



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

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

**REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON THE  
PROPOSED DECISION ADOPTING THE  
“CALIFORNIA ADVANCED SERVICES FUND”**

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December 17, 2007

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) submits these Reply Comments on the Proposed Decision of Commissioner Chong regarding the "Interim Opinion Implementing the California Advanced Services Fund" mailed on November 11, 2007 (PD).

## I. INTRODUCTION

While parties discussed a wide variety of issues in their comments on the California Advanced Services Fund (CASF), almost all parties have identified legal and/or policy bases for why it would be premature for the Commission to adopt the broadband grant program. Among other things, parties have variously advocated that, before the PD is adopted, the Commission should first: obtain legislative authority;<sup>1</sup> let the broadband market continue to develop on its own;<sup>2</sup> rather information about the appropriate minimum speeds for providing service and identifying unserved/underserved areas,<sup>3</sup> and; obtain data about broadband infrastructure.<sup>4</sup>

DRA has discussed the legal implications of the CASF in past comments, and continues to recommend that the Commission seek legislative support before implementing the CASF.<sup>5</sup> If the Commission remains committed to establishing the CASF now, however, DRA strongly recommends that the Commission adopt only the concept and general structure of the CASF, and refrain from adopting conclusions about issues that parties have identified as requiring additional inquiry.<sup>6</sup>

DRA proposes specific modifications to the PD below,<sup>7</sup> and identifies several subject areas and issues that the Commission should allow the parties to address in further comments and working groups/workshops.<sup>8</sup>

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<sup>1</sup> See, e.g., DRA Comments, 12/10/07, at 1, 5-6; Sprint Nextel Comments, 12/10/07, at 12-13, and; TURN Comments, 12/10/07, at 3.

<sup>2</sup> While no party appears to oppose the concept of a broadband grant program, parties have expressed reservations about implementing the CASF at all. See, e.g., CCTA Comments, 9/26/07, at 1; Sprint Nextel Reply Comments, 10/3/07, at 2-3; Sprint Nextel Comments, 12/10/07, at 1; T-Mobile Comments, 12/10/07, at 3-6; TURN Comments, 9/26/07, at 3-4, and; Verizon Comments, 9/26/07, at 1.

<sup>3</sup> See, e.g., AT&T Comments, 12/10/07, at 5-8; Cox Comments, 12/10/07, at 5-8, and; Verizon Comments, 12/10/07, at 7-9.

<sup>4</sup> See, e.g., DRA Comments, 12/10/07, at 7; Sprint Nextel Comments, 12/10/07, at 7-8, and; T-Mobile Comments, 12/10/07, at 6. See also DRA Opening Comments, 9/26/07, at 3-4.

<sup>5</sup> See, e.g., DRA Reply Comments, 10/3/07, at 4-5; DRA Comments, 12/10/07, at 3-5. See also T-Mobile Comments, 12/10/07, at 12-14.

<sup>6</sup> The Commission should consider adopting "tentative conclusions" rather than foreclosing the possibility of further scrutiny on important issues.

<sup>7</sup> See, *infra*, Section II.B.

<sup>8</sup> See, *infra*, Section II.C.

## II. DISCUSSION

### A. The Commission Must Clarify its Enforcement Authority

DRA and several other parties have highlighted the need to create a truly technologically-neutral program by allowing all broadband providers, not just “telephone corporations,” to receive CASF grants.<sup>2</sup> On the other hand, parties also question the legal authority of the Commission to enforce CASF requirements on broadband providers.<sup>10</sup> As CCTA states, “[t]he challenge presented by the [PD] is finding a legal path for oversight while extending CASF funding to broadband providers.”<sup>11</sup>

First, the challenge to the Commission’s jurisdiction ignores the fact that any CASF recipient will have voluntarily and knowingly submitted to the requirements of the program by its application, without regard to whether the Commission would otherwise have independent authority to impose those requirements. Put simply, any entity that does not want to be subject to the CASF requirements need not apply for CASF funding.<sup>12</sup>

Second, the PD requires that CASF applicants obtain (or be in the process of obtaining) a Certificate of Public Convenience and Necessity (CPCN) in order to be eligible for a broadband infrastructure grant.<sup>13</sup> This requirement provides unambiguous authority for the Commission to enforce any and all requirements related to receiving a CASF grant, even those requirements to which the recipient submitted voluntarily. The PD does not address directly, however, the enforcement of CASF requirements on affiliates (parent, subsidiary, etc.) through which the certificated carrier may seek to meet the CASF requirements.<sup>14</sup> In light of the jurisdictional challenges that will no doubt continue to be raised if the Commission adopts the CASF, the Commission should clarify its intent in the PD.

In particular, the PD should clearly establish, as a condition of accepting a CASF grant, that the certificated entity receiving the grant will be liable for compliance with all Commission requirements associated with receiving CASF funding. Thus, even if the CASF recipient uses one or more affiliates to carry out its commitments to the Commission, failure of an affiliate to fully meet those commitments, and any violation of Commission requirements, should be the legal

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<sup>2</sup> See, e.g., DRA Comments, 12/10/07, at 6; CCTA Comments, 12/10/07, at 3; Cox Comments, 12/10/07, at 9-10, and; TURN Comments, 12/10/07, at 10.

<sup>10</sup> See, e.g., AT&T Comments, 9/26/07, at 20; Verizon Comments, 12/10/07, at 13.

<sup>11</sup> CCTA Comments, 12/10/07, at 3.

<sup>12</sup> The entities currently identified as AT&T and Verizon are the result of using such an approach at the FCC.

<sup>13</sup> PD at 30-31, 54 (Ordering Paragraphs 10-11).

<sup>14</sup> DRA does not express an opinion on the appropriateness of this approach, or whether the PD can be read to allow  
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responsibility of the certificated entity, and should be enforceable as if the certificated entity had engaged in the action (or inaction) itself. Unless the Commission obtains legislative authority to directly enforce CASF requirements on non-telephone corporations, an explicit condition like this is vital to clearly put all CASF recipients on notice. While there may be other articles of faith associated with adopting the proposed CASF, the ability of the Commission to exercise its enforcement authority should not be one of them.

The Commission should also articulate its expectation that the certificated entity will not be a shell entity that could render any Commission action against the certificated carrier financially or legally insignificant. Similarly, the certificated entity's choice to utilize affiliates should not limit the ability of the Commission to verify compliance with and enforce Commission requirements in any way.

### **B. Other Modifications to the Proposed Decision**

In addition to the proposed changes to the Findings of Fact and Conclusions of Law provided in the Appendix to DRA's Opening Comments on the PD, DRA highlights the following substantive issues raised in DRA's or other parties' comments that the Commission should address now, rather than in the implementation phase of the CASF:

- The PD should adopt a rebuttable presumption that CHCF-A or B Fund subsidies will not be provided for the same CBGs for which a company receives CASF funds. Without limiting the ability of CHCF-A and B Fund companies to obtain CASF grants, companies with such subsidies should be prevented from "double dipping" into public funds.<sup>15</sup>
- The PD should adopt a requirement that a CASF applicant must provide a "voluntary pricing commitment" for "standalone broadband services." The Commission should treat this commitment as a requirement, rather than an option as the PD currently provides, and should specify that the pricing commitment will be for the full 5-year commitment period for providing broadband services.<sup>16</sup>
- The PD should clarify that CASF recipients must meet the minimum speed requirements based on actual speeds, not potential speeds.<sup>17</sup>
- The PD should include in the "criteria" for evaluating a CASF application a measure of the "need" for high speed broadband access. In developing

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or disallow it

<sup>15</sup> DRA Comments, 12/10/07, at 13-14.

<sup>16</sup> DRA agrees with the concerns expressed by TURN that the "price per MBPS" provision in the PD is insufficient. TURN Comments, 12/10/07, at 13. DRA would also support analysis by Commission staff of an "affordable" broadband rate, as proposed by TURN. *Id.*

<sup>17</sup> *See, e.g.*, DRA Comments, 12/10/07, at 9-10; TURN Comments, 12/10/07, at 7-8.

the “point system,” priority should be given to areas in which there is demand for high-speed broadband, but which are less likely to be served through market forces alone.<sup>18</sup>

**C. The PD Should Clarify That Several Implementation Issues Require Further Consideration**

While the Commission may seek to adopt the basic structure of the CASF program, there are important issues that must be addressed prior to full implementation, and the PD should explicitly state that the Commission will provide the specific procedural vehicles to do so.

For example, several parties express concern about the lack of a record upon which to base several of the PD’s conclusions. Parties argue that there is little factual support for the Commission’s conclusion that 3 mbps downstream and 1 mbps upstream are the appropriate minimum broadband speeds that CASF recipients should be required to provide.<sup>19</sup> As a related matter, many parties question the foundation for the PD’s definitions of unserved and underserved areas.<sup>20</sup> DRA shares many of these concerns and recommends that, if the Commission goes forward with adopting the CASF PD, the Commission should allow further input and analysis by parties and Commission staff on these and several other issues. DRA also notes that the Commission may find it preferable to modify the PD to draw tentative conclusions on some issues, rather than adopt final positions, and specify that they will be resolved after further procedures.

DRA recommends that the Commission solicit input and analysis using both comments and the working group/workshop structure now adopted for developing a reverse auction mechanism in Phase II (Reverse Auction ACR).<sup>21</sup> It is apparent from parties’ comments that the issues that should be addressed in this manner include the following, at a minimum:<sup>22</sup>

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<sup>18</sup> DRA and other parties have raised concerns about the lack of data identifying broadband infrastructure needs. DRA supports the use of any granular data that can be obtained from the CETF and/or the Governor’s Broadband Task Force. PD at 24. DRA also believes that “need” should consider demographics and/or other factors that could identify whether an area is considered “uneconomic” and thus less likely to be served without public funds. In discussing minimum speed requirements, Verizon states that the PD’s current requirements “make it unlikely that projects to serve rural customers will be prioritized for funding. Instead, funding would be diverted to upgrading suburban areas that fail to meet the 3/1 standard, since these upgrades will be capable of serving more potential subscribers at a price per Mbps that is significantly lower.” Verizon Comments, 12/10/07, at 7. Several parties advocate focusing CASF funding on areas with “the greatest need,” unserved areas. *See, e.g.*, AT&T Comments, 12/10/07, at 9; Cox Comments, 12/10/07, at 4-9, and; SureWest Comments, 9/26/07, at 3.

<sup>19</sup> *See, e.g.*, AT&T Comments, 12/10/07, at 5-8; Cox Comments, 12/10/07, at 5-8, and; Verizon Comments, 12/10/07, at 7-9.

<sup>20</sup> *See, e.g.*, AT&T Comments, 12/10/07, at 5-8; Cox Comments, 12/10/07, at 5-8, and; Verizon Comments, 12/10/07, at 7-9.

<sup>21</sup> Assigned Commissioner’s Ruling to Design and Implement a Reverse Auction Mechanism (December 13, 2007).

<sup>22</sup> In issuing the final criteria for applicants, the Commission should also ensure that interested parties receive CASF applications promptly. If the Commission does not require applicants to serve the entire service list for R.06-06-028, the Commission could establish a separate service list just for CASF applications and responses, or for CASF

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- A definition of “voice services.” The voice services provided by CASF recipients should include E911 services and be subject to the payment of California’s public purpose program surcharges.<sup>23</sup> There may be other requirements that should be associated with “voice services.”
- Minimum broadband speed provided by CASF recipient. Several commenters express concern about the 3 mbps down/1mbps up minimum speeds that the PD would require of recipients.<sup>24</sup>
- Broadband service quality. The actual broadband service at the minimum speeds adopted by the Commission should be available to most customers most of the time. The Commission should consider the appropriate standards for availability, measurement, and testing.<sup>25</sup>
- Definition of the “unserved” and “underserved” areas to which the CASF would apply, including whether “underserved” areas should qualify for CASF grants.<sup>26</sup> Related issues include the appropriate speed levels for identifying an unserved area, and whether those speeds should differ from the minimum speeds that CASF recipients must provide.
- Specific ongoing verification requirements. In addition to verifying that a CASF recipient has reached the build-out threshold to receive additional funds, the Commission should also require verification during the 5-year commitment period that the recipient is actually providing broadband services in the manner anticipated (meeting minimum speed and pricing requirements) and using the CASF funds appropriately (complying with auditing and accounting processes that the Commission should establish).<sup>27</sup>
- Specific performance incentives. The Commission should establish parameters for the refunds, penalties, and/or disgorgement of grant money that the Commission will use for categories of violations of Commission requirements.<sup>28</sup>

### III. CONCLUSION

DRA recommends that the Commission modify the PD as discussed above and in its Opening Comments on the PD.

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activities in general.

<sup>23</sup> See, e.g., DRA Comments, 12/10/07, at 10-11; Verizon Comments, 12/10/07, at 12 (supporting E911 capability).

<sup>24</sup> Verizon Comments, 12/10/07, at 7-9.

<sup>25</sup> See, e.g., DRA Comments, 12/10/07, at 9-10; TURN Comments, 12/10/07, at 10.

<sup>26</sup> See, e.g., AT&T Comments, 12/10/07, at 5-8; Cox Comments, 12/10/07, at 5-8; Sprint Nextel Comments, 12/10/07, at 13-14, and; Verizon Comments, 12/10/07, at 7-9.

<sup>27</sup> See e.g., DRA Comments, 12/10/07, at 9-10; TURN Comments, 12/10/07, at 14, and; SureWest Comments, 9/26/07, at 6.

<sup>28</sup> See, e.g., DRA Comments, 12/10/07, at 11-12; AT&T Comments, 9/26/07, at 17-20; TURN Comments, 12/10/07, at 13.

Respectfully submitted,

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December 17, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of **REPLY COMMENTS OF DIVISION OF RATEPAYER ADVOCATES ON THE PROPOSED DECISION ADOPTING THE "CALIFORNIA ADVANCED SERVICES FUND"** 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.

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Executed on December 17, 2007 at San Francisco, California.

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/s/ JANET V. ALVIAR

Janet V. Alviar

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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