



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**FILED**

11-05-08

04:59 PM

Order Instituting Rulemaking into the Review  
of the California High Cost Fund B Program.

R.06-06-028  
(Filed June 29, 2006)

**OPENING COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES  
ON THE ASSIGNED COMMISSIONER'S RULING  
SOLICITING COMMENTS ON REVISIONS IN THE CALIFORNIA  
ADVANCED SERVICES FUND PROGRAM**

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November 5, 2008

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## CERTIFICATE OF SERVICE

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Pursuant to Rule 6.2 of the Commission’s Rules of Practice and Procedure (“Rules”), the Division of Ratepayer Advocates (“DRA”) respectfully submits its Opening Comments on the Assigned Commissioner’s Ruling Soliciting Comments on Revisions in the California Advance Services Fund Program (“ACR”).<sup>1</sup> The ACR solicits comment on revisions to the California Advance Services Fund (“CASF”) program “with the goal of facilitating further deployment of broadband facilities in the most effective and efficient manner.”<sup>2</sup>

DRA fully supports the ACR’s goal of making the CASF funding process more effective and efficient.<sup>3</sup> The ACR seeks particular comment on TURN’s proposal to expand eligibility for CASF funding to include municipal sources such as cities, redevelopment corporations, tribes, etc.<sup>4</sup> While DRA generally supports encouraging a diversity of advanced services providers and technologies, DRA is concerned about the legal, public policy, and practical problems associated with expanding CASF eligibility

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<sup>1</sup> Assigned Commissioner’s Ruling Soliciting Comments on Revisions in the California Advance Services Fund Program (10/15/08) (“ACR”).

<sup>2</sup> ACR at 3.

<sup>3</sup> ACR at 1-2.

<sup>4</sup> ACR at 2.

to municipal sources. DRA further recommends revisions to how the criteria for approving applications are applied.

## I. INTRODUCTION

DRA urges the Commission to take this opportunity to consider the long-term impacts of its current strategies for funding broadband infrastructure. The general paucity of bidders for CASF funding, and the proposal in Draft Resolution T-17182 to approve funding for six unchallenged projects in unserved areas, all by incumbent local exchange carriers (“ILECs”),<sup>5</sup> suggests that the Commission’s anticipated advancement of broadband availability and competition is not bearing fruit. While the factors that have led to this outcome are unclear, what is clear is that one of the Commission’s goals for the CASF – encouraging a diversity of advanced technologies and service providers – is unlikely to be met unless there is a critical review of the CASF, as it is currently structured and administered. Now that the Commission has received, or will soon receive, a round of applications for unserved areas, and one for underserved areas, the Commission is in a better position to diagnose some of the true deterrents to meeting the Commission’s criteria,<sup>6</sup> and should now address the limitations of the program in an informed manner.

TURN and DRA have had a shared concern that the CASF not be structured in such a way as to effectively favor ILEC applicants<sup>7</sup> – an apprehension that has proven to

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<sup>5</sup> Draft Resolution T-17182 Approval of California Advanced Services Fund (CASF) Unserved Area Applications (“Draft Resolution”) at 1. Draft Resolution T-17182 would adopt CASF funding for six different broadband projects in unserved areas, yet each of those projects would be undertaken by one of the large ILECs – AT&T, Verizon, or Frontier. Sixteen applications that were contested are still under consideration by the Commission. *Id.* at 2.

<sup>6</sup> DRA notes that the Commission’s current stance of keeping almost all aspects of the CASF applications confidential limits the ability of non-Commission staff to conduct such an analysis.

<sup>7</sup> *See, e.g.*, Reply Comments of the Division of Ratepayer Advocates in Response to the Assigned Commissioner’s Ruling on Phase II Issues Relating to the “California Advanced Services Fund” (10/3/07) (“DRA Reply Comments, 10/3/07”) at 4-5; Comments of the Utility Reform Network on Interim Opinion (continued on next page)

be reasonable thus far in light of Draft Resolution T-17182. Even if the legal, public policy, and practical obstacles to expanding eligibility to municipal sources were actually resolved, the Commission should entertain more fundamental revisions to the program. Given the lack of information about the “significant interest from serious potential applicants” referenced in the ACR, it remains to be seen how many uncertificated entities would be truly viable to provide advanced services according to the Commission’s current modest requirements.

If the Commission does not undertake more material changes to the CASF program, the short-term gains of bringing advanced services to a handful of communities (perhaps just a few years sooner than would otherwise occur) could well be outstripped by the long-term harms of using the hard-earned financial resources of nearly all Californians to develop what will likely be a broadband monopoly in the unserved and underserved areas targeted by the CASF, or at best a broadband duopoly. For the health of the industry itself, as well as to bring the greatest benefits to consumers, the Commission should aggressively attempt to prevent this outcome by modifying the program before the expenditure of additional funds is authorized.

## **II. UNCERTIFICATED APPLICANTS TO THE CASF PROGRAM**

DRA urges the Commission to exercise caution in disbursing ratepayer funds raised by the various surcharges. Using money raised from regulated utility ratepayers to invest in infrastructure by service providers over which the Commission has no authority is problematic in that the Commission’s ability to hold the CASF recipients accountable for their use of funds, and to take appropriate actions in the event a fund recipient does not comply with Commission requirements, are dependent upon the extent of the Commission’s jurisdiction and its willingness to pursue enforcement of those requirements (whether through Commission procedures or civil action).

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Implementing California Advanced Services Fund (12/10/07) (“TURN Comments on PD, 12/10/07”) at 9.

Furthermore, there is an additional public policy concern about granting CASF funds to municipal sources. For some municipally-organized entities, it may be more appropriate for the residents of those entities to raise their own funds to develop advanced services, rather than providing funds obtained from all California users of intrastate telecommunications services to develop infrastructure intended to benefit only a small subset of the population.

**A. Statutory Bar to Including Uncertificated Applicants in CASF Program**

As a statutory matter, the Commission appears to be barred from providing CASF funding to entities other than “telephone corporations.” Recently enacted Senate Bill 1193, which codifies the CASF adopted in D.07-12-054, also adds the CASF to the State Treasury by amending PU Code § 270.<sup>8</sup> For all of the funds authorized in § 270, however, § 270(b) states that:

(b) Moneys in the funds are the proceeds of rates and are held in trust for the benefit of ratepayers and to compensate telephone corporations for their costs of providing universal service.<sup>9</sup>

SB 1193 also adds a new provision to the PU Code that articulates the goals of the CASF and establishes certain auditing and reporting requirements, but it does not appear to contain any language that would supersede the limitations in § 270(b).<sup>10</sup>

Furthermore, as a matter of Commission procedure, expanding eligibility for the CASF beyond entities certificated or registered with the Commission requires a decision of the Commission as a whole because the current eligibility limitations of the CASF were established by Commission decision.<sup>11</sup>

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<sup>8</sup> Senate Bill 1193 at Section 2.

<sup>9</sup> Public Utilities Code (“PU”) Code § 270(b) (emphasis added).

<sup>10</sup> Section 4 of SB 1193 adds a new § 281 to the PU Code.

<sup>11</sup> D.07-12-054 at Ordering Paragraphs 13-15.

**B. Oversight and Enforcement Barriers to Including Uncertificated Applicants in CASF Program**

Aside from the legal barriers discussed above, DRA reiterates the concerns expressed by the Commission itself in deciding, before the enactment of SB 1193, to limit CASF funding to “telephone corporations.” The Commission stated in D.07-12-054:

In order to administer the program within the statutory framework we adopt herein and maximize the effectiveness of the Commission’s oversight, CASF funding shall be limited to a “telephone corporation” as defined under Pub. Util. Code § 234.... 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 CASF program.<sup>12</sup>

Although allowing any uncertificated (or unregistered) entities to provide broadband facilities, including municipalities and redevelopment corporations, would further the Commission’s goal of increasing competition in the communications market, but as referenced in D.07-12-054, the Commission’s lack of statutory jurisdiction over such entities translates into an inability of the Commission to ensure accountability and enforce adherence to the terms and conditions of the funding grants.

The Commission put applicants on notice in D.07-12-054 that they would “be subject to specific audit or related verification requirements to verify that funds are spent in accordance with Commission requirements.”<sup>13</sup> Consistent with the need for oversight identified in D.07-12-054, subsequently-enacted SB 1193 requires that the Commission to conduct financial and performance audits of the program and report to the Legislature by December 31, 2010.<sup>14</sup> DRA recommends that the Commission require companies that receive CASF monies to submit financial and performance data on a quarterly basis

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<sup>12</sup> *Id.* at 34-35 (footnote omitted).

<sup>13</sup> *Id.* at OP 19.

<sup>14</sup> Senate Bill 1193 at Section 4; new PU Code § 281(d).

to facilitate these audits and develop its report to the Legislature. Developing baseline measures, and then tracking outcomes over time, are important to ensure the cost-effective use of ratepayer funds, and to identify specific needs for improvement to achieve the goals of the program. The difficulty of this level of monitoring is significantly increased, however, if the Commission has no statutory jurisdiction over either the services provided (broadband services) or the providers themselves (those that are neither certificated nor registered with the Commission).

If the Commission decides to expand the eligibility for CASF funds to non-“telephone corporations,” DRA strongly recommends that the Commission at least require a registration process for CASF applicants in which a CASF recipient must voluntarily commit to limited Commission oversight for the purposes of ensuring performance and compliance with the program requirements. It would be important, however, for the Commission to first develop the “specific audit or related verification requirements” referenced in OP 19 of D.07-12-054, before a non-telephone corporation entity commits to Commission oversight and accepts CASF funds. In this situation, there is an increased likelihood that such a CASF recipient, with no other legal ties to the Commission, may challenge Commission inquiries as arguably outside the bounds of appropriate Commission oversight. This should be considered a serious concern because, as evinced by the implementation of the CASF application process, requirements and criteria established by the Commission may well require revision, a possibility that would be significantly complicated by including non-telephone corporations in the program.

### **III. CHANGES TO CASF SCORING CRITERIA**

The ACR generally solicits comments on “possible revisions to the criteria used in reviewing and granting” CASF funds.<sup>15</sup> After reviewing the proposals in Draft Resolution T-17182, DRA believes that modifications may be needed for three of the criteria. Specifically, DRA seeks to ensure that the subsidies-per-household are

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<sup>15</sup> ACR at 1.

appropriate and cost-effective, that the Commission will take action if a provider does not meet the proposed speed requirements, and that greater attention be given to areas with low-income households in light of the dearth of low-income areas in the applications proposed for CASF funds in Draft Resolution T-17182.

**A. Funds Requested per Household**

According to the Draft Resolution, five of the six recommended applications propose a subsidy of between \$189 and \$455 per household to build facilities-based broadband. However, one application proposes a subsidy of \$1210 per household. This wide range of per-household subsidy requests raises the question of whether providing funds to provide advanced services at \$1210 per household is cost-effective and an appropriate use of ratepayer money. Now that the Commission has a number of CASF applications to evaluate, DRA recommends that the Commission consider ways to address this concern, perhaps by capping the subsidy-per-household amount that may be granted.

DRA recommends reevaluating the applications to ensure that the costs to ratepayers are fair and yield a benefit that is at least equal to the cost the ratepayer is bearing. Furthermore, the Commission weights Funds Requested per Potential Customer<sup>16</sup> the most heavily of the seven criteria, allocating 40 out of 100 total points, so it is surprising that the Commission recommended this application since the subsidy is so much higher than the subsidy in the other recommended applications.

**B. Speed Criterion**

Upload and download speeds vary in the six recommended applications and the benchmark of 3 MBPS download and 1 MBPS upload to CASF subscribers is not met in several of the recommended applications. The Commission states that it will allow for lower speeds, especially if it receives only one application to serve an area.<sup>17</sup> DRA notes

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<sup>16</sup> DRA assumes that “Potential Customer,” the term used in T-17143, is synonymous with “household,” the term used in Appendix A of Resolution T-17182.

<sup>17</sup> Draft Resolution T-17143 at 4.

that prior to reimbursement of the final payment to recipients, the Commission will require all providers to assess final actual speeds compared to initially proposed speeds.<sup>18</sup> In addition, the Commission will require providers to submit Form 477 to the Commission, a form which the FCC currently requires of broadband providers.<sup>19</sup> However, if the speeds do not meet the proposed speeds after build-out completion, the Commission does not have any remedies or penalties in place to reimburse the ratepayer for the cost incurred in providing the subsidy for inferior service. DRA recommends that the Commission establish performance penalties or other remedies in the event that the recipients of CASF monies do not meet their speed commitments.

### **C. Low Income Criterion**

The Commission's Draft Resolution describes a commitment to extending the benefits of broadband to all Californians, including low-income Californians. The Commission includes serving low-income areas as one of the seven criteria when evaluating applications but only allots 5 points out of 100 points total, the same weight given to Guaranteed Pricing Period and Timeliness criteria. Despite the Commission's intent, none of the six recommended proposals in Draft Decision T-17182 serve low-income households. In fact, one application, AT&T's Mount Wilson Project Area, proposes serving an area with two households in a CBG with a median income of \$126,131.<sup>20</sup>

To encourage more of a focus on serving low-income areas with these limited ratepayer funds, DRA recommends revising the criteria to weight the low-income criterion by giving it 10 points rather than the existing 5 points.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at Appendix, page A-7.

#### IV. CONCLUSION

DRA urges the Commission to restrict eligibility to entities with a CPCN or wireless registration and not allow municipalities and other non-telephone corporations to receive funds at this time, because of both the legal barrier to doing so and the difficulties in ensuring recipient accountability and enforcement of requirements.

Furthermore, the Commission should also conduct an on-going audit to ensure that CASF funding is being spent in accordance with each winning bidder's approved building plans, and to determine whether the ratepayer subsidized CASF actually is meeting its intended goals. This is especially important if the Commission expands eligibility for CASF funds beyond telephone corporations, an expansion that should nevertheless require registration with the Commission and a voluntary commitment to limited Commission oversight.

Finally, DRA recommends that the Commission revise some of the criteria used to evaluate the applications, and ensure enforcement of recipient commitments.

Respectfully submitted,

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November 5, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of **“OPENING COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON THE ASSIGNED COMMISSIONER’S RULING SOLICITING COMMENTS ON REVISIONS IN THE CALIFORNIA ADVANCED SERVICES FUND PROGRAM”** in **R.06-06-028** by using the following service:

**E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

**U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known active parties of record who did not provide electronic mail addresses, if any.

Executed on **November 5, 2008**, at San Francisco, California.

/s/ Nelly Sarmiento

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Nelly Sarmiento

**N O T I C E**

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