STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: January 23, 2013

To: The Commission
(Meeting of January 24, 2013)

From: Lynn Sadler, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **Proposed Legislation on California Advanced Services Fund Eligibility**

RECOMMENDED POSITION: SUPPORT AS SPONSOR

SUMMARY OF BILL:

This bill would amend Public Utilities Code Sec. 281 to make any facilities-based non-telephone corporation broadband service provider eligible to apply for California Advance Service Fund (CASF) grants and loans if that entity otherwise satisfies the requirements of the CASF program as defined by the California Public Utilities Commission (CPUC).

CURRENT LAW:

Currently, PU Code 270(b) limits eligibility for CASF grants and loans to telephone corporations as defined by PU Code Sec. 234.

AUTHOR'S PURPOSE:

The stated objective of the CASF is to promote the ubiquitous availability of broadband services throughout the state. To achieve this objective, the CASF provides grants and loans for broadband deployment projects in unserved and underserved areas. Such projects are for the construction of last mile and middle mile broadband facilities. Last mile facilities are necessary to connect individual households to Internet access providers (ISPs). Middle mile projects deploy the infrastructure necessary to connect an ISP's last mile facilities to the Internet backbone. Currently, the CASF is authorized to award $200 million in grants for infrastructure projects. Another $15 million is available for loans to entities that have received a CASF grant.

This proposal would expand the pool of applicants eligible for CASF grants and loans in order to increase the number of grants awarded for broadband deployment projects. Currently, Pub. Util. Code Sec. 270(b) limits eligibility for CASF grants and loans to telephone corporations as defined by Pub. Util. Code Sec. 234. The bill proposes to change the CASF eligibility requirements to permit any entity that is a facilities-based broadband provider to apply for CASF support whether or not that entity is a telephone corporation.

The proposed change in the eligibility requirement is premised on an analysis of the performance of the CASF program conducted by the CPUC's Communications Division (CD).

Of the $100 million initially authorized for CASF grants, approximately $58 million has yet to be awarded. Combined with the additional $115 million for infrastructure grants and loans authorized by SB 1040 (Padilla), there is a significant surplus of available CASF grant funds.

In addition, approximately 75% of the CASF funds awarded to date have been for middle mile projects while approximately 25% of those funds have been awarded for last mile projects. Middle mile projects are a critical component of broadband infrastructure and can attract last mile providers. However, middle mile projects by themselves do not guarantee that households will receive broadband service. Put another way, middle mile facilities are not a substitute for last mile facilities. To date, the CASF has approved grants for last mile projects that will provide Internet access to 2.9% of the identified 360,000 unserved and underserved households in California.

CD believes there are a number of broadband providers which may take advantage of CASF funding but are currently unable to do so because they are not telephone corporations subject to the CPUC's jurisdiction. This is because these providers often offer standalone Internet access which is an information service and hence jurisdictionally interstate, or middle mile facilities which are mostly jurisdictionally interstate. The inclusion of these providers will expand the pool of applicants eligible for CASF support and may ultimately increase the number of grants awarded. Additionally, since many of these providers use low cost technologies such as terrestrial fixed wireless, they may be best suited to provide cost effective last mile facilities in unserved and underserved areas of the state. This is because most, if not all of these areas are, located in rural areas where the cost to deploy broadband facilities is high because of low population density and/or difficult terrain.

Since the CASF has surplus funds available and the funds awarded thus far are predominantly for middle mile projects, CD believes that the change in the CASF eligibility requirements proposed by the bill is necessary and it may increase the pool of available applicants so more grants can be awarded, particularly for last mile projects.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:

This bill should be sponsored for the following reasons:

(1) The bill may increase the pool of applicants for CASF grants stimulating deployment in unserved and underserved areas of the state.

(2) The bill may increase the number of grants for last mile deployment projects.

(3) The bill may result in promoting cost efficient last mile deployment in unserved and underserved areas.

SUMMARY OF SUGGESTED AMENDMENTS:

None.

DIVISION ANALYSIS (Communications Division):

This bill would modify the CPUC's existing CASF program to allow non-certificated facilities-based entities to apply for CASF grants and loans. The proposed change in the eligibility requirements is intended to increase the pool of applicants for CASF grants and loans. This change may increase the overall effectiveness of the CASF in achieving the goal of promoting ubiquitous broadband availability. Moreover, to the extent that the proposed change draws applicants which use technologies that are more cost effective than the wireline technologies used by telephone corporations, it may not only stimulate deployment in unserved and underserved areas of the state but may also result in more efficient use of existing CASF funds.

However, the proposed change in eligibility requirements does present the CPUC with a challenge. The bill proposes to award CASF support to entities which it does not regulate. Thus the CPUC will not have the same tools at its disposal to enforce CASF program requirements if non certificated entities are awarded grants. However, awarding CASF grants to non-certificated facilities-based entities is not without precedent. In fact, the bill is modeled on a similar amendment to PU Code Sec. 281 enacted by the Legislature in 2009 (AB 1555) which permitted entities which were not telephone corporations but had been awarded American Recovery and Reinvestment Act (ARRA) grants to obtain matching grants from the CASF. To implement AB 1555, the CPUC adopted a specific set of safeguards applicable to these entities to ensure that CASF funds would not be subject to waste, fraud, or abuse. See Resolution T-17233. CD believes that the adoption of a similar set of safeguards will be adequate to ensure that ratepayer funds are protected, albeit more complicated to enforce.

PROGRAM BACKGROUND:

The CPUC established the CASF in D.07-12-054 to provide $100 million dollars in grants for the construction of broadband facilities in unserved and underserved areas of the state. The decision required that the CPUC grant awards for infrastructure projects based on a competitive application and scoring process. The decision limited eligibility for project grants to "telephone corporations" as defined by PU Code Sec. 234, i.e., entities which held either a Certificate of Public Convenience and Necessity (CPCN) or a Wireless Identification Registration (WIR). In adopting this requirement the CPUC stated, "We consider the CPCN requirement necessary in order to ensure that the CPUC has jurisdiction to control against waste, fraud, and abuse in the administration of our program."

In Resolution T-17143, the CPUC adopted specific application requirements, timelines, and scoring criteria for parties seeking CASF grants. The resolution confirmed that eligibility for CASF grants was limited to entities holding either a CPCN or WIR but did not rule out reconsidering the issue in future if the CASF had a surplus or if other circumstances justified reconsideration of the issue.

The restriction on eligibility for CASF funding adopted in D. 07-12-054 was subsequently reflected in statute when the Legislature codified the CASF through amendments to PU Code Sec. 270 and the addition of Sec. 281 (SB 1193, Padilla). The amendment to Sec. 270 placed the CASF in the state treasury along with the CPUC's other public purpose programs administered by the CPUC. Section 270(b) requires that moneys collected to support these programs be held for the benefit of ratepayers in order to compensate telephone corporations for the costs of providing universal service.

In February of 2009, the federal American Recovery and Reinvestment Act (ARRA) was signed into law. ARRA appropriated funds to establish a federal grant program for the construction of broadband facilities administered by the National Telecommunications and Information Administration (NTIA in the U.S. Dept. of Commerce. In D.09-07-020, the CPUC determined that it would consider modifying the CASF eligibility requirement to provide CASF support to ARRA grantees, which were not telephone corporations, contingent upon the passage of a bill that would give the CPUC the required authority to make such modifications. The CPUC noted that expanding the range of entities eligible to receive CASF funds beyond those which held a CPCN or WIR raised issues about the fitness and technical capabilities of entities the CPUC does not regulate. Therefore, it stated that the CPUC would need to implement appropriate safeguards to ensure that non-certificated entities were financially and technically qualified to meet the CASF program requirements as a condition of receiving CASF money.

In July of 2009, AB 1555 (Perez) was enacted. The bill amended PU Code Sec. 281 to give the CPUC the authority to provide CASF matching grants to ARRA entities that were not telephone corporations if those entities met the requirements of the CASF program.

Subsequently, the CPUC 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 CPUC 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 CPUC, the CPUC imposed additional requirements on them, including, the submission of information sufficient to conduct a thorough background check; an affidavit agreeing to comply with specific CPUC rules; an agreement to allow the CPUC to inspect the applicant's accounts, books, papers and documents related to the application and award of CASF funds; and a mandatory performance bond for the full amount of any CASF grant.

In February of 2010, SB 1040 (Padilla) was enacted by the Legislature. SB 1040 amended PU Code Sec 281 to augment the CASF by an additional $125 million. In addition, it created three sub accounts within the CASF. First, it created the Broadband Infrastructure Grant Account which made an additional $100 available for infrastructure grants. Second, it created the Broadband Infrastructure Revolving Loan Account which made available $15 million in loans to CASF grant recipients. Third, it created the

Urban Regional Broadband Consortia Grant Account which made $10 million available to regional consortia to fund activities to facilitate broadband deployment other than the capital costs of broadband facilities not funded by a CASF grant.

In February of 2012, the CPUC subsequently implemented the infrastructure grant and loan accounts created by SB 1040 through D.12-12-015. It also revised the application and scoring process adopted in Resolution T-17143 and addressed a number of policy issues related to the grant and loan programs. Among those issues was whether the CPUC should seek the legislative authority necessary to extend CASF grants and loans to entities other than those holding a CPCN or WIR given that ARRA funding for broadband projects had been exhausted. The decision rejected pursuing such authority for the following reasons. First, it cited reports by the staff that non-certificated or registered entities that had applied for ARRA grants had required significant assistance from the staff to negotiate the application/grant processes. Moreover, it noted that few grants had been issued to these entities because many of these applicants had failed to obtain ARRA grants. Finally, the CPUC recognized that it might not have the regulatory tools to enforce the conditions attached to grants awards made to non-certificated entities.

In November of 2012, the CPUC issued R. 10-12-012 to revisit the eligibility issue it had considered in D. 12-05-015. The rulemaking sought comment on the CPUC's proposal to change the CASF eligibility rules to permit any facilities based broadband service provider, including commercial and nonprofit entities, to apply for CASF grants and loans contingent upon obtaining the required legislative authority.

The rulemaking is premised on several considerations. First, it found that D.12-02-015 had declined to pursue extending eligibility to non-certificated providers based primarily on oversight concerns without taking into account the performance of the fund. The rulemaking pointed out that there was a substantial surplus of CASF funds; that there were still a significant number of areas in the state that remained unserved or underserved; that the CASF had, for the most part, funded middle mile projects which by themselves do not assure that individual households would have access to the Internet; and finally, that there were a number of facilities-based entities not eligible for a CPCN who could potentially provide cost effective last mile infrastructure in unserved and underserved areas of the state. Opening and reply comments on the OIR were submitted in December of 2012. The rulemaking is pending.

SAFETY IMPACT:

As the Governor's Broadband Task Force stated in its 2007 report, ubiquitous broadband capability creates opportunities to enhance public safety operations in a variety of areas and cites as examples public safety applications in law enforcement, disaster relief, and traffic management. The utilization of the Internet to enhance public safety is rapidly evolving. CD believes that over time, the Internet and the associated broadband facilities necessary to access the Internet, will play a key role in virtually every aspect of public safety. The CASF program is intended to promote such access and the proposed bill is intended to make the CASF more successful at achieving this objective. Finally, any entity attaching to investor owned utility support structures or placing facilities in utility conduits is subject to the safety requirements in CPUC General Order 95 and GO 128.

RELIABILITY IMPACT:

The scope of the CPUC's authority to impose reliability standards on Internet access service is uncertain and in flux. Nonetheless, the current CASF rules require that applicants for broadband project grants and loans demonstrate that they have the requisite technical and managerial expertise to build and operate any proposed broadband system. Furthermore, applicants are required to demonstrate that they are financially sound and that the proposed project is financially sustainable. Under the current CASF framework, much of this demonstration is accomplished through the process necessary to obtain a CPCN. If the proposed bill is enacted, the CPUC plans to require that non-certificated applicants make the same demonstration required of applicants seeking a CPCN as part of the CASF application process.

RATEPAYER IMPACT:

Both the state and the CPUC are federally preempted from regulating the rates charged for Internet access. However, as a condition of being awarded a grant, the current CASF program requires that the grantee commit to providing service at the rate it specifies in its application for a two year period after the project becomes operational. The price proposed by the applicant is included in the scoring process used to rank grant applications against one another. Lower prices are assigned a higher number of points. However, price accounts for only five percent of the overall score assigned to each application. Finally, the bill does not propose to expand the amount of funds appropriated for the CASF and, therefore, will not increase the end-user surcharge that currently funds the program.

FISCAL IMPACT:

This bill will require one new PURA V position in Communications Division at a cost of $120,230 annually.

With the expanded eligibility to apply for the CASF grant/loan to facilities-based non-CPCN and WIR holders, the CPUC workload would inevitability increase. This new workload potentially includes:

Staff support in the development of more specific rules and requirements for CASF grant/loan applications from the expanded pool of applicants. This could entail organizing meetings/workshops with interested parties and stakeholders, and eventually preparing a resolution for the CPUC to adopt revised guidelines for the CASF Infrastructure Grant and Revolving Loan Accounts.

Responding to inquiries and assisting the newly-eligible entities in the preparation of their CASF applications. Given that these entities are most likely not as familiar with CPUC processes, CPUC staff could be devoting a significant amount of time in explaining to these entities the specific information that they need to submit in their CASF applications, how to submit their applications through the CPUC Oracle system, and how to use the tools that the CPUC had already developed to assist them with their applications -- i.e., the CPUC's interactive broadband availability map and its CASF application tool features.

Processing a larger number of CASF applications than otherwise would be submitted under current CASF rules. As a consequence, CPUC staff has to devote more time in evaluating the project proposals, investigating potential challenges to the applications, working with the applicants in revising their proposals as needed, scoring the proposals based on set criteria, and preparing resolutions for CPUC approval of CASF funding to hopefully more CASF projects.

Monitoring and processing of CASF payments to more CASF projects, as a consequence of having more CASF applications granted funding by the CPUC.

To effectively oversee all three CASF program areas (Infrastructure Grant Account, Revolving Loan Account, and the Regional Consortia Account), an additional senior level analyst position in the Communications Division (CD) will be required.

Currently, the CD staff consists of only one PURA V, two PURA IVs, and one PURA III who are assigned to the CASF program areas. The existing PURA V takes the lead role in overseeing all the CASF program areas, while the three other analysts are responsible for each of the program areas, respectively. The current staff is already hard pressed to cope with all the necessary tasks involved in the administration and implementation of the CASF program as it stands today. This includes oversight of 19 CASF broadband projects that are in various stages of construction and 14 CASF regional broadband consortia groups working across California on a variety of activities designed to increase broadband deployment, access, and adoption in the state. Even though the Regional Broadband Consortia Account has the least amount of CASF funding per P.U. Code Sec. 281, it turned out to be a very staff resource-intensive area that cannot be effectively overseen just by one analyst.

Thus, all four existing CASF staff have been assigned to undertake critical tasks associated with the oversight of this program area such as the review of quarterly reports, processing of quarterly payment requests from each consortium, facilitating monthly meetings with all consortia groups, and participating in consortia events in their respective regions. The addition of another PURA V will help alleviate and redistribute the workload.

The new PURA V can be dedicated solely to the Infrastructure Grant/Loan Accounts, given the expected increase in CASF applications and funded projects as a result of this proposed legislation. The other PURA V can take lead responsibility for the Regional Consortia Account.

It is well known at this point that the Internet and Internet access have the capacity to make businesses more efficient and to stimulate business activity. Equally well known are the benefits that access to the Internet confers on local government, education, healthcare etc. To the extent that the change in the eligibility requirement will increase the deployment of Internet access facilities in unserved and underserved areas, consumers, businesses, schools and local governments and the economy in these areas will benefit accordingly.

LEGAL IMPACT

Although the CPUC may not have direct regulatory jurisdiction over some of the applicants, the CPUC will be able to apply contract law principles to ensure appropriate program governance.

OTHER STATES' INFORMATION:

None.

LEGISLATIVE HISTORY

- SB 1193, Padilla (2008)
  Amended PU Code sec. 270
  Added sec. 281
- AB 1555, Perez (2009)
  Amended PU Code sec. 281.
- SB 1040, Padilla (2010)
  Amended PU Code sec. 281

STATUS:
None.

SUPPORT/OPPOSITION:

None on file.

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Add new subparagraph, PU Code Sec. 281(c)(3) as follows:

"(3) Notwithstanding any other law, including, but not limited to section 270 of this chapter or the preceding subsection (c)(2) or any decision, order, or rule adopted by the commission, any facilities-based provider of broadband services, whether or not a telephone corporation, shall be eligible to apply to participate in the program administered by the commission pursuant to this section, if that entity otherwise satisfies the eligibility requirements and complies with program requirements established by the commission."