



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

FILED

03/22/22

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R2009001

Order Instituting Rulemaking Regarding Broadband
Infrastructure Deployment and to Support Service
Providers in the State of California

Rulemaking 20-09-001
(Filed September 10, 2020)

**OPENING COMMENTS OF THE RURAL COUNTY REPRESENTATIVES
OF CALIFORNIA ON THE PROPOSED DECISION ADOPTING
FEDERAL FUNDING ACCOUNT RULES**

Tracy Rhine
Senior Policy Advocate
Rural County Representatives of California
1215 K Street, Suite 1650, Sacramento, CA 95814
Tel: (916) 447-4806
E-mail: trhine@rcrcnet.org

Dated: March 22, 2022

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TABLE OF AUTHORITIES

California Public Utilities Code Section 281

American Rescue Plan Act of 2021 (ARPA), sec. 9901, Public Law 117-2, codified at 42 U.S.C 802 et seq.

Department of Treasury, Final Rule, Coronavirus State and Local Fiscal Recovery, 31 C.F.R. Part 35 of Title 31 of Code of Federal Regulations

Senate Bill 156 (Chapter 112, Statutes of 2021)

Assembly Bill 164 (Chapter 84, Statutes of 2021)

CPUC Commission Rules of Practice and Procedures: Rule 14.3

SUMMARY OF RECOMMENDATIONS

Per Rule 14.3 (b) of the Rules of Practice and Procedure, and as discussed below, RCRC respectfully requests that the Proposed Decision be modified to:

- With respect to the apportionment of funds, replace the proposed County Allocation model with the methodology set forth in RCRC's Opening Comments to this proceeding for a more equitable distribution of funds to all rural counties¹.
- Require all applicants seeking Commission staff ministerial review to submit a Letter of Credit, as outlined in section 9.10 of the Program Rules and Guidelines.
- Exempt public agencies from obtaining a Certificate of Public Convenience and Necessity (CPCN) and Letter of Credit, and instead require local governments to demonstrate administrative capability and expertise in financial administration; demonstrated relationships with financial advisors; in-house or contracted expertise in evaluating broadband infrastructure project feasibility; and demonstrated relationships with, and support from, experienced public or nonprofit broadband system operators.
- Lower per household project cost threshold for ministerial review to \$3,000 per location.
- Exclude from the prohibition on leveraging other state and federal funding programs, for the purposes of the Federal Funding Account (FFA) grant program completely, those programs established through Senate Bill 156 and/or funded by Assembly Bill 164.
- Establish a Public Right of First Refusal process for local governments with identified plans to deploy broadband services in a priority area, as published by the Commission.

¹ OIR 20-09-001, Opening Comments, November 30, 2021

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I. Introduction

In accordance with Rule 14.3 of the California Public Utilities Commission (“Commission” or “CPUC”) Rules of Practice and Procedure (“Rules”), the Rural County Representatives of California (RCRC) respectfully submits comments on the Proposed Decision of Commissioner Alice Reynolds *Decision Adopting Federal Funding Account Rules* to the Order Instituting Rulemaking 20-09-001 (“Rulemaking”). RCRC was granted party status via an oral ruling by the assigned Administrative Law Judge, Thomas J. Glegola, at a pre-hearing conference on November 11, 2020.

II. Background

RCRC is an association of thirty-nine² rural California counties, and its Board of Directors is comprised of elected supervisors from those member counties. RCRC member counties include 26 of the 27 counties define as “Rural” for the purposes of the proposed Federal Funding Account

² RCRC members include Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, Glenn, Humboldt, Imperial, Inyo, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, San Benito, San Luis Obispo, Santa Barbara, Shasta, Sierra, Siskiyou, Solano, Sonoma, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo and Yuba counties.

(FFA) Grant Program³. Thirteen RCRC counties are identified as “Urban” in the allocation set forth in Proposed Decision, the most populated having less than 489,000 residents⁴ and the least populated having a little more than 138,000 residents⁵. RCRC county members comprise 60 percent of the state’s land mass, with geography ranging from forested and mountainous landscapes to coastal areas, deserts regions, and farmlands.

III. Discussion

Last year the Governor signed Senate Bill 156, representing a paradigm shift in the way the state envisions broadband deployment, focusing funding, both federal and state, on municipal constructed infrastructure. Beyond the \$3.25 million appropriated for a state owned, open-access middle mile, legislation created funding programs specifically for local and tribal governments, such as the Local Agency Technical Assistance fund and the Loan Loss Reserve fund. Historically, state subsidization of broadband deployment has been structured to induce existing telecommunication service providers to expand service by funding up to 100 percent of the cost of the deployment project⁶. In fact, until passage of SB 156, local governments were unable to receive state funding through the California Advanced Services Fund (CASF) Broadband Infrastructure Account program to deploy broadband in their unserved or underserved communities unless no other eligible entity applied to build in that area.

Policy changes made primarily through SB 156 made clear statements of the Legislature’s intent to place local governments on equal footing as existing internet service providers in deploying broadband solutions. Specifically, statutory changes expressly authorized a Joint Powers Authority (JPA) and county, among others, to provide broadband internet access service⁷. Additionally, new statutory authority allows counties to construct, own, and operate a broadband internet access service and any telecommunications service.⁸ Lastly, the Legislature repealed Public Utilities Code section 281(f)(9) that allowed local governments to apply for CASF funding only when no other eligible entity applied for the project area.

³ Proposed Decision (March 2, 2022), Page 33. Kings County is not a member of RCRC.

⁴ Sonoma County population 488,863, Census data (2020); <https://www.census.gov>

⁵ Napa County population 138,019, Census data (2020); <https://www.census.gov>

⁶ California Advanced Services Fund Guidelines (2021), D. 21-03-006 Appendix A

⁷ Government Code Section 53167

⁸ Government Code Section 26231

In addition to the policy revisions, the Legislature made significant investments aimed at empowering local governments to participate in increasing broadband access in their respective jurisdiction. For example, the Loan Loss Reserve program that is specifically for local government agencies and nonprofit organizations for the financing of broadband deployment, as well as the \$50 million technical assistance grant program for local agencies “seeking to deploy and connect local broadband networks”⁹ created by SB 156 and AB 164 (Chapter 84, Statutes of 2021).

Consistent with the other legislative changes put forth last year, the FFA program represents another opportunity for local and tribal governments to bring reliable and robust broadband service to their communities. The statute requires project funding allocation by county, based on a split of urban and rural counties. RCRC believes that the Legislature’s intent is clear in removing barriers to local governments seeking to provide broadband services and providing additional resources to local governments through the Local Agency Technical Assistance (LATA) grant program to support grant application development.¹⁰ This further demonstrates the State’s attempt to shift away from subsidizing incumbent internet providers and instead focusing on the development of reliable and high-quality municipal broadband. In the Findings of Fact in this Proposed Decision, the Commission itself states: “The Final Rule encourages recipients to prioritize support for broadband networks owned, operated by, or affiliated with local government, nonprofits, and cooperatives, finding that these networks have less pressure to generate profits and a commitment to serve entire communities.” Therefore, the FFA Rules and Guidelines should likewise vantage broadband infrastructure project applicants that are local governments¹¹.

A. CPCN and Letter of Credit

The FFA Proposed Decision requires that grant applicants either hold a CPCN issued by the Commission or submit a Letter of Credit covering the full FFA grant amount, valid from the entire 24-month construction period¹². Requiring local government – but not CPCN holders – to obtain a letter of credit seriously disadvantages public entities, and is an inappropriate criterion for a *broadband* funding program.

⁹ Senate Floor Analysis of AB 164, July 11, 2021

¹⁰ Senate Floor Analysis of SB 156, July 11, 2021

¹¹ As used in this document to have the same meaning as defined in Government Code section 53167.

¹² Appendix A, page A-17, Item 9.10

Local governments are not required to obtain a CPCN in order to own, operate and provide broadband services. Additionally, Administrative Law Judge correspondence as recent as February 2022 states that, “Broadband or data services are not telecommunications services for the purposes of the Commission’s Certificate of Public Convenience and Necessity (CPCN) authority”¹³, and further indicates that a CPCN application may be denied if an applicant provides only those services. Further, both prior Commission decisions and caselaw suggest that public entities are wholly *ineligible* to obtain a CPCN for these purposes – no matter how well qualified and willing – as they are not “telephone corporations” under Public Utilities Code section 234 (see *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 165), and their services are outside of the Commission’s jurisdiction. (*Application of Cal Coast Charter, Inc.* (1982) 1982 Cal. PUC LEXIS 1276.

Requiring applicants without a CPCN to provide a Letter of Credit covering the full FFA grant amount issued to the applicant presumes that a CPCN is a proxy for reliability and financial stability and that the thresholds for the Letter of Credit outlined in the Proposed Decision are equivalent to demonstrating that same reliability and financial stability. However, to obtain a CPCN from the Commission, an applicant must only obtain a \$100,000 performance bond, that is “reasonably liquid and available to meet the firm’s first year expenses....”¹⁴ In addition, the applicant must provide an “audited balance sheet for the most recent fiscal year and an unaudited balance sheet as of the most recent fiscal quarter, certificate of deposit or other liquid deposit, with a reputable bank or other financial institution , or a third-party undertaking to provide the required amounts on behalf of applicant. If the balance sheet shows current liabilities in excess of current assets or negative equity, explain how applicant will be able to maintain sufficient liquidity for its first year of operations.”¹⁵ These very modest requirements are sufficient to demonstrate basic ability to provide some level of service, but by themselves hardly demonstrate the wherewithal and competency to manage multi-million dollar publicly funded construction projects.

By contrast, a Letter of Credit as outlined in the Proposed Decision would require a local government to have the entirety of the grant amount, tens of millions of dollars, set aside for two years, in addition to having tens of millions of dollars for the actual construction of the

¹³Email ruling Directing Applicant to File a Response, February 17, 2022:
<https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M453/K953/453953062.PDF>

¹⁴ CPCN application, May 5, 2021, pursuant to D. 13-05-035

¹⁵ CPCN application, May 5, 2021, pursuant to D. 13-05-035

infrastructure as the FFA program is reimbursement based (meaning the local government would have to spend the money for completion of at least ten percent of the project in order to receive the first tranche of funding from the Commission). There is also an additional cost assessed by the financial institution for issuing the letter of credit – all cost incurred by local governments, and not incumbent service providers holding a CPCN. This would greatly disadvantage local governments in their efforts to utilize the funding and program changes made in 2021 to deploy affordable and reliable municipal broadband.

Requiring such extensive outlays by sophisticated and well-resourced public entities, while exempting even a sole proprietorship that has obtained a CPCN, does not serve the Commission's purposes. Therefore, local governments should be allowed to demonstrate competency, through the resolution process, by other means, similar to those required through the CPCN application, using quantitative metrics that is at least as predictive of public agency performance as a CPCN is of a provider.

B. Ministerial Review versus Commission Resolution

The Proposed Decision allows those entities that meet specified criteria to be assessed through a ministerial review process by Commission staff, including a grant request amount of no more than \$25 million, a per household project cost of \$9,300 and either the applicant is a CPCN holder or has the prescribed Letter of Credit. As discussed above, a CPCN is not sufficient for the level of funding available through the FFA and establishes minimal financial security. Therefore, in order to proceed through the ministerial process, RCRC suggests that all applicants must have a Letter of Credit as set forth in the Proposed Decision. This will level the playing field, and ensure fiscal accountability, no matter who is the applicant. Additionally, the per project location costs threshold for ministerial review should be lowered to \$3,000 in order to ensure that more complicated build projects with higher per location costs receive a full and careful review by the Commission through the Resolution process. Only most simple FFA applications should be reviewed by Commission staff.

C. Leveraging Other Funding Sources

As outlined in the Proposed Decision, a requirement for ministerial review is that the application “does not propose to leverage funding from other state or federal programs or propose a project area that overlaps with areas of existing commitments to provide broadband service that is reliable and offer speeds of 100/20 Mbps.”¹⁶ However, SB 156 specifically states that, “Moneys appropriated for purposes of this section may be used to match or leverage federal moneys for communications infrastructure....”¹⁷ With the additional monies allocated and pending allocations from the federal government, and the other broadband funding programs established through the budget last year, it is imperative, especially for rural and high-cost build areas that other sources of funding be leverage to bring internet access the hardest to reach residents. Therefore, for the FFA program, irrespective of the application process, should allow the leveraging of funds allocated through programs established by SB 156.

IV. Conclusion

RCRC urges the Commission to adopt the suggestions contained herein and accept these comments for filing.

Dated: March 22, 2022

Respectfully submitted,

/s/ Tracy Rhine

Tracy Rhine

Senior Policy Advocate

Rural County Representatives of California

Tel: (916) 447-4806

E-mail: trhine@rcrcnet.org

¹⁶ Appendix A, Item 13, page A-23

¹⁷ Public Utilities Code 281(b)(2)(B)(ii)(3)

APPENDIX A

This Appendix is provided in compliance with Rule 14.3(b) of the Rules of Practice and Procedure and contains RCRC's proposed changes to the Findings of Fact and Conclusions of Law.

- 1. The following changes should be made to the Conclusions of Law. Additions are underlined, and strikethroughs signify deletions.**

The Final Rule encourages recipients to prioritize support for broadband networks owned, operated by, or affiliated with local government, nonprofits, and cooperatives, finding that these networks have less pressure to generate profits and a commitment to serve entire communities.