unregulated entities, leads DRA to continue urging the Commission to focus on improving the cost-effectiveness and outcomes from current CASF funding parameters instead. If the Commission expands CASF eligibility to unregulated entities, however, it should adopt enhanced performance bond and liquidity requirements as safeguards to protect consumers from the risks associated with having less experienced unlicensed entities receiving CASF grants, and should rely on its regulatory, not contractual authority, to enforce CASF rules and regulations.

Respectfully submitted,

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<sup>13</sup> D.11-06-038, *mimeo*, at 26-27.

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