

**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

**PHASE II COMMENTS OF THE
CALIFORNIA CABLE AND TELECOMMUNICATIONS ASSOCIATION**

Lesla Lehtonen
California Cable and Telecommunications
Association
1001 K Street, 2nd Floor
Tel. (916) 446 - 7732
Fax. (916) 446 - 1605
E-mail: Lesla@calcable.org

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The California Cable and Telecommunications Association (“CCTA”) hereby submits these Comments in response to the Amended Scoping Memo and Ruling of Assigned Commissioner (“Scoping Memo”) dated February 14, 2018 in the captioned proceeding.

I. INTRODUCTION

The Communications Division Staff has accomplished much of the “heavy lifting” to implement the significant changes to the California Advanced Services Fund (“CASF”) mandated by Assembly Bill (“AB”) 1665, and CCTA supports many elements of the proposal drafted by Staff, which is set forth in Appendix C of the Scoping Memo (“Staff Proposal”). However, CCTA believes the Staff Proposal should be modified in several important respects: (i) satellite providers should be excluded as eligible applicants; (ii) clarification should be provided about middle mile projects and what constitutes a “high-priority area;” (iii) several of the grant application items should be revised to enhance the application process; and (iv) the “expedited ministerial review” and request for proposal (“RFP”) processes should be eliminated. Moreover, while CCTA members look forward to serving applicants seeking funding from the CASF Line Extension Program, some modest changes to the scope of the Line Extension Program and subsidy amounts,

as detailed below, will make the CASF Program significantly more effective and beneficial for consumers.

II. BROADBAND INFRASTRUCTURE ACCOUNT

As facilities-based providers of broadband services, the primary focus of CCTA members is on the Broadband Infrastructure Account. In this section, CCTA provides feedback on various aspects of the Broadband Infrastructure Account outlined in the Staff Proposal.

A. Low-Income Areas (Section 1.2)

Section 1.2 of the Staff Proposal provides that the “Commission may award grants to finance up to 100 percent of eligible project costs in low-income area census block groups,”¹ and the term “low-income areas” is defined in Section 1.3 to mean “areas identified by the median income within a Census Block Group having median income less than \$49,200.”² CCTA is concerned that the median income data may not be publicly available or exportable, which is necessary for transparency in the process. CCTA suggests therefore that the Commission clearly identify the data sources to be utilized for CASF applications pertaining to low-income areas.

B. Eligible Applicants (Section 1.4)

Satellite Service Providers. Section 1.4 of the Staff Proposal states: “the Commission will consider applications from satellite service providers provided that the applicants are able to prove functionality, and are able to meet the speeds required.”³ Although AB 1665 permits an “entity that is not a telephone corporation” to apply for CASF grants, CCTA believes this provision is directed primarily at facilities-based providers of broadband Internet access service that do not hold certificates of public convenience and necessity – not satellite providers. Indeed, AB 1665

¹ Scoping Memo, App. C, p. 5.

² Scoping Memo, App. C, p. 6.

³ Scoping Memo, App. C, p. 7.

includes no references to satellite service providers and further makes clear that the CASF program is intended for the construction of broadband infrastructure. For instance, Section 2(c) of AB 1665 states: “[i]t is the intent of the Legislature ... to fund **broadband infrastructure** where private investments and federal funds are not available and not use moneys in that fund to overbuild the **broadband infrastructure**.” (Emphasis added.) Thus, while AB 1665 does not address satellite providers, it does clearly reflect the legislative intent to fund infrastructure of facilities-based providers.⁴ Satellite providers already presumably offer service throughout *all* of California, so it is unclear what “infrastructure” could be funded via the CASF. Thus, the Staff Proposal to include satellite providers should be revised to remove this provision.

Definition of “Facilities-Based Broadband Service Provider.” The definition of a “non-telephone corporation ... facilities-based broadband service provider” set forth in Section 1.4 is somewhat ambiguous.⁵ The Staff Proposal references the National Telecommunications and Information Association (“NTIA”) definition and refers to D.14-02-018; however, footnote 100 of D.14-02-018 refers to the NTIA’s “Notice of Availability of Funds for the State Broadband Data and Development Grant Program” with a link to a now-defective URL.⁶ For clarity, CCTA suggests that the Staff Proposal be revised to directly incorporate the following NTIA definition, which is set forth in the technical appendix of the NTIA document:

An entity is a “facilities-based” provider of broadband service connections to end user locations if any of the following conditions are met: (1) It owns the portion of the physical facility that terminates at the end user location; (2) it obtains unbundled network elements (UNEs), special access lines, or other leased facilities that terminate at the end user location and provisions/equips them as broadband; or (3)

⁴ The Commission has likewise adopted the intent to exclude satellite providers, given that it has defined “unserved areas” as areas that are not served by any form of facilities-based broadband, or where Internet connectivity is available only through dial-up service or satellite.” See Resolution T-17143 at 1.

⁵ Scoping Memo, App. C, p. 7.

⁶ The NTIA document is available online at the following URL:

https://www.ntia.doc.gov/files/ntia/publications/fr_broadbandmappingnofa_090708.pdf.

it provisions/equips a broadband wireless channel to the end user location over licensed or unlicensed spectrum.

Business Customers. Section 4 of the Staff Proposal states that “[a] local governmental agency may be eligible for an infrastructure grant only if the infrastructure project is for an unserved household or business, in the context of local government applicants, the Commission has conducted an open application process, and no other eligible entity applied.”⁷ CCTA notes that this provision refers to a “business,” while most of the Staff Proposal refers to “households” alone. CCTA suggests that the Staff Proposal confirm that, to the extent local government grantees are permitted to serve business, so too should private provider grantees.

C. Middle Mile Projects (Section 1.2)

With respect to middle mile projects, Section 1.2 of the Staff Proposal provides as follows:

Projects that only deploy middle-mile infrastructure are not eligible for grant funding. For an application requesting funding for middle-mile infrastructure, the applicant is required to prove that the proposed middle-mile infrastructure is indispensable for accessing the last mile infrastructure. Examples of proof shall include a detailed explanation of existing middle-mile facilities, if any, and how and why the existing middle-mile facilities cannot meet the needs of the last-mile infrastructure and/or the needs of the community.⁸

The Staff Proposal incorporates the requirements set forth in Pub. Util. Code § 281(f)(5)(B) that (1) “[p]rojects that only deploy middle-mile infrastructure are not eligible for grant funding” and (2) for any project that includes middle mile infrastructure, the Commission must “verify that the proposed middle mile infrastructure is indispensable for accessing the last mile infrastructure.” CCTA believes the Staff Proposal generally strikes the right tone as it is essential that the funding of middle mile projects should be strictly limited to those that are both tied to last mile projects and indispensable. Less stringent criteria would run afoul of AB 1665 and would risk diverting

⁷ Scoping Memo, App, C., p. 7.

⁸ Scoping Memo, App. C, p. 5.

substantial funds from last mile projects that are at the heart of the Broadband Infrastructure Account to peripheral middle mile projects, which are generally quite costly.

CCTA submits that, in addition to the criteria set forth in Section 1.2 of the Staff Proposal, the term “indispensable” should be clarified to mean that there is no other middle mile service provider willing or capable of serving the area.⁹

D. “High-Priority Areas” or “Hi-Priority Areas” (Sections 1.3 and 1.8)

There appears to be ambiguity in the Staff Proposal as to what constitutes a “High-Priority Area” (or a “Hi-Priority Area,” as both terms are used). Section 1.8 of the Staff Proposal describes a process by which Commission Staff will prepare a Request for Proposal (“RFP”) for “‘high-priority areas’ for which no CASF grant applications have been received.” The term “‘High-Priority Area’ is defined in Section 1.3 as “ an area deemed by the Commission in an order that it should receive a broadband CASF grant with preference given to projects having low-income census tracts.” CCTA believes this definition is too open-ended to provide meaningful guidance – significantly departing from the criteria-based approach to designating priority areas as set forth in Resolution T-17443. Notably, the definition contains no meaningful criteria to establish those areas to be deemed “high-priority” beyond the preference for areas with low-income census tracts. CCTA submits that there should be objective criteria for the Commission to utilize when considering which areas should be deemed “high-priority.” Further, it should be clear that those areas may change over time and will not remain “high priority” indefinitely because there may be construction of new broadband infrastructure builds and demographic changes.

E. Application Items (Section 1.6)

⁹ See e.g., Resolution T- 17429, Approval of Funding for the Grant Application of Sunesys, LLC, (U-6991 -C), from the California Advanced Services Fund (CASF) in the Amount of \$10,640,000 for the Connected Central Coast Unserved and Underserved Broadband Project (April 10, 2014) in a situation where, at the time of the application, no other provider had middle mile facilities in the area or had imminent plans to build.

Section 1.6 of the Staff Proposal describes the information required from applicants for CASF grants. As described below, CCTA believes several of these items should be revised.

- Proposed Item 3 - Description of the Applicant’s Current Broadband Infrastructure and Existing Infrastructure in the Area. In proposed Item 3, applicants are required to provide a “description of *other provider’s infrastructure* within the project area which can be leased, purchased or accessed via interconnection.”¹⁰ (Emphasis added.) CCTA believes an applicant should not be required to describe the network(s) of its competitor(s) in a given area. The applicant may not have knowledge of the nature or extent of its competitor’s (or competitors’) network(s). Therefore, an applicant may be required to speculate and might possibly provide inaccurate information to the Commission or, worse yet, reveal confidential or proprietary information. Instead, CCTA believes that the focus of Item 3 should be on whether the applicant has the ability to interconnect with other broadband providers. An applicant could provide such information accurately, and on a non-confidential basis.
- Proposed Item 6 - Project Eligibility. Proposed Item 6 states that an “applicant may provide CalSPEED tests to show actual speeds or denials of service or other public feedback as evidence on unserved status.”¹¹ CCTA submits that, to the extent CalSPEED tests are permitted to show actual speeds, applicants should be required to produce multiple tests taken at different times of the day and calculate an average of these speeds, because networks speeds inevitably fluctuate based on the level of user activity of the network.

¹⁰ Scoping Memo, App. C, p. 9.

¹¹ Scoping Memo, App. C, p. 10.

- Proposed Item 8 – Project Expenditures. Proposed Item 8 requires an applicant to “identify all the equipment to be funded by the CASF by category” including “network and access equipment, operating equipment” and “broadband switching equipment.”¹² CCTA does not object to this requirement; however, applicants should be permitted to submit equipment descriptions on a confidential basis to ensure that this information is not available to competitors (because it can be used for anticompetitive purposes) or to the public (as it details Critical Network Infrastructure).
- Proposed Item 9 – Performance Bond Relief. In proposed Item 9, Staff has requested “comments on whether the performance bond requirement should be maintained.”¹³ CCTA submits that the performance bond requirement should be maintained because it serves as an important safeguard for the CASF Program in the event of a service provider default. Although, as the Staff Proposal notes, there have been no program defaults to date, the CASF is undergoing a major expansion as a result of AB 1665, which increases the probability of a service provider default in the future. To the extent a performance bond presents administrative difficulties for service providers and staff, CCTA suggests that the Commission could consider allowing alternatives to a performance bond, such as an irrevocable letter of credit. CCTA further submits that if the performance bond requirement is maintained that the current exception to the bond requirement for Certificate of Public Convenience and Necessity (“CPCN”) and Wireless Information Registration (“WIR”) holders should be extended to holders of franchises awarded under the Digital

¹² Scoping Memo, App. C, p. 11.

¹³ Scoping Memo, App. C, p. 11.

Infrastructure and Video Competition Act (“DIVCA”).¹⁴ Like CPCN/WIR holders, DIVCA registrants have a proven track record at the Commission and should similarly be exempted from the bond requirement if they can certify that the percentage of total projects costs provided comes from capital budgets and not outside financing.

- Proposed Item 10 – Pricing Commitment. In proposed Item 10, Staff proposes that CASF applicants commit to a price freeze for two years, after which service providers may revise their generally applicable service rates.¹⁵ Although such provision may protect consumers from price change in situations where an applicant is only providing service in the application area, the 2-year price freeze serves as a significant disincentive to a potential applicant that provides retail service elsewhere in the state of California. To address those situations, CCTA proposes that Proposed Item 10 be modified: (a) to limit the 2-year price freeze to those applicants that only provide service in the application area using CASF funds and (b) by the inclusion of the following language at the end of Item 10:

If the Applicant offers retail service to end-user customers elsewhere in California, the Applicant will offer access to broadband service on the same rates, terms, and conditions as for comparable services which the provider offers broadband services to all other customers in the State. The Commission shall not require a provider to offer service in the project area on rates, terms, and conditions different from those on which the provider offers broadband service throughout the State or to provide all services in the project area offered elsewhere in the State.

¹⁴ Under the current rules, a performance bond is not required of CPCN/WIR holders that certify that the percentage of total projects costs it is providing comes from their capital budget and not outside financing.

¹⁵ Scoping Memo, App. C, p. 12.

F. The “Expedited Ministerial Review” and RFP Processes (Sections 1.7 and 1.8)

In Section 1.7, Staff has proposed the Commission delegate to Staff the authority to conduct “expedited ministerial review” and approval of applications that meet certain criteria,¹⁶ and in Section 1.8, Staff has proposed implementing an RFP process for “high-priority” areas for which no application has been received.¹⁷ For multiple reasons, both proposals are problematic and should be eliminated. “Expedited ministerial review” and the RFP process would both undermine due process and fail to recognize the time and stakeholder input needed to ensure vetted, sustainable, long-term solutions.

As an initial matter, the “expedited ministerial review” process may constitute an unlawful delegation of authority. Although the Commission “may delegate the performance of *ministerial* tasks, including the investigation and determination of facts *preliminary* to agency action, functions relating to the application of standards, and the making of preliminary recommendations and draft orders,”¹⁸ the Commission cannot delegate its power to make “final discretionary decisions.”¹⁹ However, under the Staff Proposal, Staff would be given authority to make *final discretionary* decisions about awarding CASF grants. Moreover, the “expedited ministerial review” process currently includes no provision for application challenges, and thus does not afford potential challengers due process.

CCTA also is concerned that the criteria for triggering “expedited ministerial review” is not “technology-neutral” as required by Pub. Util. Code § 281(f)(1). Whereas the threshold for “new fiber to the home” projects, which typically are constructed by telephone companies, is

¹⁶ Scoping Memo, App. C, pp. 13-14.

¹⁷ Scoping Memo, App. C, pp. 14-15.

¹⁸ Application of Union Pacific Railroad Company and BNSF Railway Company for Rehearing of Resolution ROSB-002, D.09-05-020, mimeo at 2-3 (citations omitted) (emphasis added).

¹⁹ D.09-05-020, mimeo at 3.

\$15,650 per household, the threshold for all other projects is \$1,212 or \$1,285 per household²⁰ - thereby giving fiber-to-the-home a 12-13 times cost advantage over other technologies. To the extent the Commission wishes to expedite the grant award process, CCTA respectfully suggests that the timeline for the staff's internal review and resolution drafting processes be accelerated.

The proposed RFP process is also problematic. Most fundamentally, an RFP would seem to add time to the process and it is unclear whether staff presently has the expertise, experience, and resources necessary to prepare and review RFPs, which could prove to be a costly drain on Commission resources. CCTA believes the issue of increasing applications for "high priority" areas could be more efficiently and easily addressed by providing higher funding amounts for such areas, instead of establishing an entirely new process for these areas.

G. Application and Right of First Refusal Timing (Sections 1.9 and 1.11)

Section 1.9 of the Staff Proposal requests comment on whether it is "reasonable to grant repeated extensions of a [Right of First Refusal ("ROFR")], and if so, how many and for how long?"²¹ CCTA submits that multiple extensions of a ROFR should be allowed if progress can be demonstrated by the service provider.

Section 1.11 of the Staff Proposal requests comment on whether "an additional CASF grant application opportunity [should] be afforded following the July 31st ROFR completion dates, thereby permitting submission of applications every 180 days?"²² In response, CCTA submits that, to the extent CASF application submission are allowed multiple times per year, so too should ROFR letters be allowed.

²⁰ Scoping Memo, App. C, p. 14 (The \$1,212 threshold is for "upgrades using existing infrastructure" and the \$1,285 threshold is for fixed wireless projects.).

²¹ Scoping Memo, App. C, p. 16.

²² Scoping Memo, App. C, p. 17.

H. Project Challenges (Section 1.13)

In Section 1.13, Staff has recommended “that the challenge period be 21 calendar days from the filing of the application.”²³ Instead, for the sake of clarity, CCTA submits that the challenge period should be revised to 21 calendar days *from service upon the service list* because the date of filing may not be known to potential challengers and other interested parties.

In addition, Section 1.13 of the Staff Proposal requires that challengers to projects must identify the number of served households in the project area that already have broadband availability of 6 Mbps download and 1 Mbps upload and further requires that the challenger identify the geographic location of households that are served.²⁴ CCTA submits that it is important that the Commission take into consideration areas within a proposed area that already have service, even if the project area is more expansive. In a large project area, any fund award should be limited only to those areas that are truly unserved to avoid overbuilding in areas where service already is available.

I. Line Extension Program (Section 2)

As detailed below, CCTA has several concerns about the implementation of the Line Extension Program (“LEP”) as proposed in Section 2 of the Staff Proposal. These concerns pertain to the scope of the LEP and to the subsidy amounts.

Scope of the LEP. Section 2.2 of the Staff Proposal defines “facilities –based broadband provider” in part as an entity that owns “the portion of the physical facility that terminates at the end-user premises ... to complete such terminations.”²⁵ CCTA submits that facilities-based providers should

²³ Scoping Memo, App. C, p. 17.

²⁴ Scoping Memo, App. C., pp. 17-18.

²⁵ Scoping Memo, App. C, p. 33 (one condition of being a facilities-based wireline provider is that the provider must own “the portion of the physical facility that terminates at the end-user premises ... to complete such terminations”).

qualify for line extension funding even if facility does not terminate directly at the end-user's premises. The point of the LEP is to extend the facilities from existing distribution facilities to the customer premises network interface device at the demarcation point — the facilities-based provider may not necessarily terminate at the applicant's premises.

Section 2.2 of the Staff Proposal also defines "Service Connection" as one that "serves only the property on which it is located."²⁶ CCTA respectfully disagrees with this limitation. Instead, a service connection should be able to be combined with those of other applicants in an area in order to reduce the overall costs of a project and improve efficiency.

Section 2.3 addresses the income threshold of "applicants" for the LEP.²⁷ The Commission should clarify, however, whether an applicant may be an owner or a tenant (or conceivably either) of the premises for which the line extension is requested.

Subsidy Amounts. While Section 2.4 of the Staff Proposal is clear that low-income participants receive 95% of the cost of the proposed project, the subsidy percentage for other applicants "will be determined at the time the project is under review."²⁸ CCTA submits that clarification should be provided on the types of exemptions from low-income eligibility and that a "one size fits all" subsidy may not be appropriate. Instead, guidelines should be established for each category to reflect the different need for subsidy.

Section 2.4 of the Staff Proposal contemplates a possible "requirement for the facilities-based broadband provider to pay for some minimal amount of the proposed line extension."²⁹

CCTA opposes such a requirement because providers have no say in the filing of an application

²⁶ Scoping Memo, App. C, p. 34.

²⁷ Scoping Memo, App. C, pp. 34-35.

²⁸ Scoping Memo, App. C, p. 35.

²⁹ Scoping Memo, App. C, p. 35.

or the application process and therefore should not involuntarily be required to fund such projects.
The line extension costs should be shared between the CASF Program and the applicant.

III. CONCLUSION

For the reasons detailed above, CCTA respectfully recommends that the Staff Proposal be revised as set forth herein.

Respectfully submitted,

By: /s/ Lesla Lehtonen
Lesla Lehtonen
California Cable and Telecommunications
Association
1001 K Street, 2nd Floor
Tel. (916) 446 - 7732
Fax. (916) 446 - 1605
E-mail: Lesla@calcable.org

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