

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

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COMMENTS ON ELIGIBILITY FOR AND PRIORITIZATION OF
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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 these Reply Comments to the California Public Utilities Commission (“Commission”) in response to the comments of other parties on the six questions in the ALJ Ruling. CCTA’s overarching position is that the CPUC may not adopt proposals for the California Advanced Services Fund (“CASF”) infrastructure grant program that are not based in the authorizing statute – Public Utilities Code Section 281,² as amended by AB 1665 (Garcia 2017). Instead, the CPUC must follow the specific direction from the Legislature in AB 1665, especially the key provisions that (i) establish a preference for funding infrastructure projects in completely unserved areas, (ii) prohibit use of CASF funds to overbuild infrastructure offering

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.

broadband service at “served” speeds, and (iii) preserve the right of any party to challenge an infrastructure application for a project area where broadband infrastructure already exists.

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

Regarding the funding provision in Section 281(f)(13), CCTA concurs with the comments of the Public Advocates Office (“PAO”) that grant recipients should have some financial stake in a CASF infrastructure project “to better ensure that the expenditures of ratepayer funds are prudent, necessary, and cost-effective.”³ But CCTA objects to PAO’s proposal that no grant should exceed 85% of project costs.⁴ A bright line rule with an absolute maximum grant amount would contravene the requirement in Section 281(f)(13) for a case-by-case determination of project funding level. It also would eliminate the flexibility necessary to ensure that adequate funding is available for deployment in the remaining areas of California lacking broadband access.

CCTA also objects to PAO’s proposal to impose “stringent requirements” on any grant funded at or near 100% of project costs.⁵ These proposed requirements would subject applicants to onerous showings akin to a rate case, and thereby impose burdensome compliance costs on the projects, including those in completely unserved areas with some of the highest infrastructure costs. Instead, the Commission should award higher funding levels in accordance with statutory provisions -- on a case-by-case basis, when warranted by the unique factors in each case, with preference for projects in areas lacking any wireline or wireless broadband service, as provided in Section 281(b)(2)(B).

³ PAO Comments at 1.

⁴ PAO Comments at 1.

⁵ PAO Comments at 1 to 2.

CCTA agrees with the comments of The Utility Reform Network and Greenlining Institute (“TURN”) that the Commission should avoid “the impossible task” of establishing a static definition of what justifies higher funding levels and instead allow applicants to identify reasons for each application.⁶ However, CCTA disagrees with the TURN proposal to mandate service quality guarantees and service pricing mandates.⁷ These proposed requirements are not based in Section 281 and would impermissibly exceed the Commission regulatory jurisdiction over broadband service.⁸ As CCTA emphasized in its Comments, the Commission’s first priority should be compliance with the statutory preference for projects expanding broadband access to completely unserved areas. Further, Section 281(j)(5) provides that grants from the Broadband Adoption Account shall be awarded with a preference for adoption programs in low-income communities. But the statute does not authorize layering onto infrastructure grants these proposed additional requirements. Moreover, these “stringent requirements” would discourage participation in the infrastructure program and thereby impede progress to meet the deployment goal.

Multiple parties state that the Commission, in implementing the funding provision in Section 281(f)(13), should consider factors beyond the three listed. CCTA concurs. However, some parties seek to define the phrase “significant contribution to the program goal” to impose new impermissible requirements on a CASF grant recipient. For example, the California Emerging Technology Fund (“CETF”), Race Telecommunications Inc. (“Race”), and Conifer Communications (“Conifer”) state – or at least imply -- that grant recipients should be required to provide service to every anchor institution, business and working farm in a project area.⁹

⁶ TURN and Greenlining Comments at 3.

⁷ TURN and Greenlining Comments at 4 to 6.

⁸ TURN and Greenlining Comments at 6.

⁹ CETF Comments at 6; Race Comments at 11; and Conifer Comments at 5.

CCTA objects to the extent that these proposals would result in CASF grants funding infrastructure to customers other than households. The program is for funding infrastructure to provide broadband service to unserved households.¹⁰ If infrastructure necessary to achieve last-mile connections to households also enables service to anchor institutions and farms, that is a corollary public interest benefit of a project.

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

Several parties concur with the CCTA Comments that the Commission cannot and should not require CASF grantees to offer broadband service at a specific rate as a condition of receiving a CASF infrastructure grant.¹¹ Race states that it was neutral on this proposal, citing “jurisdictional concerns about the Commission setting and regulating interstate broadband rates, even if it is tied to a voluntary state infrastructure program.”¹²

Parties supporting the proposal to require an affordable broadband plan cite to general policy goals or provisions in AB 1665 related to broadband adoption, but they fail to acknowledge that these provisions are specific to the CASF Broadband Adoption Account and not the Broadband Infrastructure Grant Account. TURN claims “an affordability requirement is consistent with the spirit and language of the CASF program,” citing to language in the intent provision of AB 1665 and in Section 281(a) that the CASF program should benefit *all* Californians.¹³ But TURN’s reliance on these provisions is misplaced, as the language states

¹⁰ Section 281(b)(1)(A) and Section 281(b)(2)(A).

¹¹ Central Coast Broadband Consortium Comments at 6; AT&T Comments at 5 to 6; Frontier Communications Comments at 4; Conifer Communications Comments at 5; Small LECs Comments at 3 to 4.

¹² Race Comments at 7.

¹³ TURN and Greenlining Comments at 7.

nothing specific about a service pricing mandate and is not tied to the provisions specific to the CASF Broadband Infrastructure Grant Account.

CETF proposes that only “an incumbent provider” such as Frontier, AT&T “or a cable provider” be required to provide an affordable broadband plan if it receives a CASF grant, but that “the smaller independent ISPs which have been deployment companies (such as Praxis/Inyo or Race communications)” merely be encouraged to provide affordable plans.¹⁴ As stated above, CCTA objects to this requirement for *any* CASF grant recipient. CCTA further objects to the CETF proposal because it is discriminatory and reflects an anti-incumbent bias. Moreover, the policy rationale for this proposal is questionable, especially given that the providers CETF would exempt from this mandate are the recipients of the largest CASF grants awarded to date, including, for example \$46.7 million to Inyo Networks in Resolution T-17548 and \$27.6 million to Race in Resolution T-17545.

CCTA further objects to proposals that would require the Commission to establish any broadband product price or price range as “affordable;” mandate any other terms of service offerings such as router fees, installation charges, and credit checks; or require compliance with service quality standards from, or participation in, the LifeLine program.¹⁵ As noted above, these measures go beyond the statute and would impede program participation.

Some parties include other proposals, unrelated to the ALJ Ruling, in their comments responding to this question. CETF and Race propose that, to be eligible for a CASF infrastructure grant, any provider required to offer a low-income broadband product as part of a merger condition must (i) continue to offer the product for 2 to 5 years beyond the merger-

¹⁴ CETF Comments at 7 to 8 and 10.

¹⁵ CETF Comments at 10; POA Comments at 6; TURN and Greenlining Comments at 8 to 9.

required timeline, and (ii) disclose subscription data for those low-income offerings.¹⁶ These proposals are not based in any statutory provision and adopting them would have significant negative consequences. First, layering additional requirements on settlement conditions long ago approved by the CPUC would raise due process issues for settling parties and discourage settlements generally, contrary to public policy favoring settlements. Parties will be less likely to enter into settlement agreements if the Commission can add to settlement terms in subsequent rulemakings. Imposing these particular requirements would specifically discourage settlement conditions that promote offering broadband service for low-income customers. Second, it would be patently unfair to impose these requirements only on some providers and would inappropriately put the Commission in the position of picking winners and losers in the competitive broadband marketplace. Third, as discussed above, the Commission lacks authority to impose these requirements. The Commission should resist these dubious attempts to achieve other goals in a program that the Legislature has authorized and funded to deploy infrastructure to the remaining unserved areas of California that still lack broadband access.

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?

Multiple parties express concern, seek major modifications, or outright oppose the new proposal presented in the chart on page 6 of the ALJ Ruling, which combines a funding level formula plus a ministerial process for approval of infrastructure grants without the need for a Commission resolution. Notably, the PAO objects to approval of an infrastructure grant without a Commission resolution, stating that the “Commission should require the Resolution process for

¹⁶ CETF Comments at 7; Race Comments at 7.

all grants to ensure accountability, transparency, and allow for public and stakeholder input.”¹⁷ CCTA concurs that the critical stakeholder input from the challenge process is essential to ensuring compliance with the prohibition on use of CASF grants to fund overbuilds.

Other parties object to the complexity of the proposal and the strong likelihood that it would create more delay in awarding grants and erect barriers to participation.¹⁸ CETF objects to the proposal because it does not encourage project applications that will “drive to” the statutory program goal of 98% deployment by region.¹⁹ However, CETF supports a ministerial process to approve CASF grants without a Commission resolution if the project limit is increased to \$20 million, claiming that the \$5 million threshold is too small.²⁰ CETF’s position is diametrically opposed to the PAO statement supporting the ministerial process “only for low cost projects that fall into the bottom 10 percent in grant per household and total grant as compared to previously approved CASF projects.”²¹ These contradictory positions highlight the clear lack of agreement on the merits or purpose of this proposal.²²

In addition, some parties echo CCTA’s objection to the proposal’s emphasis on low-income areas as not based in statute and contradicting the express statutory provision favoring projects in completely unserved areas. As stated in CCTA’s Comments, transparency and a clearly identified data source for low-income status also is problematic. In this regard, PAO would define low income areas as having a median income less than \$49,200.²³ Race defines

¹⁷ OPA Comments at 7.

¹⁸ Central Coast Comments at 7; Frontier Comments at 5.

¹⁹ CETF Comments at 9.

²⁰ CETF Comments at 11.

²¹ PAO Comments at 7.

²² Several parties suggest highly complex adjustments to the proposed numerical calculations, but it is CCTA’s impression that any version of the proposal would create more complexity and discourage providers from seeking a grant.

²³ PAO Comments at 2.

low-income as \$63,784, stating that the \$49,200 is “too low” and the lower number “would have failed to give any but one of Race’s ten projects an advantage.”²⁴

None of the comments identify a clear statutory basis or potential advantages to the proposed funding and ministerial process formula that outweigh the significant problems raised in CCTA’s comments,²⁵ including:

- The proposed ministerial process constitutes an unlawful delegation of authority and raises due process concerns.
- The proposed 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.²⁶
- The plain language of Section 281(f)(8), Section 281(f)(10), Section 281(k) clearly contemplates that CASF infrastructure grants are to be awarded by Commission resolution.

Finally, several parties propose in response to this question that all CASF-funded projects provide service to every household in a project area. CCTA believes this requirement would be too rigid and impractical because some distant and/or high-cost households may be outside a project area because the incremental cost per household would be exorbitant. Such high-cost households may be more appropriate for the line extension program.

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

PAO proposes defining administrative expenses as “operating expenses” without support from the ALJ Ruling or program history, and then proposes that these expenses should not be

²⁴ Race Comments at 10.

²⁵ CCTA Opening Comments (April 16, 2018) at 9 to 10; CCTA Comments (September 21, 2018) at 5 to 6.

²⁶ 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.”).

funded by a CASF grant.²⁷ Race proposes funding administrative expenses up to 20%.²⁸ TURN proposes using a different administrative cost reimbursement level for different sized companies depending on if there is a finding of an undue burden on smaller companies.²⁹ All of these proposals are speculative as to the problem to be solved and arbitrary in the solution. Thus, CCTA urges the Commission to not adopt any rule on administrative expenses at this time but to follow the practice of reimbursement of expenses based on invoices for costs incurred.

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

Parties' responses to the satellite question highlight the critical need for the Commission to clarify what services are included, or not included, when determining if a potential CASF project area is already "served" and therefore not eligible for an infrastructure grant. Some parties state that satellite broadband service should be eligible for a CASF infrastructure grant, pointing to the requirement in Section 281(f)(1) that the Commission shall award grants "on a technology-neutral basis, including both wireline and wireless technology." At the same time, some parties assert that existing satellite service should not be considered when determining if a potential CASF project area is already "served." Similarly, but in response to a different question, PAO proposes that existing wireless service should not be included in identifying the remaining unserved households in each consortia region, citing "technical limitations of wireless service."³⁰ It also should be noted that in Resolution T-17614 approving a CASF infrastructure grant for Desert Shores, the Commission discounted the existence of wireless service at verified

²⁷ PAO Comments at 8.

²⁸ Race Comments at 12.

²⁹ TURN Comments at 12.

³⁰ PAO Comments at 5.

“served” speeds to conclude that a project area was nonetheless deemed eligible for a CASF grant, stating:

“Although some census block groups in the Desert Shores project area are served by mobile service, in this resolution we consider mobile service to be an inadequate substitute for tertiary broadband service.”³¹

This conclusion by the Commission is inconsistent with CASF program rules and the practice of generally designating wireless service areas as “served” on the California Broadband Availability Map. Most significantly, this conclusion – like the PAO proposal above – is inconsistent with several provisions of Section 281: (i) the “technology-neutral” requirement in Section 281(f)(1); (ii) the definition of an “unserved household” in Section 281(b)(1)(B), which means “a household for which no facility-based broadband provider offers broadband service at speeds of at least 6 megabits per second (mbps) downstream and one mbps upstream;” and (iii) Section 281(f)(5)(A), which makes an area eligible for a CASF infrastructure grant if “no provider offers access at speeds of at least 6 mbps downstream and one mbps upstream.”

CCTA is concerned that an uncertain and inconsistent approach to designating what areas of California are “served” and therefore ineligible for a CASF grant undermines the integrity of the program. Moreover, this approach raises serious concerns regarding compliance with the prohibition on award of CASF grants to overbuild existing broadband facilities. It further underscores the need to fully protect the right to challenge each and every CASF grant application to verify that existing infrastructure does not provide broadband access.

Accordingly, given these concerns, any award of a CASF grant through a ministerial process without a Commission resolution is inappropriate and contravenes Section 281.

³¹ Resolution T-17614 (July 19, 2018) at 3 to 4, citing Decision 16-12-0257, Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California (“We are persuaded that mobile data service, at present, is not a reasonable substitute for home broadband service.”).

Response to Central Coast Comments

A significant portion of the Central Coast comments address issues for which comments were due on August 8, 2018. CCTA opposes many of the core positions taken by Central Coast. For example, Central Coast seeks to impose significant barriers to application challenges, which would require not only the submission of various subscription, speed, and construction data, but also a bond to cover the cost of verification.³² This suggestion is not only unnecessary, but plainly unfair. As described in CCTA Comments filed August 8,³³ the Commission should have the information needed to consider challenges through previously submitted information and public data, which can be supplemented when necessary. Further, requiring a challenger to submit a bond for verification and not requiring the same from an applicant is plainly unfair, especially since challengers generally serve the beneficial role of ensuring no overbuilding, as required by AB 1665.

Additionally, Central Coast indicates that new middle-mile facilities should be deemed “indispensable” if no provider can show that the middle-mile facilities currently in the area are available on an unbundled and open access basis.³⁴ This proposal misses the mark—the appropriate inquiry is whether middle-mile facilities are available to the applicant, not how those facilities are offered generally. The Legislature emphasized the limited use of funding for middle-mile facilities when it stated: “All or a significant portion of the project deploys *last-mile* infrastructure to provide service to unserved households.”³⁵ Central Coast now attempts to bypass the intent of the Legislature and increase funding of middle-mile facilities even where unnecessary.

³² Central Coast Comments at 19.

³³ CCTA Comments (August 8, 2018) at 5 to 6.

³⁴ Central Coast Comments at 26.

³⁵ Section 281(f)(5)(B).

Conclusion

CCTA appreciates the Commission engaging in a robust process to implement AB 1665 and help ensure that the CASF program achieves the goal of providing broadband access to 98% of households in each consortia region. CCTA also appreciates all stakeholders' commitment to closing the Digital Divide in California and the wide range of ideas to achieve that goal.

However, CCTA strongly urges the Commission, when adopting final rules for CASF infrastructure grants, to follow the express direction from the Legislature in AB 1665, especially the key provisions that are central to achieving the program goal and require the Commission to do all of the following:

- Establish a preference to fund infrastructure projects in areas that are completely unserved.
- Prohibit use of CASF funds to overbuild infrastructure that already offers broadband service at "served" speeds.
- Preserve the right of any party to challenge any infrastructure grant application for areas where broadband infrastructure already exists.

Respectfully submitted,

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