

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 SCOPING MEMO AND
RULING OF ASSIGNED COMMISSIONER**

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I. INTRODUCTION

Pursuant to Rule 7.3 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 Scoping Memo and Ruling of Assigned Commissioner (Scoping Memo), mailed January 17, 2014, that sets forth the procedural schedule and addresses the scope of the California Advanced Services Fund (CASF) proceeding. This ruling revises the scope of this proceeding to address additional changes, besides eligibility, to the CASF program instituted by Senate Bill (SB) 740 and Assembly Bill (AB) 1299. SB 740 amends Cal. Pub. Util. Code § 281¹ to permit non-telephone corporations to participate in the CASF program.² AB 1299 establishes the Broadband Public Housing Account, which will provide grants and loans to publicly supported communities for projects to deploy broadband networks and to increase broadband service adoption rates for residents in these communities. ORA supports the goals of SB 740 and AB 1299 to help bridge the Digital Divide and advance California's broadband policies by extending broadband service to all California communities regardless of their location or income, specifically by bringing broadband to Publicly Supported Communities (PSCs).

ORA looks forward to participating in this Rulemaking to develop new public policy that encourages investment in deployment and adoption of broadband technology in PSCs. However, ORA has concerns about the schedule set forth in the Scoping Memo to address the development of this new program. The Scoping Memo asks parties to comment on a set of 39 questions "in order to guide the workshops that CD [Communications Division] staff will hold in March and April 2014."³ ORA notes that this program is unlike the present CASF program in that the CASF applicant and

¹ All statutory references are to the California Public Utilities Code, unless otherwise noted.

² As noted in the Scoping Memo, a Proposed Decision implementing the expanded eligibility required by SB 740 was issued January 6, 2014. The Scoping Memo states that the remaining requirements in SB 740 can be implemented through the Resolution process. ORA agrees with this assessment.

³ Scoping Memo, at 6.

potential grantee is a PSC that will contract with a provider to connect the PSC to broadband facilities, whereas current applicants for CASF grants and loans are providers of broadband services. Because of this important difference, the CPUC will have to develop rules and guidelines that involve third-party participation by providers, and as the Scoping Memo correctly notes, the Commission will need to “consider the design of such a program, adopt new specific requirements and other implementation details, and determine how to allocate funds pursuant to AB 1299, given the statewide distribution of those publicly supported communities in California.”⁴ However, the Scoping Memo schedule provides no opportunity for parties to submit formal comments on proposals concerning the design and development of this program. In order to develop a record on which the Commission can base its decision, ORA has concurrently filed a motion to amend the schedule in this proceeding to clarify that the Staff Workshop Report should be served on the parties, and to provide parties the opportunity to submit comments and reply comments on the proposals in the Staff Report.⁵

Though the Scoping Memo asks parties for comment on the 39 topics listed in Appendix 1 “in order to guide the workshops”, out of an abundance of caution ORA provides substantive comment on some of the questions posed in Appendix 1. ORA further provides recommendations on other questions, including additional topics for discussion, in order to guide the workshops.

AB 1299 establishes a Broadband Public Housing Account in order to finance projects to connect broadband networks to publicly supported communities (as defined in the statute) and to support programs designed to increase adoption rates for broadband services for residents of publicly supported communities. ORA has three main concerns with the development of this new program. First, the workshops should identify the types of infrastructure and adoption projects that are most needed by the residents of PSCs to

⁴ Scoping Memo, at 5-6.

⁵ See, ORA Motion to Modify the Schedule Set Forth in the Scoping Memo and Ruling of Assigned Commissioner, filed concurrently with these comments on February 10, 2014.

bridge the digital divide. Additionally, the workshops should address the ability of the PSC applicant to physically support a new broadband infrastructure.

Second, the workshops should determine who is responsible for carrying out the project: the PSC and/or the third-party provider that connects the broadband to the residents in the PSC. This third-party arrangement introduces the opportunity for inefficient use of funds.

Third, the Commission should award the CASF grants and loans via the resolution process as it does presently and not delegate this important decision to the staff, as suggested in the Scoping Memo Appendix. The resolution process makes the Commission's decision-making transparent, an essential part of the public process.

II. DISCUSSION

ORA addresses many of the questions in Appendix 1 as they are listed. Though ORA does not comment on every question, it reserves the right to respond to all questions and any parties' comments at a later date, provided ORA's motion is granted, and/or at the workshops.

A. Eligibility Requirements

The goal of the workshops and resulting Staff Report should be to clearly define the Eligibility Requirements for the Public Housing Account. Some questions may need to be expanded and developed in the workshops.

1. Definition of Publicly Supported Community (Questions 1-3)

Questions 1-3 ask whether publicly supported communities owned by for-profit entities would be eligible for the CASF program; whether the definition in the statute is sufficiently clear to determine an applicant's eligibility status; and what documentation the Commission should require for an applicant to prove its eligibility.

ORA submits that the definition of a Publicly Supported Community in § 281 excludes for-profit housing from participating in the CASF program. As stated in the Scoping Memo, AB 1299 defines the term "publicly supported community" as:

[A] publicly subsidized multifamily housing development that is wholly owned by either of the following:

(i) A public housing agency that has been chartered by the state, or by any city or county in the state, and has been determined an eligible public housing agency by the United States Department of Housing and Urban Development.

(ii) An incorporated nonprofit organization as described in Section 501 (c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)) that is exempt from taxation under § 501 (a) of that code (16 U.S.C. § 501(a)), and that has received public funding to subsidize the construction or maintenance of housing occupied by residents whose annual income qualifies as ‘low’ or ‘very low’ income according to federal poverty guidelines.⁶

It is ORA’s understanding that Section 8 housing can be privately owned, but under income restrictions. In light of this fact, ORA recommends that the workshop include a discussion of the eligibility of Section 8 housing. Otherwise, the language of § 281 is sufficiently clear to determine an applicant’s eligibility status, and ORA does not see how for-profit housing complies with the language above. Section 281(e)(B)(i) states that the Department of Housing and Urban Development (HUD) determines eligibility, therefore the applicant should be able to provide this proof to the CPUC. Likewise, the applicant should be able to provide tax forms to prove its non- profit status, as required by the statute.

2. Denial of Right of Access – Infrastructure Projects Only (Questions 4-7)

Questions 4-7 concern implementing § 281(f)(3)⁷, which restricts a PSC from applying for CASF monies if it has denied a right of access to any broadband provider that is willing to connect a broadband network to the facility. Appendix 1 asks what

⁶ Scoping Memo, Appendix 1, at 1.

⁷ Section 281(f)(3) provides: “A publicly supported community may be an eligible applicant only if the publicly supported community can verify to the commission that the publicly supported community has not denied a right of access to any broadband provider that is willing to connect a broadband network to the facility for which the grant or loan is sought.”

documentation the Commission should require to verify that a publicly supported community has not denied access to any broadband provider, and whether the Commission should consider affordability of broadband service or other considerations when examining access denials.

ORA recommends that the CPUC craft implementation language to consider the circumstances that may have resulted in a denial but that will still allow a PSC to apply for a CASF grant.

On April 29, 2013, the Assembly Utilities and Commerce Committee held an informational hearing on broadband availability for residents of California public housing. At that hearing, cable providers with facilities to the curb near public housing buildings claimed that in some cases they were denied access to public housing to install lines that would enable service to individual units.⁸

ORA believes that any provider that was denied access to connect to a PSC will come forward in the event that a PSC applies for CASF. The more important issue for the Commission to consider is why the PSC was denied access. Was the monthly service unaffordable for the residents? Did the provider require exclusive contract rights and did the PSC did not want to bind itself for 25 years to a contract with one provider, which would be anti-competitive?

Rather than wasting time in workshops discerning the appropriate documentation to verify denial of access, the CPUC should focus on ascertaining why the PSC denied access if such a claim arises. ORA recommends implementing rules that do not preclude a PSC from connecting with a provider whose monthly service is affordable and terms are reasonable, despite a previous denial. ORA asserts that the intent of AB 1299 is to make broadband service affordable and to encourage adoption by PSC residents. Thus, the Commission should implement rules that allow consideration of affordability of broadband services or other considerations when examining access denials. Also, the

⁸ April 29, 2013 Assembly Utilities and Commerce Committee informational hearing as reported in Assembly Floor Bill analysis (September 11, 2013).

CPUC should not restrict a once-denied provider from participating again if that provider can offer a lower monthly price and/or less restrictive policies.

3. Broadband Access – Adoption Projects Only (Questions 8-9)

As Appendix 1 notes, a publicly supported community may be eligible for funds for a broadband adoption project only if the residential units in the facility to be served have or will have access to broadband services “at the time the funding for adoption is implemented.” Question 8 states that the Commission proposes to define “the time funding for adoption is implemented” as the time that the application is approved. ORA agrees with this interpretation but recommends requiring confirmation that a PSC has broadband access up and running to all residents before releasing adoption money to the PSC.

B. Funding of Infrastructure Projects and Adoption Projects

Among the 39 questions in Appendix 1 of the Scoping Memo, the funding of infrastructure and adoption projects is among the most important questions to discuss at the workshops. The workshops should identify the types of infrastructure projects most needed by the residents of PSCs to bridge the digital divide. Additionally, the workshops should address the ability of the PSC applicant to physically support a new broadband infrastructure. ORA discusses the specific questions on this topic below.

1. Infrastructure Projects (Questions 10-13)

One of the most important issues for discussion in the workshops is determining the types of infrastructure projects and costs to be funded by this program. However, ORA would also like the workshops to address the infrastructure capacity of residential buildings to support the new broadband infrastructure. For example, does the PSC facility have an adequate number of electrical plugs and electrical capacity for the computers that would access the cable or wireless connection? Is the building circuitry up to code? There may be electrical infrastructure deficiencies that need to be remedied before connecting the PSC to a network. ORA is concerned that PSCs may receive grants

or loans to connect the PSC to a network but that the network will not be fully utilized because of deficiencies in the building infrastructure.

At the April 29, 2013, Assembly Utilities and Commerce Committee informational hearing, representatives from publicly-supported and non-profit housing communities, situated primarily in urban areas, testified that a majority of their properties lack reliable broadband connectivity. They cited the cost of building or upgrading the infrastructure and maintaining the network and inside wiring as the primary barrier to receiving broadband service.² ORA would urge the workshops to address this important issue.

Appendix 1 also poses the question on how to divide the \$20 million from the CASF that was allocated to this program between loans and grants.¹⁰ To answer this question, the workshops could use data from projects that have applied for and been awarded a CASF loan.¹¹ In addition, housing advocates would be able to share their experiences with what kind of demand there is for these two financial instruments.

ORA recommends using the Commission's current CASF loan program rules and guidelines¹² to implement this loan program since it has already been approved by the Commission and is currently used by staff.

2. Adoption Projects (Questions 14-17)

Appendix 1 asks whether the Commission should offer grants, loans or a combination of both to fund adoption projects in PSCs. It also asks what types of

² April 29, 2013 Assembly Utilities and Commerce Committee informational hearing as reported in Assembly Floor Bill analysis, (September 11, 2013), AB 1299.

¹⁰ Scoping Memo, Appendix 1, at 2.

¹¹ To date, one applicant has been awarded a CASF loan. See Resolution T-17422: Approval of Funding for the Grant and Loan Application of WillitsOnline LLC and its subsidiary company, Rural Broadband Now! LLC (U-7073-C), from the California Advanced Services Fund (CASF) in the Amount of \$163,908 for the Boonville Underserved Broadband Project.

¹² See D.12-02-015, Appendix 2. The Commission adopted rules to implement provisions of SB 1040 relating to the Infrastructure Grant and Loan Account. Appendix 2 CASF- The Broadband Infrastructure Revolving Loan Account, Application Requirements and Guideline sets forth details of the application requirements and guidelines for the Infrastructure Loan Account.

adoption projects should be funded by the program and what project costs should be eligible for funding.

AB 1299 earmarked \$5 million of the CASF for adoption projects. Determining what types of adoption projects should be funded by the program is an important topic for the workshops. ORA encourages the residents of the PSCs to participate in the workshops and ORA looks forward to their input on this topic.

ORA supports funding to increase adoption of broadband whether through grants or loans. Throughout its involvement as a party to the CASF proceedings, ORA has requested that the CPUC consider adoption as a primary factor in evaluating CASF applications.¹³ Without adoption, any investment in infrastructure is wasted and the CASF program goal to bridge the Digital Divide will not be achieved. Possible adoption projects include instruction for residents to understand the benefits of broadband service and the availability of discounted or no-cost computers as well as other marketing and outreach activities.

3. Distribution Method (Question 18)

Section 281(f)(5) requires the Commission, to the extent feasible, to approve projects, both adoption and infrastructure projects, for publicly supported communities “in a manner that reflects the statewide distribution of publicly supported communities.” Appendix 1 asks how the Commission should determine this distribution method. ORA recommends that the CPUC contact the PSC advocates who collect this information and invite them to participate in the workshops.

ORA views this program as an opportunity to bring the benefits of broadband to publicly supported communities of large urban areas such as Los Angeles, which have not taken advantage of CASF grants, despite the existence of the Rural and Urban

¹³ Comments Of The Division Of Ratepayer Advocates On The Order Instituting Rulemaking To Consider Modifications To The California Advanced Services Fund, R.12-10-012 (December 3, 2012).

Regional Broadband Consortia grant program¹⁴, which funds activities promoting broadband deployment, access, and adoption.

4. Other Funding Sources (Questions 19-20)

Section 281 encourages matching funding¹⁵ and other sources of funding for adoption and deployment of broadband. ORA would also encourage an applicant to find sources of funding in addition to CASF. However, ORA would like to discuss in the workshops the use of other funding sources as one of the criteria in evaluating applications before recommending whether this factor should give preference in an application.

C. Partnering for Adoption Projects (Question 21)

Appendix 1 poses a crucial question that the legislation did not address, namely, who should be responsible for carrying out the project? The PSC is the applicant for the grant yet the PSC must contract with a provider to connect the broadband to the residents in the PSC. This third-party arrangement introduces the opportunity for inefficient use of funds.

The Commission must determine who the responsible party is to ensure project completion. This program is unlike the existing CASF programs where the applicant is also the provider of broadband, and ORA looks forward to crafting a workable and efficient method for protecting ratepayer funds and minimizing waste while holding the appropriate entities accountable. ORA recommends that both the PSC and the provider be responsible for project completion. ORA would like to use the workshops to define the role and method of the PSC in paying a third party. ORA would also like to discuss the question of what kind of oversight the CPUC will provide to ensure that the grant or loan is being used efficiently. ORA recommends a bond requirement to assure completion of the project by the provider. In addition, ORA recommends the workshops

¹⁴ See the CPUC webpage list of the many Consortia in California, available at: <http://www.cpuc.ca.gov/PUC/Telco/CASF+Consortia/>.

¹⁵ Section 281(h)(B)(6) provides: “The commission may require an applicant to provide match funding, and shall not deny funding for a project solely because the applicant is receiving funding from another source.”

include a discussion on instituting a timeline for completing the project similar to the invoicing system in the current CASF program. Finally, as ORA recommended with non-telephone corporations that are eligible for the CASF program via SB 740, the Commission should rely on its regulatory authority under § 2111 to enforce CASF requirements against the PSC entities as well as the broadband providers.

**D. CASF Public Housing Infrastructure Grant Program
Application Evaluation Criteria**

1. Criteria For Evaluating Grants (Questions 22-23)

Questions 22 and 23 ask if the Commission should use similar criteria used to review current CASF Infrastructure Grant applications to evaluate PSC infrastructure grants and whether additional or modified criteria should be used. ORA submits that the criteria used should include a focus on adoption and pricing.

ORA supports the evaluation of applications by focusing on broadband adoption and pricing of the service for residents. In previous comments regarding the CASF, ORA noted that both the Legislature and the Commission have indicated that the CASF is about closing the Digital Divide, which requires adoption in addition to construction of infrastructure.¹⁶ If the price of broadband service is affordable, residents are more likely to sign up for the service.

Pricing is included in the current list of criteria for CASF projects. However, ORA recommends changing the criteria “Guaranteed Pricing Period” to extend the pricing period in order to maintain affordability. If broadband service becomes unaffordable after two years, when the “Pricing Period” expires, residents may disconnect the service and the benefits that accrue from the service would halt. ORA recommends discussing this issue at the workshops with the goal of preserving broadband affordability.

The current list does not include criteria that would measure adoption or require an adoption plan. ORA requests that the workshops include discussion on crafting an

¹⁶ Comments Of The Division Of Ratepayer Advocates On The Order Instituting Rulemaking To Consider Modifications To The California Advanced Services Fund, R.12-10-012 at 3 (December 3, 2012).

effective measurement of adoption and a method to bind the PSC and provider to the adoption plan promised in the application.

2. Evaluation of Financial Viability (Question 24)

Question 24 asks how the Commission should evaluate the financial viability of a publicly supported community so that the community can maintain and continue the project. ORA looks forward to developing an evaluation method in the workshops.

3. Delegating Staff Approval of Grant Applications (Questions 25-27)

Appendix 1 states that the Commission wishes to develop a set of criteria that will enable it to delegate to staff approval of grant applications meeting those Commission-approved criteria; thus, obviating the need for the Commission to approve every recommended application via the resolution process. Currently, Staff reviews the applications and recommends approval through the resolution process. ORA does not support delegating staff approval of grant applications in lieu of using the resolution process. Appendix 1 fails to articulate any rationale as to why this practice should change. In fact, ORA does not see how such a delegation to staff could work or be lawful.

The Commission cannot delegate authority to staff powers that involve the exercise of judgment or discretion. In order for staff to have the ability to approve grant applications in lieu of using the resolution process, the approval process would have to be ministerial in nature. In other words, the Commission would have to provide guidance on and create a checklist to cover every possible contingency that could arise in the context of these applications. Given the variables involved and the fact that every project will be different, ORA does not see how development of such a checklist will be possible. Approval of these grant and loan applications necessarily will involve the exercise of some level of discretion. Though staff can develop recommendations to the Commission on these matters, complete discretion to approve the applications is a function that cannot be delegated to staff.

Moreover, ORA strongly supports transparency in the CASF program and application process. Several CASF resolutions have been held by staff and by Commissioners who had questions and made changes after the CASF resolution was made public. If staff is allowed to make determinations on these awards without the resolution process, there would be no opportunity for public input and there would be a complete lack of transparency in the process.

ORA finds it shocking that the CPUC would consider less oversight, public input, and transparency when awarding ratepayer funds. The resolution process makes the Commission's decision-making transparent, which is a necessary part of the public process. For these reasons, ORA submits that the Commission must approve each grant and loan under this program.

4. Scoring Formula (Question 28)

ORA looks forward to devising a method or methods for scoring, prioritizing funding and distributing funds to PSCs "in a manner that reflects the statewide distribution of publicly supported communities" in the workshops.

E. CASF Public Housing Adoption Grant Application Evaluation Criteria (Questions 29-31)

Appendix 1 states that the Commission also wishes to develop a set of criteria that will enable it to delegate to staff approval of grant applications for adoption projects meeting Commission-approved criteria, similar to the process proposed above for infrastructure projects. ORA does not support delegating authority to staff for approving adoption grants for the reasons stated above concerning infrastructure grant approvals. Staff does not have expertise in this area: as Appendix A notes, unlike infrastructure projects, the CASF has not previously administered funds for broadband adoption projects, except within the context of the regional consortia grants.

The Commission does not have expertise in adoption methods and ORA believes the participants with expertise, including the Regional Consortia groups that receive CASF grants to increase adoption, should provide guidance in developing adoption evaluation criteria, provided they attend the workshops.

F. Post Award Project Monitoring and Compliance (Questions 32-35)

Questions 32-35 ask how the Commission should monitor publicly supported community grantees to ensure progress. The Commission should develop rules in the workshops that monitor a grantee's project completion. ORA recommends using the CASF's current construction schedule where project costs are reimbursed in 25% increment payments with verification via invoice submission.

One of the differences between this program and the existing CASF program is that the PSC may oversee the third party that is contracted to complete the project. The workshops should focus on how the Commission will oversee the PSC in addition to the third party.

The Legislature has permitted non-telephone corporations to participate in the CASF and the CPUC is implementing recent legislative changes to the statute on this front.¹⁷ If the Proposed Decision implementing this recent legislation is approved by the Commission, these participating entities are required to agree to respond to Commission data requests and agree to audits for a period of three years after project completion. This compliance monitoring for the PSC project should be similar. However, ORA recommends strengthening this compliance by requiring the CPUC to complete an audit as described in ORA's recent comments on the PD implementing SB 740.¹⁸ ORA also recommends penalties for non-compliance.

G. Processes Used in Handling Applications (Questions 36-39)

The remaining questions in the Appendix 1 concern processes used in handling applications, including what information should be included, what the timeline and process should be for submission, how the applications should be made available for public review, and whether an applicant should be required to provide additional public notice of the application to the publicly supported community it intends to serve. Staff

¹⁷ See SB 740 and Proposed Decision Implementing Revised Eligibility Criteria for the California Advanced Services Fund Program, issued on January 6, 2014, in this proceeding.

¹⁸ ORA's Comments on the Proposed Decision Implementing Revised Eligibility Criteria for the California Advanced Services Fund Program, R.12-10-012, filed January 27, 2014.

has expertise from its several years of experience administering the CASF program and has an application process in place. Though there may be some changes to account for third-party participation in the program, ORA recommends keeping the application process transparent and applications available for public review. ORA agrees that there should be notice to the specific PSC that the applicant intends to serve, particularly in light of the adoption project aspect of the program.

III. CONCLUSION

ORA supports the goals of AB 1299 and the CASF program and looks forward to participating in the upcoming workshops. Specifically ORA recommends that the workshops focus on identifying the types of infrastructure and adoption projects are most needed by the residents of PSCs to bridge the Digital Divide. ORA recommends that the workshops include discussion on project responsibility between the PSC and the third-party provider that connects the broadband to the residents in the PSC to minimize inefficient use of funds.

Finally, ORA recommends the workshops focus on keeping the entire CASF process transparent, including at the staff level, which is an essential part of the public process.

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Respectfully submitted,

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