

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

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I. INTRODUCTION

Pursuant to Rule 6.2 of the California Public Utilities Commission's Rules of Practice and Procedure (Rules), the Division of Ratepayer Advocates (DRA) respectfully submits these comments on the Administrative Law Judge's Ruling Soliciting Additional Comments on Issues Identified in Order Instituting Rulemaking 12-10-012 (ALJ Ruling), filed in this proceeding on March 18, 2013. On October 25, 2012, the Commission initiated this Rulemaking (R.) 12-10-012, which proposed changes to the California Advanced Services Fund (CASF) eligibility rules to allow entities that are not "telephone corporations", as defined by Pub. Util. Code § 234, to apply for CASF grants and loans. Legislative action is required in order to change the current eligibility rules defined in Cal. Pub. Util. Code § 270(b). If the Legislature acts, the Commission has stated that it then intends to issue draft rules to implement the adopted proposals.¹ The ALJ Ruling seeks to supplement the record on what safeguards should be applied to these entities given that they are not subject to the Commission's regulatory authority.

In particular, parties are requested to comment on three questions related to the issue of allowing non-telephone corporations or unlicensed entities to apply for CASF grants and loans: (1) whether it is necessary to require unlicensed entities to maintain a performance bond equal to the full amount of the CASF grant for three years following CASF project construction; (2) what liquidity requirements should be in place to demonstrate that unlicensed entities can meet start-up expenses that may not be covered by CASF awards or external financing; and (3) whether and how the Commission has authority to enforce the terms and conditions of CASF awards and impose penalties if unlicensed entities violate Commission rules and orders.²

As discussed in our previous comments, DRA does not believe the Commission should expand CASF eligibility to unlicensed entities until the Commission has explored other program revisions that would increase last mile projects and actual broadband adoption from pre-existing already approved and funded projects.³ Nonetheless, DRA understands the Commission is seeking legislative change to provide it authority to expand CASF eligibility to unlicensed, non-telephone corporations. If the Legislature authorizes expanded CASF eligibility, DRA strongly recommends that additional safeguards are necessary to protect consumers and prevent fraud,

¹ OIR, at p. 2.

² ALJ Ruling, at p. 3.

³ DRA Comments on the OIR to Consider Modifications to the CASF (December 3, 2012), at pp. 1-4.

waste, and abuse of ratepayer monies. To this end, DRA provides comments below on the ALJ Ruling's proposals concerning performance bonds and liquidity requirements.

However, without seeing the actual text of any statutory grant of authority to expand CASF eligibility to non-telephone corporations, it is difficult to assess the Commission's ability to enforce CASF requirements and conditions and penalize unlicensed entities for failing to comply with Commission rules and orders. For this reason, DRA questions whether the performance bond and liquidity requirements will be sufficient to protect ratepayers if unlicensed entities are permitted to obtain CASF funding. As explained below, there may be other circumstances present with unlicensed entities that may pose risks to ratepayers, and DRA has concerns about the Commission's ability to enforce CASF conditions and requirements, particularly in situations where an unlicensed entity transfers CASF-funded assets to another unlicensed entity.

II. DISCUSSION

A. Performance Bond Requirements for Unlicensed Entities

The ALJ Ruling notes that several parties recommended applying the performance bond requirements adopted by Resolution T-17233 to unregulated entities if they are allowed to apply for CASF grants or loans. Resolution T-17233 implemented provisions of AB 1555⁴ which allowed non-telephone corporations which had obtained Federal American Recovery and Reinvestment Act (ARRA) grants to apply for CASF support (ARRA Resolution). The ARRA Resolution contains certain safeguards governing unregulated entities' participation in the CASF program, such as requiring unregulated entities to obtain a performance bond for the full amount of the grant, and to maintain the bond for a period that extended for three years beyond the project completion date.

The ALJ Ruling seeks comment on whether it is necessary to require unregulated entities to maintain a performance bond equal to the full amount of a CASF grant once a funded project has been completed. The Ruling states that:

While we believe the specific performance bond requirement adopted by the ARRA Resolution is appropriate up until the project is completed, we have reservations about applying the *identical* requirements during the post project completion period

⁴ AB 1555 amended Cal. Pub. Util. Code § 281, effective July 29, 2009.

even though the Commission has a continuing obligation for three years to ensure compliance with the terms and conditions of the award.⁵

In part, the proposal to reduce the bond requirement is based on challenges faced by two grantees that had difficulty obtaining performance bonds that would extend for three years after the completion of construction. In considering the relaxation of the bond requirement, the ALJ Ruling also states:

The primary function of a performance bond is to protect funds in the event the approved project is not completed or does not meet the specifications proposed in the application. Once the project has been constructed and its operational capabilities have been verified, a substantial portion of the risk to ratepayers has been eliminated.⁶

In the case of unregulated entities, DRA disagrees that the risks to ratepayers are substantially eliminated once a project has been completed.⁷ As discussed further below, it is difficult to fully analyze the ability of the Commission to exercise enforcement powers over unregulated entities without seeing the final language of the legislation granting the Commission statutory authority to award CASF grants to unregulated entities. The ALJ Ruling notes some of the possible risks to ratepayers, such as failure to meet pricing commitments or failure to allow the Commission to inspect books and accounts, but other potential risks to ratepayers also exist. For example, without a bond in place following build-out, there would be nothing to protect customers –including those throughout the state who fund CASF grants via surcharges on their phone bills, as well as those in unserved and underserved areas to whom the grants are intended to deliver affordable broadband– from situations where a grantee files for bankruptcy or transfers company ownership and attendant assets (over which the Commission would have no regulatory control).

If the performance bond were eliminated in its entirety after the project has been built, it is unclear how the Commission could uphold its continuing obligation to ensure compliance with

⁵ ALJ Ruling, at p. 5.

⁶ ALJ Ruling, at pp. 6-7.

⁷ DRA further questions the ALJ Ruling's reliance on the trouble faced by two unregulated entities in support of its rationale for relaxing safeguard requirements. If these entities are having trouble obtaining the necessary bond, then they can apply for a CPCN or WIR registration, and in fact the ALJ Ruling notes that one of the two entities that had trouble obtaining a bond did just that. (ALJ Ruling, at p. 5.)

terms and conditions of CASF awards for the three years following construction. In fact, the reason the Commission required the post-construction bond for non-regulated entities which obtain CASF grants under the ARRA resolution was to ensure the Commission had some oversight ability to enforce post-construction commitments. For example, grantees must commit to a fixed monthly subscription fee and waiver of installation and/or initial service connection fee for at least two years from the beginning date of service.⁸ Grantees must also commit to plans to encourage adoption of the CASF-funded broadband service, including the number of estimated households that will subscribe to the new service and the marketing tactics grantees will use to attract new customers.⁹ Performance bonds that extend into the post-construction time frame are needed to enforce these commitments.

The Legislature intended that the CASF program lead to adoption, not just building new infrastructure, and it is critical that unregulated grantees be obligated to deliver ratepayer benefits after projects are built. DRA supports ubiquitous affordable broadband and our position on the importance of CASF accountability has not changed. In addition to broadband becoming available where it does not currently exist in the state, people must be able to afford the services provided over the new infrastructure funded by CASF grants, and ratepayers must be protected from financial and rate improprieties and failure to live up to rate and other commitments by grantees.

If the Commission extends CASF eligibility to non-telephone corporations, DRA urges the Commission to maintain the requirement to maintain performance bonds for three years after project construction so that grantees can be held accountable for post-construction commitments they made as a condition to receiving CASF funds. Moreover, because there are other scenarios that could negatively impact ratepayers that are not contemplated by the ALJ Ruling, DRA does not believe that it would be appropriate to reduce the post construction bond to an amount that is less than the full amount of the project award. If the Commission does decide to reduce the amount of the bond, however, the bond amount should still be of sufficient magnitude (at least 50% or more of the total loan or grant amount) to ensure ratepayer protection and incentive compliance by the non-regulated entities receiving CASF funding.

⁸ *Decision Implementing Broadband Grant and Revolving Loan Program Provisions*, D.12-02-015, *mimeo*, at Appendix 1. Broadband Infrastructure Grant Account –Revised to Application Requirements and Guidelines, pp. 11-12.

⁹ *Ibid*, at p. 11.

B. Liquidity Requirements for Unlicensed Entities

If the Commission changes the eligibility rules as proposed in the OIR, the Commission states that it intends to require unregulated entities to submit financial information in order to demonstrate that they are capable of meeting start-up expenses beyond what would be covered by the CASF grant or loan or any external funding.¹⁰ As noted in the ALJ Ruling, the Commission has not adopted any specific financial requirements which an applicant must meet as a condition of being awarded a CASF grant.¹¹ The ALJ Ruling proposes to require any unregulated entity to demonstrate it has \$25,000 or 10% of the total project cost in cash/equivalents on hand (capped at \$100,000).¹² DRA understands that this proposal reflects the Commission's desire not to impose a one size fits all requirement because there will be applications for large and small projects. Specifically, the ALJ Ruling seeks comment on whether the liquidity amounts are appropriate and whether funded projects less than or equal to \$225,000 should be held to the same amount given that the cash requirement would represent at least 20% of the project cost.¹³ Parties are also asked how the Commission would reconcile imposing this requirement on unregulated entities that may have less cash than regulated ones.

If the Commission chooses to expand eligibility to unregulated entities, DRA agrees that liquidity protections should be required. However, since the ALJ Ruling does not provide a clear quantitative rationale for its liquidity proposal, it is difficult to determine at this time whether the proposed amounts are sufficient safeguards. DRA reserves the right to comment further on the substance and reasonableness of the liquidity proposals in reply comments.

As to the last question, DRA does not believe that accountability should be sacrificed to the desire to expand the CASF funding process to unregulated entities. Consistent with DRA's concern with protecting public interest integrity of ratepayer funding, DRA believes different liquidity requirements are justified for unregulated entities. The fact that this is not standard utility regulation, coupled with the uncertainty over the extent of the Commission's ability to ensure that CASF commitments are met post-construction (as discussed further below), provides sufficient grounds for the Commission to impose different requirements on unregulated entities.

¹⁰ ALJ Ruling, at pp. 7-8.

¹¹ *Ibid.*, at p. 8.

¹² *Ibid.*

¹³ *Ibid.*

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

The ALJ Ruling seeks comment on a tentative proposal to enable the Commission to impose penalties on unlicensed entities if they violate the terms and conditions governing CASF awards. DRA is concerned not only with the Commission's ability to impose penalties for failure to comply with Commission rules and decisions, but with the Commission's ability to enforce the terms and conditions of the CASF grants post-project completion. However, it is difficult to fully assess the extent of the Commission's ability to enforce CASF conditions on unregulated entities in the absence of specific statutory language granting authority to expand CASF eligibility to these entities.

DRA has concerns, for example, that the Commission would lack authority to continue to enforce CASF conditions if an unregulated entity transfers assets built with CASF funds to another unregulated entity, as the Commission does not have the same regulatory authority that it does over public utilities via Pub. Util. Code §§851 or 854 to impose conditions on the transfer of such assets. Nonetheless, if the Commission obtains legislative authority to award CASF grants to unregulated entities, DRA urges the Commission to take a strong position on its continuing regulatory authority to enforce CASF conditions on these entities and their successors, purchasers, etc., and impose penalties on these entities for failure to comply with Commission rules and regulations.

The Commission derives its jurisdiction from the California Constitution and the Legislature. The Commission's jurisdiction over non-utilities must stem from a Constitutional or Legislative grant. The Legislature has occasionally granted authority to the Commission over non-utilities. (*See, e.g.*, Pub. Util. Code §§ 314 (b) n2 [inspection of holding company records], 394.1 [jurisdiction over energy service providers], 739.5 [jurisdiction over mobile home parks].) Further, as the ALJ Ruling notes, the Public Utilities Code grants the Commission the ability to enforce its authority over non-utilities. (Pub. Util. Code § 2111.)

The Commission's use of § 2111 must be in conjunction with some other specific grant of legislative authority. In the case of CASF eligibility, the Commission's authority over otherwise unregulated entities would be limited to what the Legislature grants. The extent of the Commission's ability to enforce conditions and penalize for noncompliance will necessarily depend on the extent of authority granted by the Legislature over these entities. If the

Commission has jurisdiction to award grants and loans and impose conditions and requirements on grantees, then it should have continuing *regulatory* (not contractual) jurisdiction to monitor and enforce those conditions.

The Commission's decision in D.02-01-037 provides some guidance. In that case, three investor owned utility parent companies (PG&E Corporation, Edison International, and Sempra Energy) claimed the Commission lacked jurisdiction over them for the purpose of enforcing conditions imposed in decisions authorizing the public utilities PG&E, SDG&E, and SCE Company to reorganize under holding companies. The parent companies attempted to claim that the conditions were contractual in nature, and thus only enforceable in Superior Court. The Commission rejected this notion, stating that if the Commission had jurisdiction to promulgate the conditions as valid orders, then they are enforceable in proceedings before the Commission, regardless of whether they might also be enforceable contractually. Moreover, the Commission found that, having invoked the power of the Commission to approve the holding companies' formation and impose conditions, the holding companies were equitably estopped from later claiming the Commission was powerless to enforce those conditions. The Commission's decision was later upheld in *PG&E Corp. v. Public Utilities Comm.* (2004) 118 Cal.App.4th 1174.

Again, in the case of CASF awards, it is difficult to determine the extent to which the Commission will be able to impose conditions that the Commission deems necessary and reasonable in awarding CASF grants to unregulated entities without seeing the exact statutory language. However, DRA believes the Commission should rely on its regulatory authority to ensure compliance with CASF conditions, and reject the notion that entities should be contractually obligated to comply with Commission rules and statutes, as suggested by the ALJ Ruling. If an unregulated entity acquiesces to the Commission's authority to impose certain requirements and conditions by accepting CASF funding, it cannot then later challenge the Commission's continuing jurisdiction to monitor and enforce those conditions. Finally, DRA further disagrees with the ALJ Ruling's implication that an entity's failure to comply with Commission rules or orders must be "willful or fraudulent".¹⁴ This is not the standard used in determining whether an entity has violated a Commission rule or order. Moreover, while § 2111 contains the "knowingly" standard for violations of the California Constitution, it does not

¹⁴ ALJ Ruling, at p. 10.

contain this standard for failure to comply with Commission orders, decisions, rules, directions, demands, or requirements.

The ability to enforce CASF conditions and requirements is essential, as is the Commission's ability to impose fines and penalties for failure to comply with Commission rules and orders. Although the Commission may have the regulatory authority to enforce CASF conditions on unregulated entities if it is granted legislative authority to do so, DRA still has reservations about the extent of the Commission's ability to ensure that CASF commitments are met post-construction in instances where, for example, an unregulated entity transfers assets built with CASF funds to another unregulated entity. For this reason, DRA believes that there is a greater need for enhanced, as opposed to reduced, performance bond and liquidity requirements for unregulated entities, if the Commission goes ahead with expanding CASF eligibility.

III. CONCLUSION

For the reasons discussed above, DRA remains concerned about expanding CASF eligibility to unregulated entities. It is critical that CASF grants lead to broadband adoption in California's unserved and underserved areas. However, if the Commission expands CASF eligibility to unregulated entities, it should adopt enhanced performance bond and liquidity requirements as safeguards to ensure accountability from funding recipients and protect consumers and ratepayers from fraud, waste, and abuse. Furthermore, the Commission should rely on its regulatory jurisdiction to monitor and enforce CASF conditions and requirements, rather than relying simply on contractual obligations.

Respectfully submitted,

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