

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

R. _____

ORDER INSTITUTING RULEMAKING

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ORDER INSTITUTING RULEMAKING

1. Summary

The California Public Utilities Commission (Commission) initiates this rulemaking to revise the eligibility requirements for participation in the California Advanced Service Fund (CASF). Specifically, we propose to adopt rules that will permit an entity which is not a “telephone corporation,” as defined under the Public Utilities Code,¹ to apply for CASF infrastructure grants and loans. We recognize that the change we are proposing is contingent upon legislative action because the current eligibility requirements are defined by statute.² We plan to seek such legislation in the near future and are initiating this rulemaking in anticipation of that effort. We seek comment at this time on our proposal to modify the CASF eligibility requirements and tentatively plan to adopt modifications contingent upon action by the Legislature. Should the Legislature act, we then plan to issue draft rules that implement the proposal.

¹ Cal. Pub. Util. Code § 234.

² Cal. Pub. Util. Code § 270(b).

2. Background

The California Public Utilities Commission (Commission) established the California Advanced Service Fund (CASF) in Decision (D.) 07-12-054 and the Legislature subsequently authorized it in order to spur the deployment of broadband facilities in unserved and underserved areas of California.³ The CASF provides financial support in the form of grants for broadband infrastructure projects selected through an application and scoring process. In addition, it provides support to rural and urban regional broadband consortia to fund activities that are intended to facilitate broadband deployment other than funding the capital costs of specific deployment projects. The CASF also provides loans to finance the capital costs of broadband facilities not funded by a CASF grant.⁴

In D. 07-12-054, the Commission limited eligibility for CASF support to telephone corporations as defined by Pub. Util. Code § 234, *i.e.*, entities that hold either a Certificate of Public Convenience and Necessity (CPCN) or a Wireless Identification Registration (WIR). In adopting this requirement the Commission stated: “we consider the CPCN requirement necessary in order to ensure that the Commission has jurisdiction to control against waste, fraud and abuse in our administration of the program.”⁵ In Resolution T-17143 the Commission adopted specific application requirements, timelines and scoring criteria for parties seeking CASF project grants. The resolution confirmed that eligibility for CASF grants was limited to entities holding either a CPCN or WIR but did not

³ Cal. Pub. Util. Code § 281; Interim Opinion Implementing California Advanced Services Fund D. 07-12-054, December 21, 2007 at 2; See also Finding of Fact 3.

⁴ Cal. Pub. Util. Code § 281(e); D.12-02-015 at 46.

⁵ D.07-12-054 at 35.

rule out reconsidering the issue in the future if the CASF had surplus funds or if other circumstances justified reconsideration of the issue.⁶

The restriction on eligibility for CASF funding to telephone corporations was subsequently reflected in statute when the Legislature codified the CASF.⁷ However, with the passage of the American Recovery and Reinvestment Act (ARRA) in February of 2009, which provided grants to both telephone corporations and other entities for the construction of broadband facilities, the Commission saw the opportunity to leverage existing CASF funds by providing CASF matching grants to ARRA grantees for the unfunded portion of ARRA grants.

In D. 09-07-020, the Commission determined that it would consider modifying the CASF eligibility requirements to provide CASF support to ARRA grantees which were not telephone corporations, contingent upon the Legislature's passage of an existing bill that would give the Commission the required authority to modify eligibility.⁸ The Commission noted that expanding the range of entities eligible to receive CASF funds beyond certificated or registered telecommunications carriers would raise issues about the fitness and technical capabilities of entities the Commission does not regulate. Therefore, it stated that the Commission would need to implement appropriate safeguards to ensure that any non-certificated entities were financially and technically

⁶ Resolution T-17143 at 19.

⁷ Senate Bill (SB) 1193 (Padilla) Stats. 2008 Ch. 393, amending Cal. Pub. Util. Code §§ 270 and 281.

⁸ D. 09-07-020 at 13-14.

qualified to meet CASF program requirements as a condition of receiving CASF money.⁹

In July of 2009, Assembly Bill (AB) 1555 was enacted giving the Commission the authority to provide CASF matching grants to ARRA grantees that were not telephone corporations if those entities met the requirements of the Commission's CASF program.¹⁰ Subsequently, the Commission issued Resolution T-17233, which adopted specific rules governing the participation of non-certificated or registered entities in the CASF program, taking into account the concerns the Commission expressed in D. 09-07-020. In order to ensure the financial, technical and managerial competence of CASF applicants which were not regulated by the Commission, the Commission imposed additional requirements on them, including: the submission of information sufficient to conduct a thorough background check; an affidavit agreeing to comply with specific Commission rules; an agreement to allow the Commission to inspect the applicant's accounts, books, papers, and documents related to the application and award of CASF funds; and a mandatory performance bond.¹¹

In D.12-02-015 the Commission concluded that since broadband funding under ARRA had been fully allocated, the opportunity for non-certificated or registered entities to participate in the CASF program had expired. Therefore, if the Commission wished to allow these entities to be eligible for CASF funds prospectively, further legislative authority would be required.

⁹ Id.

¹⁰ Cal. Pub. Util. Code §281(c)(2). In fact, AB 1555 required that such entities be allowed to apply for CASF support.

¹¹ Resolution T-17233 at 4-6. See also Appendix 1 and 2.

However, the Commission decided not to pursue this authority for the following reasons. First, it cited reports by Communications Division staff that non-certificated or registered entities that had applied for CASF funds in conjunction with ARRA grants had required significant assistance from the staff to negotiate the application/ grant processes. Moreover, the Commission noted that few grants had been issued to these entities because these applicants had failed to obtain ARRA grants. Finally, the Commission recognized that it might not have a regulatory mechanism to enforce its resolutions awarding grants to non-certificated entities, and that the Commission “does not have the same capabilities to oversee and ensure the proper use of ratepayer funds by unregistered entities” as it does with entities holding a CPCN or WIR.¹² Based on these facts and the Commission’s continued concerns about its ability to properly oversee CASF program participants that were not regulated by the Commission, it concluded that retaining the program eligibility restrictions adopted in D.07-12-054 was appropriate.

3. Discussion

3.1. Review of CASF Eligibility Requirements, is Warranted

We recognize that in D. 12-02-015 the Commission considered and rejected expanding eligibility for CASF grants and loans beyond telephone corporations which hold CPCNs and WIRs.¹³ In Resolution T-17143 the

¹² D.12-02-015 at 22.

¹³ We note that in reaching the conclusion that eligibility for CASF funding should be limited to telephone corporations in D.12-02-015, the Commission at that time did not consider the overall performance of the CASF fund but did so solely on the basis of the considerations discussed above in Section 2.

Commission contemplated the possibility that the CASF eligibility requirements would be reconsidered if regulated entities did not make use of the CASF funds or for other reasons.¹⁴ We believe that changed circumstances justify a reconsideration of the issue at this time. In particular, we have received numerous letters in recent months from internet access providers, universities, and regional county organizations consisting of public and private stakeholders which claim that broadband services will not be available throughout the state unless the Commission changes the CASF's eligibility requirements. These parties claim that there are a number of commercial and non-commercial entities that would seek CASF support if eligibility for funds was not limited to telephone corporations and that these entities are uniquely suited to provide cost effective broadband service in high cost rural areas of the state through the use of fixed wireless technology. In response to the concerns expressed in these letters, we have reviewed the performance of the CASF and believe a reconsideration of the eligibility issue is warranted at this time.

¹⁴ Specifically, the resolution states "the Commission, however, may consider the expansion of CASF eligibility to 'entities other than telephone corporations' in the near future on its own motion, should the CASF program as originally rolled out leave CASF funds remaining. The Commission emphasizes it remains open-minded about more creative and non-traditional ways to achieve broadband access to unserved areas after this initial round is completed." (Resolution at 38.) Elsewhere in that resolution, the Commission stated that "this proceeding contains no record that other entities are ready or capable of utilizing CASF funds. If the Commission finds that regulated entities do not make use of the CASF funds or that additional entities (such as wired or wireless Internet Service Providers) should be eligible for future funding, then we may consider other alternatives." (Id. at footnote 16.)

3.2. CASF Performance

As of December 2011, there were over 11,623 households in the state that lacked access to any broadband service whatsoever and approximately 347,130 households which were underserved.¹⁵ These numbers reflect the availability of both fixed and mobile broadband access. However, if only the availability of fixed broadband access, which includes fixed wireless internet service providers (WISPs), was considered, approximately 162,984 households would have no access to broadband service whatsoever while approximately 653,502 households would be considered underserved. Whether one considers access to fixed and mobile broadband on a combined basis or access to fixed broadband services alone, virtually all of the unserved and most of the underserved households in the state are located in rural areas where the cost to deploy broadband facilities are often high due to low population density and/or difficult terrain.

¹⁵ Cal. P.U.C., California Broadband Availability, http://www.broadbandmap.ca.gov/BroadbandIntermediateCA_v1.3/ (last visited Sept. 12, 2012). An unserved household is defined as one in which either no broadband service is available or broadband service is slower than 768 kbps down or 200 kbps up. An underserved household is defined as one in which broadband service is slower than 6 mbps down or 1.5 mbps up.

Moreover, while both fixed and mobile wireless coverage is the basis for determining whether an area is served or underserved for purposes of determining areas eligible for CASF support, we believe that the number of areas currently designated as either unserved or underserved is understated. For example, data regarding fixed broadband availability is reported at the census block level. If fixed broadband service at a particular speed is reported as available in any part of a census block, the entire census block is shown on the National Broadband Map (NBM) as served, even though only a portion of the census block may be served at that speed, or at all.¹⁶

Similarly, reported mobile broadband availability also inevitably overstates household coverage. This result is compelled by the fact that while the Census Bureau tells us how many households are in a particular census block, the location of households within the block is not discernible from the data. If any part of a census block has reported mobile broadband service available, all of the households in the block are counted as having service available, although this may not be the case.

¹⁶ This concern is shared by the FCC. In its Ninth Broadband Progress Notice the FCC stated “our analysis of SBI Data revealed, as of June 2011, that approximately 19 million Americans lived in areas unserved by broadband capable of ‘originat[ing] and receiv[ing] high quality voice data graphics and video telecommunications.’ While we believe SBI Data to be the best available regarding deployment, we recognize that these data may tend to overstate deployment, for example, because some customers within a census block may not be able to achieve the reported speeds.” Ninth Broadband Progress Notice, Released August 21, 2012, at Para 31.

We also base this conclusion on our experience conducting mobile broadband speed tests.¹⁷ The test results show that in many areas of the state, mobile wireless customers are not receiving services at the advertised speeds.¹⁸ As a result, any area shown on the NBM as served or underserved solely because of the presence of mobile broadband service is likely receiving service at lower speeds than reported. Some or all of the households indicated as served or underserved by mobile broadband providers would drop to underserved, or not served at all based on actual customer experience.

Given that the reported availability of both fixed and mobile broadband services is overstated, the number of households in California that are currently designated as unserved and underserved is likely substantially greater than currently identified and therefore, significantly more areas of the state could benefit from CASF support.¹⁹

¹⁷ As part of our NTIA/ARRA State Broadband Initiative (SBI) grant, we recently developed a new mobile broadband testing application and field tested actual mobile broadband quality at 1,200 points in the state, driving 35,000 miles to do so. California Public Utilities Commission, Spring 2012 Mobile Broadband Field Testing, Initial Staff Report, September 2012. <http://www.cpuc.ca.gov/NR/rdonlyres/793EB179-0B7F-44A3-BF69-277F4F33C4BE/0/CPUCSpring2012MobileTestingWhitePaper14.pdf>.

¹⁸ The Commission's tests revealed that there are significant discrepancies between advertised speeds and actual speeds, particularly in high cost rural areas of the state. Id. at Charts 5 and 6. The reliability of mobile broadband data used to for purposes of compiling the National Broadband Map has also been questioned by the FCC. (See Ninth Broadband Progress Notice at Para 33.)

¹⁹ To guard against the possibility that the overstatement problem rules out areas of the state that would otherwise be grant-eligible, areas that are currently designated served or underserved are subject to challenge by CASF applicants.

Even without challenges to their unserved or underserved status, there are a significant number of identified underserved and unserved areas in the state that are currently grant eligible. However, those entities currently eligible under the existing rules to participate in the CASF program have shown only modest interest in doing so.

Of the \$100 million initially made available for CASF grants, approximately \$41 million have been authorized for 34 projects.²⁰ Of this amount, \$33 million in grants for 32 projects was awarded to entities holding a CPCN.²¹ Approximately 23% of the funds awarded to entities holding a CPCN were for last mile projects that will make broadband service available to a total of approximately 10,475 households. The remainder of the funds awarded to certificated entities was for middle mile projects that are to make broadband service available to nearly the same number of households, approximately 9,706.²² The CASF grants awarded to date are summarized in Table 1 below.

²⁰ Initially, the CASF was envisioned as two year program which intended to award a total of \$100 million in infrastructure grants, including the costs incurred by the Commission in developing, administering and implementing the fund. In 2010, the Legislature enacted SB 1040 which increased the size of the fund by \$125 million. To date, the CASF has authorized \$105,956,018 in grants for 53 projects. However, 19 of these projects equaling \$64,871,499 in grants were subsequently rescinded leaving a net total of 34 projects equaling \$41,084,518 in authorized grants. Most, if not all of the applications for grants were accepted prior to the enactment of SB 1040.

²¹ Two of the 34 grants totaling approximately \$8 million went to entities that did not have a CPCN at the time they applied for CASF support and would not have been eligible to apply for a grant but for the exception made to the eligibility requirements by AB 1555, D.09-07-020, and Resolution T-17233 for ARRA recipients.

²² \$285,992 granted to Kernville Teleconnect authorized by Resolution T-17221; \$5,753,240 granted to Highway 36 authorized by Resolutions T-17227, T-17352.

Table 1
Approved CASF Projects as of October 2012

Type of Project		Number of Projects	Households Obtaining Broadband Availability	Amount Granted
Certificated Providers				
Last Mile		29	10,475	\$7,369,322
Middle Mile*		1	0	\$19,294,717
Middle Mile/ Last Mile**		2	9,706	\$6,039,232
Subtotal				
	Middle Mile And Middle Mile/ Last Mile	3	9,706	\$25,333,949
Subtotal				
	Certificated Providers	32	20,181	\$32,703,271
Noncertificated Providers				
Middle Mile*		1	0	\$1,721,280
Middle Mile/ Last Mile**		1	206,764	\$6,659,967
Subtotal				
	Noncertificated Providers	2	206,764	\$8,381,247
Total Projects		34	226,945	\$41,084,518

*Middle mile projects pass a specific number of homes, but the grantee has not committed to provide broadband services to any households.

**Middle mile/ last mile projects are those which have been granted funds for only the middle mile infrastructure, but the grant has been conditioned on either the grantee or an unaffiliated entity making broadband service available to a specific number of households.

It is evident from these numbers that there is a significant surplus of available CASF grant funds, including the additional \$125 million for infrastructure grants and loans authorized in SB 1040. Moreover, approximately 77% of the total CASF funds awarded to entities holding a CPCN have been for the construction of middle mile facilities rather than last mile facilities. We recognize that middle mile facilities are critical to connecting last mile facilities to the internet and can be used to enhance the speed of existing last mile services. While the construction of middle mile facilities can attract construction of last mile infrastructure, there is no guarantee that such will occur given that last mile infrastructure is generally the most costly component of a broadband network.²³ Put another way, while middle mile projects are necessary to extend broadband service to unserved and underserved areas, they are not a substitute for last mile projects. Despite the need for the last mile infrastructure, the last mile projects authorized by the CASF for entities holding a CPCN will provide broadband availability to only 2.9% of the 358,753 identified households that are unserved and underserved by both fixed and mobile broadband access providers.

²³ Significantly, the one grant which included a significant commitment to construct last mile facilities was given to an entity which did not have a CPCN at the time it applied for CASF support and therefore would have been ineligible for support but for the exception made for ARRA grantees. The grant was for a middle mile project which appeared to have been conditioned on the completion of a WiMAX network which would provide last mile connections to approximately 206,000 households. \$6,659, 967 granted to CVIN authorized by Resolution T-17295.

Moreover, there are few compelling reasons to believe that eligible entities will participate in the program in substantially greater numbers or that more applicants will seek grants for last mile facilities. While D.12-02-015 raised the percentage of a project's total cost that could be funded by the CASF, the major wireline carriers such as AT&T and Verizon are reported to be pursuing investments in their mobile wireless networks than in their wireline networks.²⁴ Further, the Commission received only five applications to provide service in unserved areas during the first application window in October 2012.

Finally, if participation in the FCC's recently adopted Connect America Fund (CAF) is any indication of potential interest by certificated carriers in the CASF program, it is not encouraging. Under its CAF Phase 1 program, the FCC recently made \$300 million in subsidies available to price cap carriers to upgrade their existing wireline facilities in unserved areas of the country. Of this amount, approximately \$140 million was available to price cap carriers with operations in California and other states. These carriers claimed a mere \$275,000 of the total \$140 million to deploy facilities to approximately 294 California locations.²⁵

²⁴ Light Reading Mobile, June 20, 2012 reporting research by Jeffries & Co, Inc. stating: "We note that 2012 could be the first year in recent memory where all of the major Wireless operators in North American are all spending aggressively at the same time. Conversely, operators in North America are tending to pare back wireline spending in favor of funneling their capex budgets towards 4G deployments."

http://www.lightreading.com/document.asp?doc_id=222149

Although mobile providers are eligible for CASF support, to date, no mobile provider has applied for a CASF grant.

²⁵ Public Notice, DA 12-639, WC Docket Nos. 10-90, 05-337, released April 25, 2012; Federal Communications Commission, Connect America Fund (CAF) Phase I Map, <http://www.fcc.gov/maps/connect-america-fund-caf-phase-i> (last visited

Footnote continued on next page

3.3. Permitting Additional Entities to Apply for CASF Funding May Increase, Deployment of Broadband Infrastructure

It is the Commission's and the Legislature's policy objective to ensure that broadband services are available ubiquitously throughout the state in order to bridge the digital availability divide. The CASF program was intended by both the Commission and the Legislature to play a major role in achieving this objective.²⁶ To the extent that CASF has surplus funds available and that the funds awarded thus far are predominantly for middle mile projects, the Commission has the obligation to consider modifications to the program that will increase the pool of available applicants so more grants can be awarded, particularly for last mile projects. Because the current CASF eligibility rules limit the pool of applicants that can apply for CASF projects, the Commission should consider changing the CASF eligibility requirements to permit eligibility by entities that hold neither a CPCN nor WIR. Indeed, to the extent that some of these entities use technologies that may be more cost effective than technologies generally used by certificated providers to provide service in high cost rural areas, changing the CASF eligibility requirements may also promote the deployment of more cost effective broadband infrastructure in unserved and underserved areas.

Sept. 5, 2012).; Letter from Steven K. Berry, RCA to Marlene H. Dortch, Secretary, FCC. WC Docket No. 10-90, at 1 (filed Aug. 3, 2012).

²⁶ We are also mindful that the California Emerging Technology Fund, which was created by the Commission to expand broadband availability and adoption, has adopted a target of making broadband available to 98% of the state's residences by 2015. We see the CASF as playing an important role in reaching this target.

We realize that Pub. Util. Code §270 currently limits eligibility for CASF support to broadband service providers that are also telephone corporations and that any change in the Commission's program eligibility requirements would require legislative action. However, based on the considerations discussed above and in anticipation of seeking such legislation in the near term, we propose that contingent upon obtaining that authority, the Commission should change its current CASF eligibility requirements to include facilities-based broadband service providers that hold neither a CPCN nor WIR. We further propose that program eligibility should be extended to any commercial provider of broadband access or any nonprofit entity, including government entities or community anchor institutions that elect to provide facilities based broadband service.

We believe that there are a number of providers which may take advantage of CASF funding, but are currently unable to do so because they do not provide the kind of services that require or even qualify for a CPCN or WIR. This is because these particular providers often provide standalone internet access or specific types of middle mile services which are not subject to the Commission's regulatory authority. Moreover, we believe that these providers not only have the ability to expand the pool of applicants eligible for CASF support and ultimately the number of grants awarded, but also that they may well be best suited to provide cost effective broadband facilities in high cost rural areas of the state.

For example, there are several broadband service providers operating in the state that provide internet access to residences and businesses over fixed wireless connections using predominately unlicensed spectrum used for Wi-Fi capability in the home. Because these providers offer only standalone internet

access, which is an information service over which the Commission has no regulatory authority, they are not required to obtain or are even eligible for a CPCN or WIR. Consequently, they are ineligible for CASF support.²⁷ However, because this technology uses unlicensed spectrum and does not require the placement of a physical cable between a residence or business and the internet service provider, it is often more cost effective to deploy in high cost areas where population density is low and/ or terrain is difficult. Currently, there are at least 28 WISPs who use this technology operating in mostly rural areas of the state.²⁸

In addition, there are some entities that build fiber optic based middle mile facilities to support broadband service in rural areas that are also currently precluded from applying for CASF support, since they provide only interstate telecommunications services and, like fixed wireless providers, do not need state-issued CPCNs. While the dollar amount of CASF grants awarded to date has been mostly to middle mile projects, there is still a need for middle mile facilities in unserved and underserved areas. Furthermore, it is possible that these providers could use unlicensed microwave to provide middle mile facilities more efficiently than entities that currently hold CPCNs or WIRs.

²⁷ The Commission had suggested in prior CASF decisions that these entities can overcome the requirement that they obtain a CPCN in order to obtain CASF grant by partnering with an existing certificated provider. We now believe that in most instances such partnerships are infeasible given that the likely pool of candidates for a partnership consists of competitors.

²⁸ F.C.C., Internet Access Services: Status as of June 30, 2011 38 (2012) http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314630A1.pdf.; Showing 27,000 fixed wireless connections in California with over 200 kbps in at least one direction. This represents the number of subscribers in contrast to the number of households to which service is available

Based upon the letters we have received in recent months and the record developed in the closed CASF OIR (R.10-12-008), there also appears to be a number of nonprofits and at least one tribal entity that are interested in providing broadband infrastructure and services using fixed wireless technology, either as broadband service providers or in partnership with existing broadband service providers, such as WISPs. Since many of these entities are only interested in providing standalone broadband service or are tribes occupying sovereign tribal lands, they neither qualify nor are required to obtain a CPCN.

We wish to make clear that although we propose to modify the CASF eligibility requirements to include both for profit and nonprofit broadband infrastructure providers, it is not our intent to change the focus of the CASF program. The CASF was created to fund the deployment of broadband infrastructure in unserved and underserved areas of the state, rather than the adoption of broadband services. We have some concern that as a result of expanding the number of entities eligible for CASF support by including both for profit and nonprofit entities, some entities may seek funding for broadband adoption rather than deployment.²⁹ This was not an issue when the Commission modified the eligibility requirements to make CASF funding available to entities that were applying for ARRA infrastructure grants because the CASF requirements were merely expanded to include potential ARRA grantees without reference to the type of entities or the projects they could propose.

²⁹ Adoption is determined by examining how many households actually subscribe to broadband service, however deployment considers whether the physical infrastructure is in place so that people may subscribe if they choose to.

However, since ARRA grants are no longer being offered, we believe it will be necessary to clearly identify in any proposed rules implementing revised eligibility requirements not only the types of entities, but more importantly, the kind of projects eligible for CASF support.

We propose to rely on the NTIA's definition of a facilities-based broadband service provider that is used to compile the data shown on the NBM, to ensure that funds are used for appropriate projects. The NBM identifies where broadband service is available throughout the country, using availability data collected by each individual state. This information is used by the CASF and also by the FCC's broadband funding programs to award subsidies for the deployment of broadband infrastructure to unserved and underserved areas. An entity that meets the NTIA's definition of a broadband service provider is eligible to be represented on the NBM. In summary, the NTIA defines a broadband service provider as any entity providing internet access service or middle mile transport, over its own fixed or wireless facilities to residences, businesses, or other institutions³⁰.

We believe using the NTIA's definition of a broadband services provider will address the concerns expressed above by identifying not only the entities eligible for CASF, but also the kind of projects that can be funded by the CASF. Should an entity propose a project that is inconsistent with the definition of a broadband service provider, the project and by implication the entity, will

³⁰ The NTIA's detailed definition can be found on pages 1 and 2 of the technical appendix of the NTIA's Notice of Availability of Funds for the State Broadband Data and Development Grant Program at <http://www.dhSES.ny.gov/ocs/broadband/documents/nofa-with-technical-appendix-and-clarifications.pdf>.

not be eligible for CASF support. In addition, it will ensure that only projects eligible for representation on the California portion of the NBM are considered for CASF support.³¹

We also wish to make clear that in reaching our tentative conclusion that the CASF program eligibility requirements should be modified to include broadband service providers other than holders of CPCNs or WIRs, we are not proposing to abrogate our responsibility to ensure that ratepayer funds are not subject to waste, fraud, and abuse. In effect, we are proposing to do what the Commission and the Legislature did when they permitted entities which had applied for ARRA grants, but were not telephone corporations, to apply for CASF matching grants. In the previous change, both the Legislature and the Commission revised the eligibility requirements to allow applicants to obtain CASF grants which could be leveraged as matching funds for ARRA grants. In the current case, we are proposing to change those requirements so that the CASF functions more effectively based upon our analysis of the performance of the fund.³² Similarly, we propose to address the increased potential for waste, fraud, and abuse of ratepayer funds that might arise if unregulated entities are given access to CASF support by instituting rules by resolution similar to those

³¹ The same definition of broadband service applies with regard to the service and providers on the California Broadband Map, which reflects the same data submitted by the Commission to the NTIA for use on the NBM.

³² This is in marked contrast to approach taken in D.12-02-015. There, the Commission rejected the idea of expanding CASF eligibility to include entities other than telephone corporations without considering the issue in light of the overall performance of the fund. Instead, the decision dismissed the idea that the CASF eligibility should be extended to unregulated entities prospectively based upon its experience with unregulated entities which in many cases did not qualify for CASF awards because they failed to obtain ARRA grants.

previously established for non-telephone corporations who had obtained ARRA grants.³³

3.4. Request for Comments

We seek comments from interested parties on our tentative conclusion that the CASF eligibility requirements should be changed to include entities other than those that hold a CPCN or a WIR. While parties are free to comment on any aspect of the legal, policy, and factual analysis that is the basis of our tentative conclusion, we seek comments on the following:

1. We ask commercial providers of broadband services who do not currently hold a CPCN or WIR whether they would consider participating in the CASF program if the eligibility requirements were changed. If so we ask such providers to discuss the following:
 - a. How they might put CASF funds to use, i.e, for upgrades to existing last mile or middle mile facilities or the deployment of new infrastructure.
 - b. What technologies they currently use or would use to provide broadband service.
 - c. Where they provide service in California.
 - d. What types of entities they provide service to.
2. We ask government entities, anchor institutions, other nonprofit entities, and American Indian Tribes whether they would consider participating in the CASF program if the eligibility requirements were changed. If so, we ask such entities to discuss the following:
 - a. How they might put CASF funds to use and who they would provide service to.

³³ Approval of the California Advanced Services Fund (CASF) Application Requirements and Scoring Criteria for Awarding CASF Funds, Resolution T-17233, June 12, 2009 at 5-6. See also Appendices 1 and 2.

- b. The technologies they might use to provide broadband service.
 - c. Whether they would seek to provide broadband service on their own or in conjunction with a commercial provider.
3. We also ask parties to comment on the safeguards that would be necessary if the eligibility requirements were modified as we tentatively propose, since the Commission does not have the same tools at its disposal to secure compliance from unregulated entities as it does with regulated entities. However, in doing so, commenters should take into account the need to strike a balance between the Commission's and Legislature's policy goals with respect to the CASF program and protecting ratepayer money from waste, fraud, and abuse. Any safeguards the Commission imposes involve costs and constraints which, if not properly considered, may preclude the ability to bring broadband to some parts of California. Thus, in making these comments, parties should discuss how each of the safeguards proposed balances these competing objectives. Specifically we ask:
- a. Whether the specific rules adopted in Resolution T-17233³⁴ which were applied to non-certificated ARRA grantees are adequate for this purpose.
 - b. Whether there are additional safeguards that the Commission should consider adopting.
 - c. Whether the safeguards adopted in Resolution T-17233 were too stringent, and if so, how those safeguards should be modified.

³⁴ Resolution T-17233 can be found on the Commission's website at: http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_RESOLUTION/109345.PDF.

4. Preliminary Scoping Memo

As required by Rule 7.1(d) of the Commission's Rules of Practice and Procedure (Rules), we provide a Preliminary Scoping Memo for this rulemaking.

4.1. Issues

In sections 2-4 above, we broadly summarized the subject matter of this rulemaking and listed the issues and proposals under consideration. Notably, the issues in this case are whether eligibility for CASF grants should be extended to facilities based broadband providers, which do not have a CPCN or a WIR and if so, what safeguards should be implemented to ensure compliance from those providers. In addition to responding to these issues and proposals, commenters may offer suggestions of their own or modifications to the proposals; the assigned Commissioner has discretion to add the suggestions or modifications in finalizing the Scoping Memo and may provide for further comment, as appropriate.

4.2. Categorization and Need for Hearing

Rule 7.1(d) also requires that an Order Instituting Rulemaking preliminarily determine the category of the proceeding and the need for hearing. As a preliminary matter, we determine that this proceeding is quasi-legislative as defined in Rule 1.3(d). We anticipate that the issues in this proceeding may be resolved through comments without the need for evidentiary hearings.

Anyone who objects to the preliminary categorization of this rulemaking as "quasi-legislative," or to the preliminary hearing determination, must state the objections in opening comments to this rulemaking. If the person believes hearings are necessary, the comments must state: (a) the specific disputed fact for which hearing is sought; (b) justification for the hearing (e.g., why the fact is material); (c) what the party would seek to demonstrate through a

hearing; and (d) anything else necessary for the purpose of making an informed ruling on the request for hearing. After considering any comments on the preliminary scoping memo, the assigned Commissioner will issue a Scoping Memo that, among other things, will make a final category determination; this determination is subject to appeal as specified in Rule 7.6(a).

4.3. Preliminary Schedule

We establish the following preliminary schedule for this proceeding. Opening comments are due 30 days after the Order Instituting Rulemaking is mailed, and reply comments are due 15 days thereafter. The assigned Commissioner or assigned Administrative Law Judge (ALJ) may, if it appears useful, convene a prehearing conference following the opening and reply comments. The Assigned Commissioner will issue a scoping memo for this case, pursuant to Rule 7.3.

Consistent with Public Utilities Code Section 1701.5, we anticipate this proceeding will be concluded within 18 months of the issuance of the Scoping Memo.

5. Participation in this Rulemaking

Entities on the service lists for R.10-12-008 and R.06-06-028, and other interested persons are invited to participate in this rulemaking. Therefore, our initial service list for this rulemaking will be the service lists of R.10-12-008 and R.06-06-028, and the CASF Distribution List maintained by Communications Division as required by ordering paragraph 3 of D.12-02-015.³⁵ Additionally, staff will make an effort to notify those parties that have been asked to comment,

³⁵ The Commission directed in D. 12-02-015 for CD to create and maintain an interested party distribution list for matters relating to the CASF program.

but are not included on the CASF Distribution List. However, receipt of this Order Instituting Rulemaking does not in itself confer party status. Any person or entity seeking party status must follow the instructions below in Sections 5.1 and 5.2 below.

You may participate actively in this rulemaking or merely monitor it. In either case, by acting within 20 days of the date of mailing of this OIR, you will ensure that you will receive all documents served in the proceeding. Our Process Office will publish the official service list at our website (www.cpuc.ca.gov), and will update the list as necessary.

5.1. During the First 20 Days

Within 20 days of the mailing of this OIR, anyone may ask to be added to the official service list. Send your request to the Process Office. You may use e-mail (process_office@cpuc.ca.gov) or letter (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). Include the following information:

- Docket Number of this rulemaking;
- Name (and party represented, if applicable);
- Postal Address;
- Telephone Number;
- E-mail Address; and
- Desired Status (Party, State Service, or Information Only).³⁶

³⁶ If you want to file comments or otherwise actively participate, choose “Party” status. Individuals seeking only to monitor the proceeding (i.e., not participate as an active party) may request to be added to the service list as “Information Only.”

5.2. After the First 20 Days

If you want to become a party after the first 20 days from mailing, you may do so by filing and serving timely comments in the rulemaking (Rule 1.4(a)(2)), by filing a written motion (Rule 1.4(a)(4)), or through an oral motion at a prehearing conference if one is held (Rule 1.4(a)(3)). If you make an oral or written motion, you must also comply with Rule 1.4(b). These rules are in the Commission's Rules of Practice and Procedure, which you can read at the Commission's website.

If you want to be added to the official service list as a non-party (that is, as State Service or Information Only), follow the instructions in section 5.1 above.

5.3. Updating Information

Once you are on the official service list, you must ensure that the information you have provided is up-to-date. To change your postal address, telephone number, e-mail address, or the name of your representative, send the change to the Process Office by letter or e-mail, and send a copy to everyone on the official service list.

5.4. Serving and Filing Documents

The Commission has adopted rules for the electronic service of documents related to its proceedings, Commission Rule 1.10, available on our website at http://www.cpuc.ca.gov/PUBLISHED/RULES_PRAC_PROC/44887.htm. We will follow the electronic service protocols adopted by the Commission in Rule 1.10 for all documents, whether formally filed or just served.

This Rule provides for electronic service of documents, in a searchable format, unless the appearance or state service list member did not provide an e-mail address. If no e-mail address was provided, service should be made by United States mail. In this proceeding, concurrent e-mail service to all persons

on the service list for whom an e-mail address is available will be required, including those listed under “Information Only.” Parties are expected to provide paper copies of served documents upon request.

E-mail communication about this OIR proceeding should include, at a minimum, the following information on the subject line of the e-mail:

R. [xx-xx-xxx] – OIR to Consider Modifying the CASF. In addition, the party sending the e-mail should briefly describe the attached communication; for example, “Comments.” Paper format copies, in addition to electronic copies, shall be served on the assigned Commissioner and the ALJ.

If you have questions about the Commission’s filing and service procedures, contact the Docket Office (docket_office@cpuc.ca.gov).

5.5. Subscription Service

You can also monitor the rulemaking by subscribing to receive electronic copies of documents in this proceeding that are published on the Commission’s website. There is no need to be on the service list in order to use the subscription service. Instructions for enrolling in the subscription service are available on the Commission’s website at <http://subscribecpuc.cpuc.ca.gov/>.

5.6. Public Advisor

Any person or entity interested in participating in this rulemaking who is unfamiliar with the Commission’s procedures should contact the Commission’s Public Advisor in San Francisco at (415) 703-2074 or (866) 849-8390, or e-mail public.advisor@cpuc.ca.gov; or in Los Angeles at (213) 576-7055 or (866) 849-8391, or e-mail public.advisor.la@cpuc.ca.gov. The TTY number is (866) 836-7825.

6. Intervenor Compensation

Any party that expects to request intervenor compensation for its participation in this rulemaking must file its notice of intent to claim intervenor compensation in accordance with Rule 17.1 of the Commission's Rules of Practice and Procedure within 30 days of the filing of reply comments or a prehearing conference in this proceeding, whichever is later.

7. Ex parte Communications

Pursuant to Rule 8.2(a), ex parte communications in this rulemaking are allowed without restriction or reporting requirement.

O R D E R

IT IS ORDERED that:

1. A rulemaking is instituted to consider modifications to the eligibility requirements of the California Advanced Services Fund.
2. The Executive Director will cause copies of this Order Instituting Rulemaking to be served on all telephone corporations as defined in Public Utilities Code Section 234, on the service lists of Rulemaking (R.) 10-12-008 and R.06-06-028, and on the California Advanced Service Fund Distribution List maintained by the Commission's Communication Division as required by Decision 12-02-015.
3. Within 20 days from the date of mailing of this Order Instituting Rulemaking, any person or representative of an entity interested in participating in this rulemaking may ask, by letter or e-mail to the Commission's Process Office (505 Van Ness Avenue, San Francisco, California 94102, or process_office@cpuc.ca.gov) to be placed on the official service list as party to this rulemaking. Alternatively, the person or representative may request State

Service or Information Only status. The letter or e-mail must include all information specified in section 5.1 of this Order Instituting Rulemaking.

4. To be placed on the official service list after more than 20 days have elapsed from the date of mailing of this Order Instituting Rulemaking, or to update information previously provided for purposes of the official service list, the person or representative must follow the instructions set forth in Section 5.2 or 5.3 of this Order Instituting Rulemaking.

5. The category of this rulemaking is preliminarily determined to be “quasi-legislative,” and it is preliminarily determined that no hearings are necessary. Anyone objecting to the preliminary categorization of this rulemaking as “quasi-legislative,” or to the preliminary determination that evidentiary hearings are not necessary, must state their objections in opening comments, as specified in Ordering Paragraph 6 below.

6. Interested parties are invited to file comments responsive to this Order Instituting Rulemaking (OIR). Comments must conform to the requirements of the Commission’s Rules of Practice and Procedure. Opening comments must be filed within 30 days following mailing of the OIR and reply comments within 15 days thereafter.

7. The assigned Administrative Law Judge (ALJ), in consultation with the assigned Commissioner, may make additions or adjustments to the schedule and official service list for this proceeding, as appropriate. The assigned Commissioner or assigned ALJ may set a prehearing conference if it is determined that one should be held.

8. Any party that expects to request intervenor compensation for its participation in this rulemaking must file its notice of intent to claim intervenor compensation, in accordance with Rule 17.1 of the Commission's Rules of Practice and Procedure, within 30 days of the filing of reply comments or a prehearing conference in this proceeding, whichever is later.

This order is effective today.

Dated _____, at San Francisco, California.