

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 OFFICE OF RATEPAYER ADVOCATES
ON PROPOSED DECISION IMPLEMENTING REVISED ELIGIBILITY
CRITERIA FOR THE CALIFORNIA ADVANCED SERVICES FUND
PROGRAM**

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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 Office of Ratepayer Advocates (ORA) respectfully submits these comments on the Proposed Decision (PD) of Commissioner Peevey, mailed January 6, 2014. This PD implements Senate Bill (SB) 740, which amends Cal. Pub. Util. Code § 281 to permit non-telephone corporations to participate in the California Advanced Service Fund (CASF) program. The PD further implements revised eligibility rules for the CASF program, including additional safeguards for non-telephone corporations¹ applying for CASF funding to ensure that ratepayer funds are protected.

ORA supports the Legislature's goals in SB 740, which expands eligibility for the CASF program to non-telephone corporations. This expansion should address the need for more last mile projects in underserved areas of the state by allowing these entities the opportunity to provide broadband in a cost-effective manner, especially in high-cost rural areas of the state. ORA supports the goals of the CASF program and supports the PD's expansion of the program to include non-telephone corporations.

However, while ORA supports the benefits associated with expanding the CASF program to non-telephone corporations, there are some areas of the PD that require clarification or modification. While ORA supports the PD's requirement of a construction bond equal to the CASF award, ORA finds that the determination not to require a post-construction bond or liquidity requirement relies on reasoning that is inconsistent with previous Commission decisions. The PD should be modified to correct this legal error. The PD should also be revised to incorporate a requirement that the Commission's Communications Division (CD) verify or audit a CASF grantee in order to determine whether CASF requirements, including pricing and adoption plans, have been met. This measure is particularly imperative to protect ratepayer funds if the Commission decides not to require a post-construction performance bond, and will facilitate the Commission's ability impose fines and penalties on non-telephone

¹ Entities that do not hold a Certificate of Public Convenience and Necessity or a Wireless Identification Registration.

corporations. ORA also requests clarification regarding the section in the PD on Sales and Transfers. Finally, ORA requests that the PD be modified in order to correct a mischaracterization of ORA's comments regarding the Commission's ability to impose fines pursuant to Cal. Pub. Util. Code § 2111.²

II. DISCUSSION

A. The Rationale for Rejecting a Post-Construction Bond Instrument Is Not Consistent With Prior Commission Decisions.

ORA supports the PD's proposal to implement a performance bond requirement for non-telephone corporations to ensure completion of the construction of the project. However, the PD states that Commission will not require a compliance bond during the post-construction phase of the project from newly eligible non-telephone corporations. Rather, the PD states that the Commission will rely on its ability to impose penalties during the post-construction phase. The PD states that this is due to difficulties attributable to the types of obligations the Commission was asking sureties to take on in the form of a bond and the difficulties in assigning a value to each CASF requirement. ORA continues to assert that there should be a requirement that the grantee secure some type of "financial security instrument" that the Commission can access in cases where the grantee fails to pay fines or penalties imposed by the Commission for failure to comply with CASF program requirements. A post-construction bond is necessary to ensure protection of ratepayer funds.

The conclusions in the PD not to require a post-construction bond are based on the Communication Division's independent research questioning two security companies,

² Pub. Util. Code § 2111 states: "Every corporation or person, other than a public utility and its officers, agents, or employees, which or who knowingly violates or fails to comply with, or procures, aids or abets any violation of any provision of the California Constitution relating to public utilities or of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in the violation or noncompliance, in a case in which a penalty has not otherwise been provided for the corporation or person, is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense."

attached to the PD as Appendix 3. The primary reason given for the impossibility of requiring a post-performance/compliance bond is that none of the compliance requirements can be valued monetarily.³ However, this reasoning is not consistent with the rationale for requiring performance bonds in the case of Non-Dominant Interexchange Carriers (NDIECs) or holders of Certificates of Public Convenience and Necessity (CPCNs) or Wireless Identification Registrations (WIRs). This test was not applied to NDIEC/CPCN/WIR-holders and yet these entities are required to procure a bond. The rationale the Commission used in decisions requiring bonds for NDIEC/CPCN/WIR holders is that a bond facilitates the Commission's ability to collect fines, penalties, and bring about restitution. As the Commission stated in D.13-05-035:

[O]nce an investigation is launched, it is 'inherently difficult' in many cases – particularly those involving less established carriers – to ensure the collection of fines or payment of restitution. [Footnote omitted.] The Commission should not encounter difficulty or incur needless expense recovering fines, surcharges, taxes, penalties, and fees and should have a reasonable expectation that customers will be reimbursed or compensated in cases of bankruptcy or fraud. Therefore, it is reasonable and prudent to take steps now, both to reduce the need for future enforcement actions, and to increase the likelihood of successfully collecting fines or bringing about restitution once an enforcement action is initiated.⁴

The Commission's reliance on Pub. Util. Code § 2111 to enforce compliance of CASF regulations on non-telephone companies is untested. The Commission should impose a post-construction performance bond to ensure it has leverage to collect fines or restitution from companies that engage in fraudulent or inappropriate practices and cease to operate or file for bankruptcy after the Commission initiates investigations or shortly after the Commission imposes fines.

The NDIEC/CPCN/WIR holders provide a service as the CASF grantees will do, and are able to acquire these bonds. The surety companies that underwrite bonds for

³ PD, Appendix 3 at p. 3.

⁴ D.13-05-035, *mimeo*, at pp. 13-14.

CPCN/WIR/NDIEC holders must have figured out how to assess the risk of non-compliance with Commission rules and regulations. Since the PD relies on logic and rationale that is inconsistent with previous Commission decisions, it is legally in error as it does not constitute reasoned decision-making. The Commission should revise the PD to incorporate a post-construction performance bond as recommended by ORA in its earlier comments.

In the event the Commission insists on not requiring a post-construction performance bond, the PD should be revised to incorporate a requirement that CD verify or audit a CASF grantee in order to determine whether CASF requirements, including pricing and adoption plans, have been met. The PD lists the compliance measures that the Commission “will seek to enforce against non-telephone corporations during the post-construction phase....”⁵ For example, one existing CASF compliance measure requires that “grantees must carry out carry out the adoption plan submitted as part of its application to encourage adoption of broadband service in the proposed project area(s).”⁶ However, there is no requirement that CD verify compliance with this rule, nor is there any indication that the Commission has ever verified that the grantee did indeed carry out its adoption plan. ORA accordingly requests that language requiring this verification by the Communications Division or by mandatory audit be added to the Post-Construction section of Appendix 2. This measure is particularly imperative to protect ratepayer funds if the Commission decides not to require a post-construction performance bond, and will facilitate the Commission’s use of Cal. Pub. Util. Code § 2111 to impose fines and penalties on non-telephone corporations.

B. The Sales and Transfers of Assets Language Requires Clarification In Order To Protect CASF Project Assets.

ORA supports the PD’s addition of language to Appendix 2 in response to ORA’s concern about sales and transfers of assets. However, there should be more explicit direction in the section.

⁵ PD at p. 20.

⁶ PD at p. 20.

For example, the new requirement directs the buyer to reapply for the CASF grant but it is not clear if the new owner has to “meet” the requirements of the grant. ORA requests that the Commission define what kind of review the Communications Division will do in this circumstance. ORA recommends that this review be as thorough as the review of the original CASF grantee.

ORA has further concerns. For example, the new language states:

Grantees must notify the Commission within five days of determining that the grantee is planning to sale [sic] or transfer its assets. The grantee shall notify the Director of the Commission’s Communications Division in writing of their intent to sale or transfer company assets within five days of becoming aware of these plans. The grantee shall also provide documentation, including an affidavit, stating that the new entity will take full responsibility and ownership to meet the requirements and compliance of the CASF award. The new entity shall agree in writing to such. The grantee shall provide the Commission with any necessary documents requested in its review of the transfer. This will include all documents that are generally required of all entities applying for the CASF grants and loans. *The grantee shall not transfer CASF funds or the built out portion of the project to the new entity prior to Commission approval via a Resolution. If the Commission does not provide approval, it will rescind the grant or loan.*⁷

These latter sentences introduce the possibility of the transfer not being approved by the Commission. In that event, how much of the grant will be rescinded if the transfer or sale is not approved by the Commission? How will this decision be made?

Relatedly, the PD does not discuss the possibility of bankruptcy or discontinuation of service by the grantee. Will the construction bond then apply to protect the ratepayers’ investment? What if grantee discontinues service? Can the Commission penalize the grantee in that circumstance? What resources will the Commission be able to collect if there is no “post-performance bond”? ORA respectfully submits that these questions should be answered in the PD in order to provide further support and protection of

⁷ PD at p. 18 (emphasis added).

ratepayer funds. The existence of a post-performance bond would help to protect the ratepayers' investment in the event of bankruptcy and/or discontinuation of service.

C. The Rationale for Not Imposing a Liquidity Requirement Does Not Constitute Reasoned Decision-Making.

The PD elects not to adopt a liquidity requirement and finds “that the rigorous underwriting process involved in obtaining a performance bond is a sufficient indicator.”⁸ However, there is insufficient rationale in the PD for this determination, thus constituting legal error.

ORA continues to support a liquidity requirement for non-telephone corporations applying for CASF funds.⁹ The role of the liquidity requirement is to cover start-up operations. The PD does not impose such a requirement, first reasoning that an applicant must submit information on its financial viability, which is one of the eight criteria used to score an application.¹⁰ However, as the PD notes, applicants are not required to meet any specific financial requirement.¹¹ ORA questions the level of scrutiny the Commission performs in evaluating a company's “financial fitness” and determining whether a company is “financially secure” when there are no specific financial requirements to meet. If there are no financial requirements, by what standard will CD evaluate whether an applicant is “financially secure”? Since there are no standards in place this seems a rather thin rationale for basing the decision not to impose a liquidity requirement.

Next, the PD determines that all applicants “should undergo a rigorous underwriting process to obtain a construction phase performance bond.”¹² Thus, the PD puts the responsibility on a surety company's underwriting process for thoroughly vetting

⁸ PD at p. 27.

⁹ See, e.g., ORA Reply Comments on the Administrative Law Judge's Ruling Soliciting Additional Comments on Issues Identified in Order Instituting Rulemaking 12-10-012, at 4-5 (April 23, 2013).

¹⁰ PD at p. 26.

¹¹ PD at p. 22.

¹² PD at p. 26.

an applicant's financials.¹³ The Commission has a responsibility to ensure that ratepayer funds are not subject to waste, fraud, or abuse; it should not abdicate this responsibility by presuming that a key vetting of an applicant's financial information will be done by an outside third party.

Further, ORA notes that CPCN applicants are subject to a liquidity requirement. Some of these applicants for a CPCN construct facilities to serve customers, similar to CASF applicants. CASF applicants should also be subject to such a requirement. The decision to not adopt a liquidity requirement is not reasoned decision-making and constitutes legal error. The Commission should correct this legal error by adopting a liquidity requirement that is proportionate to the CASF award.

D. The Commission Should Modify the PD to Correct a Mischaracterization of ORA's Comments

The PD concludes that Cal. Pub. Util. Code § 2111 permits the Commission to enforce the CASF requirements in both the construction and the post-construction phases against non-telephone corporations, i.e., entities which do not hold CPCNs or WIRs, through the use of penalties.¹⁴ ORA agrees with the PD's assessment on the Commission's ability to enforce the requirements of the CASF program on non-telephone corporations through fines and penalties. However, ORA requests that the PD be modified to correct a mischaracterization of ORA's comments. The first full paragraph on page 31 of the PD begins:

ORA comments that we would need specific statutory language to impose penalties and enforce the terms and conditions of the grant during the construction phase and post-construction. While we do not agree with ORA's statement, we note that the Legislature did, indeed, grant the Commission authority to penalize non-telephone corporation CASF applicants and grant recipients that violate the rules of the CASF program.

¹³ PD at p. 26.

¹⁴ PD at p. 30.

ORA's comments did not state or intend to imply that the Commission would need additional specific statutory language *to impose penalties*; rather, ORA's point was that the Commission should have the authority to award CASF grants to non-telephone corporations and impose those program requirements in the first place. With that authority, the Commission has the ability to enforce the terms and conditions of the CASF program through Cal. Pub. Util. Code § 2111. ORA thus agrees with the remaining analysis in that paragraph. In order to correct the PD so that it accurately reflects ORA's comments on this matter, ORA requests that the paragraph in question be modified to read:

ORA comments that we would need specific statutory authority to expand CASF eligibility to non-telephone corporations in order to rely on § 2111 to enforce the requirements of the CASF program on non-telephone corporations. As stated above, ORA made these comments before the Legislature passed SB 740. Since that time, we note that the Legislature did, indeed, grant the Commission authority to expand CASF eligibility to non-telephone corporations. ~~ORA comments that we would need specific statutory language to impose penalties and enforce the terms and conditions of the grant during the construction phase and post-construction. While we do not agree with ORA's statement, we note that the Legislature did, indeed, grant the Commission authority to penalize non-telephone corporation CASF applicants and grant recipients that violate the rules of the CASF program.~~ [Footnote to remain the same.] The Commission has ancillary jurisdiction over its own public purpose programs, including the CASF program, pursuant to SB 740, which amended Public Utilities Code § 281. Thus, we have the authority to give grants and to require applicants and grantees to "meet[s] the eligibility requirements and compl[y] with program requirements established by the Commission" to non-CPCN/WIR holders, which are not telephone corporations. [Footnote to remain the same.] Because of our authority over this program and our responsibility to ensure that ratepayer money is protected from waste, fraud and abuse, the Commission may rely on § 2111 for purposes of enforcing all the requirements of the CASF program.

In the alternative, ORA requests that the first two sentences of the first paragraph on page 31 of the PD be deleted.

III. CONCLUSION

ORA supports expanding the CASF program to non-certificated entities along with sufficient safeguards in place to protect ratepayer funds. ORA finds the expansion will bring the benefits of broadband to more Californians. ORA supports the PD's requirement of a construction bond equal to the CASF award. For the reasons discussed above, however, the PD's rationales for not requiring a post-construction performance bond and liquidity requirement do not constitute reasoned decision-making. The PD should be modified in order to correct this legal error. ORA also recommends that the PD be revised to incorporate a requirement that CD verify or audit a CASF grantee in order to determine whether CASF requirements, including pricing and adoption plans, have been met. In addition, ORA requests that the Sales and Transfers section of the PD be modified in order to clarify how the Commission will evaluate and treat sales and transfers of assets built with CASF funds. Finally, ORA requests that the PD be modified in order to correct a mischaracterization of ORA's previous comments on the ability of the Commission to impose fines and penalties under Pub. Util. Code § 2111.

Respectfully submitted,

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