

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)

**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 comments on the Order Instituting Rulemaking (OIR) to Consider Modifications to the California Advanced Services Fund (CASF).¹ The OIR was initiated to revise the eligibility requirements for participation in the CASF and 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 (hereinafter referred to as “non-licensed” or “non-CPCN/WIR” entities). These new rules are contingent on legislative action to change the current rules defined by statute in Cal. Pub. Util. Code § 270(b), in which case draft rules would be issued to implement the proposal.² The rulemaking seeks comment on the proposal to expand the CASF eligibility requirements.

The OIR states 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.³ Additionally, the OIR contends that last mile projects have not been adequately undertaken via the current CASF eligibility requirements. DRA is concerned that the current CASF has not been fully leveraged to support underserved and unserved areas, and DRA questions the OIR’s rationale for expanding CASF eligibility to non-licensed entities. There are many risks in giving entities that do not hold a CPCN or WIR millions of dollars in CASF funds, including but not limited to the possibility of unfinished projects, unaffordable new services, and insufficient speeds or reliability.

The OIR seems to attribute low program performance solely to low participation by currently eligible entities. DRA believes that prior to considering expanding CASF eligibility to non-licensed entities over which the Commission has no jurisdiction, the Commission should instead focus on other possible revisions to the CASF program that would increase last mile projects and actual broadband adoption from pre-existing projects and currently eligible entities with CPCNs and WIRs.

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

² OIR, *mimeo*, at 2.

³ OIR, *mimeo*, at 10.

In the event, however, the Commission is able to gain necessary legislation and proceeds in establishing rules for these entities to apply for funding, DRA urges additional ratepayer protections, including broader use of performance bonds to ensure project benefits. To this point, DRA provides a response to Question #3 set forth in the OIR regarding safeguards that are necessary if eligibility requirements are modified as proposed.⁴

The legislative and Commission goals for the CASF program are to create ubiquitous broadband in California as a result of well-located, accessible, and affordable new infrastructure. DRA supports these goals, but urges the Commission to develop effective rules for the CASF that will ensure better projects, including more last mile projects, from entities already eligible to participate in the program. The Commission should undertake this effort prior to opening up the CASF to non-licensed entities. All California citizens should have access to a high speed Internet connection, and DRA continues to advocate for greater benefits and cost-effectiveness from ratepayer funded CASF projects.

II. DRA QUESTIONS THE FOUNDATION/NEED FOR CONSIDERING CHANGES IN CASF ELIGIBILITY

A. Giving Funds to Non-Licensed Carriers May Create More Problems Than Benefits, More Strategies Are Needed

The OIR identifies shortfalls in the CASF program that have essentially left many unserved areas and too few last mile projects.⁵ DRA agrees that more projects are needed that target the areas in greatest need, but questions whether the solution to this problem is to open up participation in the CASF to non-licensed carriers. There is no guarantee that non-licensed entities will build more cost-effective projects, more last mile projects, and better middle mile projects, especially since such entities likely have no demonstrated expertise in telecommunications or in building broadband facilities. In fact, there is no evidence that the Commission could expect to see better projects or would not experience significant risks associated with its lack of jurisdiction over these entities. The OIR would allow additional entities to receive funding as a solution to sub-standard CASF performance. DRA urges the Commission instead to require more detailed analysis of program deficiencies accompanied by a

⁴ DRA provides no response to the other questions posed in the OIR, as they are directed at commercial broadband providers and the entities that would participate in CASF if eligibility is broadened; however, DRA reserves the right to respond to comments provided by other parties.

⁵ OIR, *mimeo*, at 8-10, 13.

strategic plan for improving performance without putting ratepayers at risk. DRA recommends a comprehensive review of CASF shortfalls that takes into consideration such critical variables as: affordability of new services, tracking adoption/marketing plans over time, and withholding funding when projects fall short of goals. DRA believes that a number of measures, short of opening up participation to non-licensed carriers, have the potential to improve broadband deployment and adoption in California. Simply expanding the pool by allowing less experienced entities to receive CASF funding may also cause more harm than good.

DRA is interested in strategies that will achieve the Commission and the Legislature's goals for the CASF program. According to the OIR, "[t]he CASF was created to fund deployment of broadband infrastructure in unserved and underserved areas of the state, rather than the adoption of broadband services."⁶ However, this statement conflicts directly with previous Commission sentiment in D.12-02-015 concerning the purpose of the CASF, wherein the Commission stated: "[w]e emphasize that the ultimate goal of the CASF program is to increase the *adoption* of broadband."⁷ DRA notes that both the Legislature and the Commission have indicated that the CASF is about closing the "Digital Divide", which requires *adoption* in addition to construction.⁸ Giving millions of dollars of funding to non-licensed companies with limited or no track records in telecommunications or broadband deployment will not necessarily increase broadband deployment or adoption. As DRA recommended in previous comments, adoption/marketing plans that estimate the number of new customers from projects and methods for attracting these customers are a key strategy for moving California towards ubiquitous broadband.² DRA's recommendations went further than the Commission's decision, however,

⁶ OIR, *mimeo*, at 18.

⁷ D.12-02-015, *mimeo*, at 3.

⁸ *See, e.g., id.* *See also*, D.11-06-038, implementing the CASF Broadband Consortia Grant: "Through the Consortia program, we promote more widespread availability of advanced communications services for all Californians by fostering increased broadband deployment and *adoption*." (D.11-06-038, *mimeo*, at 1-2; emphasis added.) The bill analysis for SB 1193, which established the CASF in the State Treasury, further expresses concern for the *adoption* rate for broadband services, as opposed to just the *access* to broadband, and noting that affordability is a key element to increasing adoption: "A commitment to offer at any price is not much of a commitment...[I]t would be counterproductive to provide the subsidy without getting a service which was priced at an affordable level." (State Energy, Utilities and Communications Committee Bill Analysis SB 1193 (April 9, 2008).)

² DRA Opening Comments on the Decision Implementing Broadband Grant and Revolving Loan Program Provisions (filed Jan. 6, 2012), at 2.

by urging the Commission to hold CASF projects to the adoption estimates in their plans by requiring additional outreach when targets are not met and by not authorizing additional funding for contingency measures when projects fall short of goals.¹⁰ The Commission's February 2012 CASF Decision does not include enforcement mechanisms regarding adoption goals.¹¹ DRA reiterates that recommendation here.

B. The Commission's Ability to Enforce Safeguards on Non-Licensed Entities is Questionable

Even with new legislation, DRA questions the ability of the Commission to disburse CASF funds to non-telephone corporations and still retain the ability to maintain oversight over the projects and protect ratepayers. Investing utility ratepayer funds in service provider infrastructure over which the Commission has no authority is problematic. The legislative authority to grant the funds to non-regulated entities is necessary, but the Commission must still have the ability to hold CASF recipients accountable for the use of funds and to take appropriate enforcement actions in the event a funding recipient does not comply with Commission requirements or otherwise cause harm to the state's telecommunications ratepayers. The limits of the Commission's jurisdiction in seeking to enforce conditions placed upon grants or loans to non-licensed entities affect its ability to ensure accountability for these expenditures. Although the Commission may have jurisdiction to impose various conditions on CASF recipients via §§ 281 and 701 of the Pub.Util. Code, the jurisdictional issue comes into play when attempting to enforce those conditions. The California Court of Appeal has held that the Commission has authority to enforce conditions on an entity that it might not otherwise regulate if it has the statutory authority to impose them in the first place. *See PG&E Corp. v. Public Utilities Comm.* (2004) 118 Cal.App.4th 1174, 1207 ("We conclude that the PUC may enforce the holding company conditions even in the absence of express statutory authority to do so because the PUC's jurisdiction to enforce the conditions is implied from its unchallenged statutory authority to impose them."). However, the court went on to state that this jurisdiction is limited in that the PUC's action must be cognate

¹⁰ *Ibid.*

¹¹ D.12-02-015, *Decision Implementing Broadband Grant and Revolving Loan Program Provisions*, *mimeo*, at 25.

and germane to *public utility regulation*. (*Id.* at 1201.) Indeed, the court’s analysis in *PG&E Corp. v. Public Utilities Comm.* relied heavily on the fact that the holding companies had an ongoing relationship with the regulated public utilities, which presented ongoing concerns for the regulated entities. *Id.* at 1201, 1207-1208, 1210-1211. In the case of providing funds to non-CPCN or non-WIR entities, there would be no nexus to public utility regulation. Accordingly, even with legislative action, DRA questions the Commission’s ability to *enforce* the conditions placed upon non-regulated entities.

Moreover, simply placing conditions upon an unregulated entity alone does not necessarily confer jurisdiction on the Commission to enforce those conditions, even if those conditions are agreed to by the unregulated entity. “We do not suggest that the PUC has enforcement authority over entities other than public utilities simply because it has the power to approve certain transactions involving public utilities subject to conditions. The conditions and the PUC’s interest in their enforcement must directly relate to some aspect of utility regulation.” *Id.* at 1201. The Commission too has expressed concerns in expanding funding to non-regulated entities:

In order to administer the program within the statutory framework we adopt herein and maximize the effectiveness of the Commission’s oversight, CASF funding shall be limited to a “telephone corporation” as defined under Pub. Util. Code § 234... We consider the CPCN requirement necessary in order to ensure that the Commission has jurisdiction to control against waste, fraud, and abuse in our administration of the CASF program.¹²

There are too many unforeseen complications stemming from possible limitations on the Commission’s ability to enforce conditions placed upon non-licensed entities to ensure proper oversight and accountability for funds spent. Accordingly, DRA questions the wisdom in expanding CASF eligibility to non-CPCN and non-WIR entities.

¹² D.07-12-054, *mimeo*, at 34-35 (footnote omitted).

III. STRONGER SAFEGUARDS ARE NEEDED IF THE COMMISSION ALLOWS NON-LICENSED ENTITIES TO RECEIVE CASF FUNDS

The OIR requests comment on the safeguards that would be necessary if the eligibility requirements were modified as proposed, noting that the Commission does not have the same tools at its disposal to secure compliance from unregulated entities as it does with regulated entities. Although DRA questions the need to expand the CASF to non-CPCN and non-WIR entities, if the Commission were to expand eligibility to them, DRA agrees that the Commission would need to adopt appropriate safeguards to protect ratepayers against waste, fraud and abuse. DRA offers the following comments on the questions set forth in the OIR, yet notes that accountability for ratepayer funded grants will not be ensured even with additional requirements that the Commission may adopt.

A. Whether the Specific Rules Adopted in Resolution T-17233 Which Were Applied to Non-Licensed ARRA Grantees are Adequate

DRA agrees with the OIR that the Commission would need to implement appropriate safeguards to ensure that any non-licensed entities are financially and technically qualified to meet CASF program requirements as a condition of receiving CASF money.¹³ Resolution T-17233 requires qualifications background checks, performance and financial audits, and performance bonds for non-licensed ARRA grantees. DRA provides specific comment on each of these areas below.

1. Qualifications Background Check

Resolution T-17233 required that non-licensed CASF applicants (and any organization that would benefit from ratepayer funds) must demonstrate financial, technical and managerial competence by submitting the following information:¹⁴

- Company balance sheets proving liquidity;
- Biographical information demonstrating expertise of management team;
- Compliance with the California Environmental Quality Act (CEQA);

¹³ OIR, at 4-5.

¹⁴ Resolution T-17233, at 5-6.

- Certificate of good standing issued by the Office of the Secretary of State of the State of California not more than 60 days prior to CASF filing date;
- Additional information as needed to enable background checks on the business, its principal owners, and managers;
- Disclosures regarding past or current bankruptcy, regulatory compliance failures, and criminal or civil violations of § 17000 et seq. of the California Business and Professions Code, or for any actions which involved misrepresentations to consumers;¹⁵
- Compliance with Rules 1.1, 1.11 and 2.2 of the Commission's Rules of Practice and Procedure as outlined in Appendix 2 of T-17233.

Although this information is an adequate starting point, when Resolution T-17233 was issued for comment in October, 2009, DRA raised concerns about the resolution being premature given the Commission's then-pending examination of requirements for NDIEC entities in R.09-07-009.¹⁶ Subsequently, the Commission issued a final decision (D.10-09-017) making revisions to the NDIEC registration requirements. Currently, the Commission has an open rulemaking (R.11-11-006) regarding revisions to the certification process for telephone corporations seeking CPCNs or WIRs. A proposed decision is pending in that rulemaking, which generally aligns CPCN/ WIR requirements with those for NDIEC in D.10-09-017. For consistency, DRA recommends that any requirements for non-telephone corporation entities eligible for CASF funds also be aligned with updates made in D.10-09-017, as those requirements are foundational to both the CPCN rulemaking and Resolution T-17233. For instance, the NDIEC requirements have been updated to require resumes of all key officers and owners that indicate sufficient managerial and *technical* experiences. This seems particularly key as non-telephone entities will need to demonstrate that they are able implement complex broadband projects when that is not the business they are primarily engaged in.

¹⁵ Required from any individuals associated with or employed by the applicant as an affiliate, director, partner or owner of more than 10% of the company, or any person acting as director or officer of the applicant, whether or not formally appointed, have been associated with any company. Resolution T-17233, at 5-6.

¹⁶ Resolution T-17233, at 9

2. Performance Bonds and Audits

Resolution T-17233 correctly notes that, pursuant to AB 1555, the Commission is required to conduct both a financial audit and a performance audit of the CASF program to ensure that funds have been expended in accordance with the approved terms of the CASF grant.¹⁷ The latest audit, published in April 2011, incorporating projects approved as of December 31, 2010, includes substantial data and DRA believes it could be further utilized for internal CASF program evaluation. Prior to opening up eligibility to non-CPCN and non-WIR applicants, DRA urges the Commission to use these audit findings as more than a status quo report to the Legislature. The 2011 audit provides a basis for a strategic plan to increase broadband deployment and adoption.

In addition to identifying the pre-existing audit requirements, the Resolution requires all applicants who are non-CPCN and non-WIR holders to agree in writing that they will allow the Commission to inspect their accounts, books, papers, and documents related to the application and award of CASF funds.¹⁸ If the Commission expands CASF eligibility to non-licensed entities, DRA agrees with this approach and recommends the Commission adopt the same requirement here.

DRA also supports the use of performance bonds to provide some form of protection when non-licensed CASF applicants default or do not build adequate projects, and fully agrees with the requirement that failure on the part of the applicant to allow the Commission to inspect the applicant's accounts, books, papers, and documents related to the application and award of CASF funds makes the performance bond callable.¹⁹ The required performance bond documentation and payment policies specified in T-17233 for non-CPCN and non-WIR holders are also appropriate.²⁰

While DRA supports the *need* for performance bonds for non-licensed CASF recipients and various policies discussed above, we urge the Commission to increase the

¹⁷ Resolution T-17233, at 6.

¹⁸ *Ibid.*

¹⁹ Resolution T-17233, at 6.

²⁰ Res. T-17233, at 7, states that performance bond documentation should be a copy of the executed bond, equal to the total amount payable under the CASF award, addressed to the Executive Director and to the Director of Communications Division within five business days after the completion of CEQA review.

scope of how performance bonds are used. Resolution T-17233 notes that a performance bond is intended to ensure project completion and guarantees continued operations or compliance with the approved pricing terms/conditions and pricing commitment period.²¹ DRA's recommends that these performance bonds should also be called if a non-licensed CASF project does not lead to the outcomes specified in the application or adoption/marketing plan. This strategy can effectively serve to increase broadband in California, with the bonds providing an incentive for meeting the parameters specified in CASF project proposals. This strategy would depend on the Communications Division to determine the appropriate timeframe in which to evaluate adoption outcomes before calling the bonds. Entities should be given an opportunity to revisit missed goals, and, as long as they find ways to address deployment/adoption goals, the bonds do not need to be called. In terms of costs and constraints associated with this recommendation, there may be added oversight costs for staff to more actively track project outcomes (potentially over a longer time horizon when marketing projections will be realized). As with NDIEC carriers and is currently proposed for CPCN and WIR holders in the pending OIR, DRA further recommends that the performance bonds can be called in the event that the Commission needs to seek recovery of fees, taxes, fines and/ or restitution because the non-telephone companies violate state laws and regulations or harm customers. Adding these aspects to the regulatory approach is an appropriate risk management strategy given that the Commission may not have the authority to exercise any punitive measures over CASF recipients who are not CPCN or WIR holders, and it balances the Legislature and the Commission's goals with the need to minimize ratepayer abuse, waste, and fraud.

Moreover, the amount of the performance bond for non-telephone corporations awarded CASF funds should be specified. The current performance bond amount for NDIEC carriers is \$25,000 or 10% of intrastate revenues²² and the same bond amount is recommended for CPCN and WIR holders in the pending CPCN OIR.²³ The \$25,000 bond amount may not be appropriate based on the size of a given CASF project. In addition, as non-CPCN and non-WIR entities will not have intrastate telecommunications

²¹ Resolution T-17233, at 6.

²² D.10-09-017, *mimeo*, at 2.

²³ Proposed Decision in R.11-11-006 (issued October 18, 2012), at 2.

revenues on which to base performance bond amounts, DRA recommends that the Communications Division hold a technical workshop to determine what the appropriate bond amount would be.

B. Whether The Commission Should Adopt Additional Safeguards

DRA recommends that the scope of the OIR be expanded beyond the proposed safeguards in order to consider ways to make the program more cost-effective. Expanding eligibility to non-licensed entities is only one, albeit risky, approach for addressing the underlying need for improving program performance. The Commission should also consider how current projects will be accountable for creating intended benefits over time. However, if the Commission decides to expand CASF eligibility to non-CPCN and non-WIR entities, DRA urges the Commission to specify that these recipients will be bound by the same requirements as licensed entities, and will be required to submit and comply with adoption/marketing plans. DRA has been concerned for some time about a “build it and they will come” approach to the CASF that falls short of the Legislature and the Commission’s goals for ubiquitous broadband in California. The CASF is a Public Purpose Program, and thus it is one of a series of programs created to benefit ratepayers and ensure broadband access regardless of income level, geography, or other diversities. There must be additional accountability and emphasis on tracking and enforcing CASF project outcomes for non-licensed entities as well.

DRA also suggests that the Commission require specific measures to decrease the propensity of costly and ineffective middle-mile project funding in regard to non-licensed entities. For example, requiring the ability to interconnect with other telephone and non-telephone entities may encourage more last mile broadband extensions if the Commission moves forward with funding for a crop of non-licensed grantees. DRA believes the need for these types of added safeguards is substantiated in the OIR, which points out that middle mile projects comprise over three-quarters of all CASF projects to date and yet they deliver unclear benefits and rarely lead to new last mile construction.²⁴ Thus, DRA urges additional protections when entrusting non-licensed less experienced entities to construct middle mile projects with ratepayer monies.

²⁴ OIR, at 13.

C. Whether The Safeguards Adopted in Resolution T-17233 are Too Stringent

DRA's view is that the safeguards in Resolution T-17233 should be more stringent in order to protect ratepayers from scenarios where non-CPCN and non-WIR holders receive CASF funds but do not deliver anticipated benefits. For example, these entities may not finish projects, run into serious budget problems, and/or build projects that are not accessible to customers for any number of reasons such as affordability. There is also the real risk that these projects will not deliver intended speeds, signals, or other basic broadband features that ratepayers financed and deserve as a return on their investments.

IV. CONCLUSION

As discussed above, DRA believes there are too many risks to ratepayers associated with giving non-CPCN and non-WIR entities millions of dollars in CASF funds. There are a number of scenarios that could occur, such as recipients walking away from unfinished projects after they have received ratepayer-funded CASF money. If the Commission moves forward in gaining needed legislative changes and then allowing these entities to apply for funding, DRA strongly urges additional ratepayer protections including broader use of performance bonds to ensure project benefits. DRA appreciates the opportunity to be involved in the process of improving the CASF program in order to achieve cost-effective ubiquitous broadband in California, which cannot be realized unless new infrastructure is accessible and adopted.

Respectfully submitted,

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