

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to  
Consider Modifications to the California  
Advanced Services Fund.

R. 12-10-012  
(Filed October 25, 2012)

**REPLY COMMENTS OF THE UTILITY REFORM NETWORK  
AND THE GREENLINING INSTITUTE ON  
THE SEPTEMBER 2018 ADMINISTRATIVE LAW JUDGE RULING AND ON  
THE JULY 2018 ASSIGNED COMMISSIONER RULING  
REQUESTING COMMENTS ON ELIGIBILITY FOR AND PRIORITIZATION OF  
BROADBAND INFRASTRUCTURE FUNDS**

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## I. INTRODUCTION

Pursuant to the September 5, 2018, Administrative Law Judge’s Ruling, The Utility Reform Network and the Greenlining Institute (“Joint Consumers”) respectfully submit these reply comments on the September 2018 ALJ Ruling, and these reply comments on the July 2018 Assigned Commissioner’s Ruling, regarding eligibility for and prioritization of Broadband Infrastructure Funds from the California Advanced Service Fund (CASF).

## II. DISCUSSION

### A. Reply Comments on the September 2018 Administrative Law Ruling

#### 1. Funding Levels

In its Opening Comments on the September 2018 ALJ Ruling, AT&T suggests that 100% funding should be the “default presumption,” reasoning that anything less than full funding would be a disincentive for participation.<sup>1</sup> However, other providers, some that regularly participate in CASF, unlike AT&T, disagree. Conifer Communications, GeoLinks and Race Communications argue that 100% funding should be reserved for select projects.<sup>2</sup> Consumer advocates, including Joint Consumers share this view.<sup>3</sup> In addition to the reasons Joint Consumers raise in Opening Comments to support limited opportunities for 100% funding,<sup>4</sup> using a default presumption of full funding as a way to incentivize greater participation is premature, misguided, and an ineffective means of managing the Fund.

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<sup>1</sup> AT&T Opening Comments on the September 2018 ALJ Ruling at p. 5 (dated September 21, 2018). *See also* AT&T Phase II Opening Comments at p. 26 (dated April 16, 2018) (arguing that the Commission should indicate in the program rules that it will be liberal in granting no-matching-fund proposals).

<sup>2</sup> Conifer Communications Opening Comments on the September 2018 ALJ Ruling at pp. 3-4 (dated September 21, 2018); GeoLinks Opening Comments on the September 2018 ALJ Ruling at p. 2 (dated September 21, 2018); Race Communications Opening Comments on the September 2018 ALJ Ruling at pp. 6-7 (dated September 21, 2018).

<sup>3</sup> Public Advocates Office Opening Comments on the September 2018 ALJ Ruling at pp. 1-3 (dated September 21, 2018).

<sup>4</sup> Joint Consumers Opening Comments on the September 2018 ALJ Ruling at pp. 1-3 (dated September 21, 2018).

Relying on a presumptively higher funding threshold, at 80% to 100%, to incentivize participation, *before* determining if other methods to improve the program will be just as effective, would be a premature and expensive decision. As several commenters note, one barrier to participation is the burden and complexity of the application and challenge process.<sup>5</sup> If the Commission successfully implements changes in the program rules, the result should be faster application processing times, fewer challenges, and lower costs to apply, and, therefore increased participation.<sup>6</sup> The Commission should wait to use higher funding levels as a tool to generate more CASF applications until it sees the impacts of the new application and challenge processes.

A default presumption of 100% funding also misreads the language of Section 281(f)(13) of the Public Utilities Code. That section clearly states that the Commission *may* fund all of a project but does not say *shall* or *must*.<sup>7</sup> It is clear that the Legislature gave the Commission discretion to award less than 100% of a project's costs. Indeed, this discretion is necessary because the program goal of 98% participation is at risk if the Commission routinely and liberally grants 100% funding for each project, thereby limiting the total number of projects that can be funded. AT&T's assertion that guaranteed full funding would create incentives to submit lower, more competitive bids to get the grant is far-fetched. Logic suggests that it would instead create the incentive for providers to simply ask for 100% funding.<sup>8</sup> On the other hand, cost

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<sup>5</sup> See e.g. AT&T Opening Comments on the September 2018 ALJ Ruling at p. 12 (dated September 21, 2018); Central Coast Broadband Consortium Opening Comments on the September 2018 ALJ Ruling at p. 7 (dated September 21, 2018).

<sup>6</sup> See e.g. AT&T Phase II Opening Comments at p. 9-11 (dated April 16, 2018). AT&T's proposal requires further refinement as described in section II.B.2 of these comments.

<sup>7</sup> Pub. Util. Code sec. 281(f)(13) ("The commission may award grants to fund all or a portion of the project. The commission shall determine, on a case-by-case basis, the level of funding to be provided for a project and shall consider factors that include, but are 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").

<sup>8</sup> AT&T Phase II Opening Comments at p. 25-26 (dated April 16, 2018) ("The availability of 100% project funding also will create an incentive for applicants to submit the lowest bids they reasonably can (in hopes of winning funding) and may also attract a wider variety of applicants").

sharing provides a strong incentive to find cost savings, efficiencies, and project partners. Higher project costs would also work against the program goal as each project could cost the fund up to 40% more than necessary, leading to a rapid depletion of the Fund. Therefore, the Commission should restrict 100% funding to projects that deliver significant consumer benefits such as low-prices or open access rules.

## **2. Affordable Offering Requirement**

The September 2018 ALJ Ruling asks parties whether the Commission should “require CASF grantees to offer affordable broadband service plans as a condition of receiving CASF funding.”<sup>9</sup> In opening comments, Joint Consumers advocate for incentivizing CASF-applicants with a higher level of funding if the provider offers an affordable broadband plan with sufficient speeds, latency, and data allowances (if any) as a condition to receive higher levels of funding.<sup>10</sup> Other parties’ discuss whether an affordable broadband offering should be a requirement to receive *any* CASF funding, and Joint Consumers offer the following comments in response to parties’ comments on that issue. In addition to requiring an affordable broadband plan for *any* provider to receive *higher levels* of funding, Joint Consumers support an affordable broadband offering requirement for *incumbent* providers to receive *any* CASF funding.

The Commission should not allow deployed infrastructure to lay fallow because the households in that area cannot afford the service. Joint Consumers agree with Cal PA that “deploying infrastructure to unserved areas is *only helpful* [to close the digital divide] to the extent that households are capable of accessing that infrastructure.”<sup>11</sup> Through the workshop

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<sup>9</sup> September 2018 ALJ Ruling at pp. 4-5 (dated September 21, 2018).

<sup>10</sup> Joint Parties Opening Comments on the September 2018 ALJ Ruling at p. 9 (dated September 21, 2018).

<sup>11</sup> Cal PA Opening Comments on the September 2018 ALJ Ruling at p. 6 (emphasis added) (dated September 21, 2018).

process, parties discussed the major barriers that prevent households from having broadband service at home: (1) broadband is not deployed in that area, (2) the household cannot afford broadband service at home, and (3) the members of the household do not know how to use the technology.<sup>12</sup> GeoLinks also acknowledge these barriers in its comments, summarizing them as “availability and adoption.”<sup>13</sup> If the CASF program is to effectively close the digital divide, it should remove these barriers to in-home broadband service through an affordability requirement for CASF infrastructure.

However, Joint Consumers agree with CETF that an affordable broadband offering requirement to receive *any* CASF funds should be limited to incumbent providers.<sup>14</sup> CETF cautions that smaller independent ISPs may not be able to offer an affordable broadband plan due to their smaller customer base compared to incumbent providers.<sup>15</sup> Should the Commission find that an affordable broadband offering requirement would be less economically feasible for smaller independent ISPs than incumbent providers, deterring smaller independent ISPs from participating in the CASF program, then the Commission should limit the affordable offering requirement to receive *any* CASF funds to only apply to incumbent providers.

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<sup>12</sup> Small LECs suggest considering the California LifeLine program to address affordability concerns instead of requiring an affordable broadband service as part of a CASF grant. Small LECs Opening Comments on the September 2018 ALJ Ruling at p. 3 (dated September 21, 2018). However, this suggestion is not currently an option because California’s LifeLine program only supports broadband service as part of a bundle for wireless service. California’s LifeLine program, especially LifeLine offered by wireline carriers like the Small LECs, primarily offers voice service, and it would require significant Commission effort to modify the LifeLine program to support stand-alone wireline broadband service.

<sup>13</sup> GeoLinks Opening Comments on the September 2018 ALJ Ruling at p. 5 (dated September 21, 2018).

<sup>14</sup> CETF Opening Comments on the September 2018 ALJ Ruling at p. 7 (dated September 21, 2018).

<sup>15</sup> *Id.* See also Small LECs Opening Comments on the September 2018 ALJ Ruling at p. 3 (dated September 21, 2018); CCBC Opening Comments on the September 2018 ALJ Ruling at p. 6 (dated September 21, 2018); Conifer Communication Opening Comments on the September 2018 ALJ Ruling at p. 5 (dated September 21, 2018).

The Commission should also require affordable broadband offerings as a condition for an incumbent provider to receive *any* CASF funds to protect the CASF fund. GeoLinks notes that an affordability requirement is not a novel idea, and the FCC requires affordable service offerings as a requirement of receiving CAF II funds.<sup>16</sup> Although Joint Consumers generally advocate that the Commission should operate its public purpose programs independent of the FCC’s programs, Joint Consumers agree with GeoLink’s warning that should the Commission fail to require CASF grant recipients to have affordable offerings, it may incentivize incumbent providers to forego CAF funding in favor of CASF funding, and thereby burden the CASF fund.<sup>17</sup> On that ground, Joint Consumers agree with GeoLinks that “affordability should absolutely be a factor when addressing broadband access.”<sup>18</sup> As such, Joint Consumers support the affordable broadband offering requirement under two scenarios: (1) a requirement for every incumbent provider to receive *any* CASF funds, and (2) a requirement for *any* provider – incumbent or not – to receive a higher level of CASF funding for a project.

Several parties argue that affordability “should not be a consideration in the [infrastructure] grant program” and should be addressed through Adoption Account projects instead.<sup>19</sup> However, each account should not be viewed in a vacuum. Although the Adoption Account is intended to increase broadband *adoption*, the Adoption Account is the smallest of all the CASF accounts and those funds are, therefore, limited to increasing broadband adoption

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<sup>16</sup> GeoLinks Opening Comments on the September 2018 ALJ Ruling at p. 5 (dated September 21, 2018).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Frontier Opening Comments on the September 2018 ALJ Ruling at p. 4 (dated September 21, 2018), CCTA Opening Comments on the September 2018 ALJ Ruling at pp. 3-4 (dated September 21, 2018), and AT&T Opening Comments on the September 2018 ALJ Ruling at p. 6 (dated September 21, 2018) (conflating an affordable broadband offering as a condition of receiving CASF funds with monopoly rate regulation).

through programs designed to teach how to use the internet and related technology.<sup>20</sup> In comparison, the Infrastructure Account is the largest CASF account, it is fifteen times larger than the Adoption Account, and it is in a better position to reduce the barriers for in-home broadband adoption through an affordability requirement.<sup>21</sup>

Some parties' suggest that "[a]ffordable broadband offerings are not required by law,"<sup>22</sup> ignoring the statutory requirement that the Commission consider whether the project makes a "significant contribution" to the goals of providing broadband access to no less than 98% of households in each of California's consortia regions.<sup>23</sup> As Joint Consumers stated in opening comments, projects that make a significant contribution to CASF Program goals include infrastructure projects that allow for services that are affordable for residents.<sup>24</sup> Infrastructure projects with affordable service offerings mitigate both major barriers – availability and adoption - to home-broadband service, significantly contributing to closing the digital divide in California for those project areas. Through a requirement for any provider to offer affordable broadband offerings for higher levels of funding and for incumbent providers to receive any CASF funding, the Commission can also consider that offering as a factor when determining whether a project makes a significant contribution to achieving 98% broadband accessibility.

Therefore, the Commission should leverage the Infrastructure Account to remove as many barriers to in-home broadband adoption as possible by requiring *incumbent* providers to commit to offering an affordable broadband service for the households in the project area as a

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<sup>20</sup> Pub. Util. Code sec 281(d)(1).

<sup>21</sup> Pub. Util. Code sec. 281(d)(1).

<sup>22</sup> Frontier Opening Comments on the September 2018 ALJ Ruling at p. 4 (dated September 21, 2018). See also CCTA Opening Comments on the September 2018 ALJ Ruling at pp. 3-4 (dated September 21, 2018).

<sup>23</sup> Pub. Util. Code sec 281(b).

<sup>24</sup> Joint Consumers Opening Comments on the September 2018 ALJ Ruling at p. 4 (dated September 21, 2018).

condition to receive any project funds, and by requiring every provider to commit to offering an affordable broadband service for the household in the project area as a condition to receive a higher level of funding for a project. By requiring these affordable broadband services for the households in the project areas, the Commission would maximize the effect of the CASF fund to closing the digital divide and reduce incentives for CAF-providers to forego CAF funds in favor of CASF funds.

B. Reply Comments on the July 2018 Assigned Commissioner’s Ruling

**1. Subscription Data as an Indication of Accessibility**

In their opening comments to the July 2018 Assigned Commissioner’s Ruling, Frontier<sup>25</sup> and AT&T<sup>26</sup> argue that using subscription data as initial evidence for whether a census block is served, is contrary to Public Utilities Code section 281(f)(5)(A). This section states eligible projects are in “census blocks where no provider offers access at speeds of at least 6 Mbps downstream and one Mbps upstream.” The Commission’s proposal that a census block is presumptively served if, using subscription data, it is determined that subscription rate is above 40% does not violate section 281(f)(5)(A), if it includes the proper challenge provisions. If providers can prove that they offer 6/1 Mbps speeds in the census block during the challenge process, the Commission would presumably deem projects covering those census blocks ineligible. As Joint Consumers noted in its July 2018 Opening Comments, the proof provided during the challenge process should include:

- Identification of the number of served households in the project area that are capable of accessing broadband at or above 6Mbps/1Mbps;
- Attestation that the served households actually receive minimum speeds of 6/1;
- The address-level locations of the served households; and
- CalSPEED test results indicating the download and upload speeds at disperse locations in the project area.

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<sup>25</sup> Frontier Opening Comments on the July 2018 ACR at p. 3 (dated August 8, 2018).

<sup>26</sup> AT&T Opening Comments on the July 2018 ACR at p. 2 (dated August 8, 2018).



This process is consistent with Public Utilities Code section 281(f)(8) which states that “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.”

Furthermore, the Commission is not required to take a provider’s word that they offer service in the area. Section 281(f)(2) of the Public Utilities Code asks the Commission to consult with “regional consortia, stakeholders, local governments, existing facility-based broadband providers, and consumers regarding unserved areas” and section 281(f)(3) asks the Commission to identify unserved areas. It does not prescribe the exact method the Commission should use to identify whether an area is unserved, underserved or served. Ground truth testing from consortia and consumers show that areas where there is *claimed* service offerings at 6/1 Mbps, often tend to be, in fact, unserved.<sup>27</sup> The history of inaccurate provider claims regarding the availability or offering of 6/1 Mbps broadband makes it appropriate to use subscription levels as a presumption that an area is unserved with the burden on the challenger to refute that presumption. Shifting the burden to the challenger is appropriate not only because providers have historically overstated availability but also because the providers presumably have the data necessary to prove that their service is as robust and available as they claim.<sup>28</sup>

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<sup>27</sup> North Bay North Coast Broadband Consortium, *Response NTIA Request For Comments On Improving The Quality And Accuracy Of Broadband Availability Data*, (2018) available at [https://www.ntia.doc.gov/files/ntia/publications/nbncbc\\_letter\\_to\\_ntia.pdf](https://www.ntia.doc.gov/files/ntia/publications/nbncbc_letter_to_ntia.pdf);  
North Bay North Coast Broadband Consortium, *Mobile Ground Truth Testing Report*, (2014) available at <http://www.mendocinobroadband.org/wp-content/uploads/Phase-1-NBNCBC-GTT-Report-11-3-14.pdf>

<sup>28</sup> *Id.*

## 2. AT&T's Proposal for the Challenge Process

In opening comments on the Phase II Staff Proposal, AT&T made a proposal to streamline the infrastructure proposal approval process by requiring the Commission to publish an initial exhaustive list of CASF-eligible census blocks, that would then be subject to Rights of First Refusals (ROFRs) and the challenge process before a final exhaustive list is published for CASF applications.<sup>29</sup> The Commission sought parties' comments on AT&T's proposal in the July 2018 ACR and during the July 2018 workshop.<sup>30</sup>

In its opening comment on the July 2018 ACR, AT&T repeated its proposal for a challenge process that is initiated every year by the Commission's issuance of a preliminary exhaustive list of CASF-eligible census blocks.<sup>31</sup> In Joint Consumers' opening comments, Joint Consumers agreed in principle that an initial and definitive list of CASF-eligible census blocks may streamline the application process. However, Joint Consumers raised concerns that AT&T's proposal has potential shortfalls that may delay CASF-funded broadband deployment more than the current process. Joint Consumers' initial concerns included: (1) the importance of setting a deadline to move the process forward regardless of pending ROFRs and challenges, and (2) the need for more reasonable timelines for Staff to annually compile the list of CASF-eligible census blocks and to resolve ROFRs and challenges.<sup>32</sup>

Yet, the more Joint Consumers contemplate AT&T's proposal, AT&T's proposal gives rise to more concerns. For example, what happens if a census block is not included on the Commission's "exhaustive" list of CASF-eligible census blocks? Can a stakeholder challenge for that census block to be included as a CASF-eligible census block and, if so, how? Also,

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<sup>29</sup> AT&T Opening Comments on Phase II Staff Proposal at pp. 9-11 (dated April 16, 2018).

<sup>30</sup> July 2018 ACR at p. 4.

<sup>31</sup> AT&T Opening Comments on July 2018 ACR at p. 6 (dated August 8, 2018).

<sup>32</sup> Joint Consumers Opening Comments on the July 2018 ACR a p. 8 (dated August 8, 2018).

addressing the ROFRs and challenges during the same timeframe may not be practical. For example, if an incumbent provider unsuccessfully challenges a census block on the Commission’s initial list of eligible census blocks, AT&T’s proposal does not provide additional time for the incumbent to submit a ROFR for the same census block(s). If the Commission moves forward with AT&T’s proposal, Joint Consumers look forward to working with the Commission to analyze and resolve additional shortfalls that may delay the approval of CASF applications.

### III. CONCLUSION

For the reasons set forth above, Joint Consumers request that the CASF program rules be modified in accordance with our recommendations here.

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Respectfully,

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