

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking to Consider  
Modifications to the California Advanced  
Services Fund Including Those Necessary  
to Implement Loan Program and Other  
Provisions of Recent Legislation.

Rulemaking 10-12-008  
(Filed December 16, 2010)

**REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES**

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## **I. INTRODUCTION**

The Division of Ratepayer Advocates (DRA) submits these reply comments pursuant to the Assigned Commissioner's Ruling Soliciting Comments on Draft Proposals, issued August 15, 2011 (ACR). DRA's reply comments are intended to assist the Commission in reforming the California Advanced Services Fund (CASF) program to create ubiquitous broadband, raise the speeds and reliability of broadband throughout the state, and improve program cost-effectiveness.

In general, DRA agrees with parties that urge greater transparency in the application process to enable the public and affected government entities to better participate in the CASF process. DRA also agrees that there is a need for CASF funding for middle mile and other critical construction projects, and strongly supports implementing strict net neutrality and open access policies for all CASF funded projects. DRA strongly disagrees, however, with parties that claim that funding caps should be further increased. Instead, DRA continues to urge the Commission to develop stronger program standards that associate per household costs with benchmark speeds and other commitments that are intended to promote the adoption of broadband, including price cap commitments and the waiving of installation fees. Finally, DRA disagrees with the suggestion to consider the availability of mobile broadband as a substitute for hardwired broadband in determining whether an area is eligible for CASF funds. Ultimately, DRA believes that more work needs to be done to make necessary improvements to the CASF program, as discussed below.

DRA offers these comments to assist the Commission in better awarding of funds for projects in both unserved and underserved areas, in order to provide more customers with connections and to provide better broadband for all. Silence on any party's comments should not be construed as assent to the positions taken therein.

## II. DISCUSSION

### A. Complete Transparency Is Critical, Application Materials Must Be More Detailed and Should Be Available to the Public.

In its opening comments, AT&T asserts that the Commission should only require the “Information Sheet” to be made publicly available, and states that disclosure of the Information Sheet is sufficient to allow *broadband providers* to decide whether to challenge a project.<sup>1</sup> AT&T also believes such disclosure will be sufficient to give the public “constructive notice” of a proposed project. These comments merely underscore the apparent lack of concern for or interest in having public participation or comment in CASF proceedings. Broadband providers are not the only entities that may have an interest in challenging a proposed project. To date, broadband providers have neither challenged nor shown interest in the applications filed by other providers, other than the generalized comments in this proceeding. The public and relevant government agencies are also entitled to more than just “constructive notice” of a proposed project, and should be able to obtain additional information including the proposed costs, speed commitments, and planned service rates of a project in order to determine whether such projects best meet the needs of the community and whether the proposed speeds and services justify the proposed expenditure of public funds. DRA continues to urge the Commission to require all CASF applicant submission materials, as well as the Communications Division’s (CD) review information, to be posted online and made publicly available. When public money is being used to fund projects with little or no competition, ratepayers can only ensure that funds are being reasonably and efficiently used by being fully informed of the details of such projects so they can participate in the process of allocating such funds. The Commission should do more to ensure public input in the CASF process by adopting rules requiring fund applicants to share more details of

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<sup>1</sup> Opening Comments of Pacific Bell Telephone Company dba AT&T California, et al., pp. 2-3 (September 12, 2011) (AT&T’s Opening Comments).

their proposals and further by requiring that CD provide additional information from its review, including cost per household and total expenditures prior to approval of funds.

In addition to posting detailed information for public access, the Commission should also require complete transparency so that potential applicants can view the details of proposals. Although AT&T claims that this may discourage applicants from applying for grants,<sup>2</sup> it can just as easily be argued that such transparency will foster competition and lead to more cost-effective projects.

**B. The Commission Should Allow CASF Funding for Middle Mile Applications Shown to Be a Critical Part of the Broadband Project.**

In its opening comments, The Utility Reform Network (TURN) raises the point that the lack of access to middle mile and/or second mile facilities in rural areas of the state may be a contributing factor to the limited number of successful applications.<sup>3</sup> DRA agrees with TURN that the Commission should clarify that construction projects related to and necessary for last-mile deployment should be eligible for CASF funds. CASF funds should be allowed for middle mile, backbone, and other specialized construction work provided that:

- cost and construction details are provided to demonstrate that these projects are needed to connect an unserved area or to upgrade an underserved area as part of a broadband project grant application;
- the corollary broadband project connected to this construction meets one of the two cost-speed requirements and the public notice and comment process proposed by DRA for Commission adoption;
- applicants agree to operate shared facilities and net neutrality;
- non-CPCN applicants demonstrate a level of operational experience or expertise such as suggested by TURN in its comments.

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<sup>2</sup> AT&T's Opening Comments, p. 2.

<sup>3</sup> TURN's Opening Comments, p. 4 (September 12, 2011).

**C. Disclosure of Prior Convictions and/or Regulatory Sanctions Is a Reasonable Application Requirement.**

DRA disagrees with AT&T's comment that requiring CASF applicants to state whether they have been convicted of criminal activity or sanctioned by the FCC or a state regulatory agency for failing to comply with the law is too restrictive.<sup>4</sup> Contrary to AT&T's misreading of the language, this provision does not preclude telecommunications companies that have been sanctioned by the Commission or the FCC from applying for or receiving CASF funds. Rather, the application only requires applicants to state whether it is true or not that they have been subject to such sanctions. DRA recommends that the application also instruct applicants to provide details of such sanctions or convictions in order to better assist the Commission in determining which applicants may be "bad actors" or otherwise untrustworthy. The public also has a right to know if an applicant has been convicted for any criminal activity or has failed to comply with any FCC or state statutes, rules, or orders.

**D. The Commission Should Not Consider Raising the Cap for Funding at this Time.**

Both Verizon California Inc. (Verizon) and Citizens Telephone Company of California Inc. dba Frontier Communications of California, et al. (Frontier) advocate for a higher funding cap for CASF grants, albeit for different reasons.<sup>5</sup> Frontier argues for additional caps for both unserved and underserved areas claiming that a higher percentage amount "would make more economic sense" in terms of its ability to recoup its investment.<sup>6</sup> Verizon, on the other hand, advocates for an increase in the proposed cap for unserved areas (from the proposed 70% to 80%), with a corresponding decrease

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<sup>4</sup> AT&T's Opening Comments, p. 4.

<sup>5</sup> Opening Comments of Verizon California Inc., pp. 2-3 (September 12, 2011) (Verizon's Opening Comments); Opening Comments of Citizens Telephone Company of California Inc. et al., pp. 3-4 (September 12, 2011) (Frontier's Opening Comments).

<sup>6</sup> Frontier's Opening Comments, p. 3.

in the cap for underserved areas (from the proposed 60% to 25%). According to Verizon, this would provide further incentive and support to deploy broadband to unserved areas.<sup>7</sup>

As an initial matter, although DRA has advocated for an increase in the cap in order to generate more competition for CASF funds, DRA has always maintained that such an increase must necessarily be tied to additional requirements designed to reduce prices, increase speed commitments and encourage adoption, including requirements to waive installation fees and to cap rates for a number of years.<sup>8</sup> DRA also maintains that the Commission should institute additional cost controls by creating standards that link per household costs to minimum speed benchmarks, as discussed below. DRA urges the Commission to consider and adopt additional revisions to the CASF program to implement such requirements.

DRA, however, disagrees with Frontier's rationale for increasing the caps.<sup>9</sup> There is no evidence at this time to support Frontier's claim that under the proposed 70% cap, projects in rural and high cost areas cannot be financially justified. DRA cautions the Commission that increased CASF funding without sufficient oversight provides a temptation for utilities to replace their own capital assets and working cash with a different form of ratepayer-provided funding. DRA posits that CASF applications thus far may have been "cream-skimming" the less-costly or easier upgrades as projects. Were the Commission to consider and adopt carefully-crafted options *with strict requirements* to include standards linking per household costs to speed benchmarks, and corollary grant applications for non-last-mile construction, the variance between applications for unserved and underserved areas may well diminish.

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<sup>7</sup> Verizon's Opening Comments, p. 3.

<sup>8</sup> See DRA's Opening Comments on ACR Proposals, pp. 6-7 (September 12, 2011).

<sup>9</sup> DRA also disagrees with AT&T's recommendation to allow concurrent CASF loans. See AT&T's Opening Comments, p. 2. Ratepayers should not simply be providing subsidies to communications companies that cannot provide adequate financing on their own.

**E. The Commission Should Develop Standards Linking Per Household Costs to Minimum Speed Benchmarks.**

DRA supports increasing the speed benchmark beyond 3 mbps download/ 1 mbps upload. In its comments, Frontier claims that increased speed requirements may mean the difference between a project being economically feasible or not, and that the goal of 4 mbps down/1 mbps up may make it too difficult to commit to projects in unserved areas.<sup>10</sup> However, there is no evidence to support Frontier's claims. In fact, these arguments underscore the lack of any standards governing the correlation between costs and speeds in unserved and underserved areas.

DRA urges the Commission to take this opportunity to develop a record on actual speeds vs. costs in order to evaluate claims about project feasibility, and to improve program quality and cost-effectiveness. DRA has long argued that the Commission needs to develop real standards for the CASF program. To this end, DRA has recommended that the Commission set at least two standards associating per household costs to speed benchmarks.<sup>11</sup> One benchmark could be a lower target typical of DSL speeds with a cost ceiling commensurate with a DSL upgrade. The higher speed benchmark with its associated cost ceiling could be recommended to the Commission by parties following a workshop. Setting various speed benchmarks with associated costs per household will give applicants enough flexibility to bring more projects to unserved areas without blindly giving away ratepayer funds, as Frontier suggests. Based on data that DRA has gathered, there is a wide volatility of costs per household associated with a range of speeds, suggesting that some projects are more cost-effective than others. Thus DRA continues to urge the Commission to adopt a requirement of a minimum speed commitment associated with a per-household cost ceiling in order to better monitor the use of public funds.

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<sup>10</sup> Frontier's Opening Comments, p. 4.

<sup>11</sup> DRA Opening Comments, p. 10 (September 12, 2011).

**F. The Commission Should Require Open Access and Net Neutrality for Publicly Funded Projects.**

DRA agrees with TURN that the Commission should require all CASF fund recipients to share their networks with other service providers.<sup>12</sup> The Commission already has authority, when awarding ratepayer monies, to impose any conditions it deems reasonable, including requiring CASF recipients to share their networks, where technically feasible.<sup>13</sup> The Commission should incorporate open access and net neutrality as conditions of funding in the overall CASF program for both grants and loans.<sup>14</sup> The Commission should require such pro-competitive actions.

**G. DRA Supports Extending CASF Award Eligibility to Certain Non-CPCN Holders If the Commission Adopts More Stringent Application Requirements and Transparency Provisions.**

TURN in its opening comments proposes that non-CPCN holders should be offered the opportunity to apply for CASF grants if they can demonstrate the financial, technical and operational capability to successfully construct, operate and maintain a local or regional broadband system and repay any loans received to support the project. TURN's example of community service districts is persuasive.<sup>15</sup> The efficacy and advantage of successful community programs would be of great benefit to ratepayers. However, DRA is concerned that the CPUC's jurisdiction may not extend to non-CPCN entities,<sup>16</sup> and has concerns about the associated risks to ratepayers. DRA notes that the application requirements are much more stringent for loan applicants than grant applicants, for example. DRA may be open to non-CPCN applicants such as government

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<sup>12</sup> TURN's Opening Comments, p. 4.

<sup>13</sup> See DRA's Petition for Modification of Decision 07-12-054, p. 13 (citing *PG&E Corp. v. Public Utilities Comm.* (2004) 118 Cal.App.4<sup>th</sup> 1174, 1199; *Southern Calif. Edison Co. v. Peevey* (2003) 31 Cal.4<sup>th</sup> 781, 792 (discussing broad reach of Pub. Util. Code § 701)).

<sup>14</sup> DRA Opening Comments on OIR 10-12-008, p. 15.

<sup>15</sup> TURN's Opening Comments, p. 3.

<sup>16</sup> DRA Opening Comments on OIR 10-12-008, pp. 4-5.

or non-profit agencies applying for CASF grants, but only if the Commission adopts more stringent application requirements and adopts additional measures to promote transparency and public participation in the application process. DRA proposes that a review of relevant operational experience and any track record of success by a non-CPCN applicant be a part of the application process.

**H. The Availability of Mobile Wireless Broadband Should Not Be Considered in Determining Whether an Area Is Eligible for CASF Funding.**

DRA disagrees with Verizon’s recommendation that the Commission consider wireless broadband and the growing availability of 3G/4G in its determination of whether an area is unserved or underserved.<sup>17</sup> The purpose of SB 1040 and the CASF is to encourage the deployment of high-quality advanced communications to all Californians to promote economic growth, job creation, and social benefits. It is also to ensure that consumers in rural and high-cost areas have access to advanced communications services that are reasonably comparable to those services provided in urban areas. While the geography in rural areas does not lend itself to a one-size-fits-all solution and wireless broadband may be the first step for an unserved area before hardwired availability is available, wireless broadband is not a substitute for hardwired high speed internet connectivity. It is difficult to imagine for example, schools and hospitals getting the same benefit from using mobile devices as they would from using desktops or laptops. There are limitations to using mobile devices for broadband access.

In addition, there are serious issues with “tethering” a mobile device to a home computer or laptop. In terms of rates, tethering requires a data plan and wireless contract that is very costly for consumers. Moreover, tethering a mobile device to a home computer results in less functionality, and may result in much slower speeds and unreliable service. Many carriers also prohibit or limit certain applications or devices that consumers may use on their spectrum. In short, calling a tethered wireless plan “broadband availability” is not at all the same thing as providing broadband, and the

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<sup>17</sup> Verizon’s Opening Comments, p. 3.

Commission should reject Verizon's suggestion, as it is anticompetitive, violates net neutrality policies, and conflicts with the open access requirement DRA has proposed for any broadband construction with public funds.

The Commission should use the CASF program to create ubiquitous, reliable, and affordable broadband in California. Allowing wireless broadband to be the primary form of broadband in any area of the state will not achieve the CASF goals of ensuring that everyone is able to participate in society and use the internet for access to jobs, education, and healthcare among other needs.

### **III. CONCLUSION**

DRA appreciates the opportunity to participate in reforming the CASF program, which DRA views as a priority area for the Commission. However, DRA believes that significant changes to the program are still warranted. Going forward, DRA proposes that the Commission hold a series of workshops to allow parties to address and develop the issues below, to be followed by a round of comments to propose specific recommendations and requirements on:

- Setting minimum commitment speed/maximum per-household cost standards;
- Defining the process and information necessary for public notice of and comment on proposed applications;
- Reviewing the public and non-proprietary aspects of potential applications and determining what details concerning project cost, construction, and operational plans can be made publicly available;
- Proposing standards for review of experience and reputation for possible approval of non-CPCN applicants;
- Proposing standards for review and approval of non-last mile construction projects that are necessary for and corollary to applications for last-mile broadband projects.

DRA believes that further fleshing out these issues will assist the Commission in improving program quality, cost-effectiveness and success in connecting the maximum number of California's citizens to broadband services.

Respectfully submitted,

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