

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public)
Service Commission, on its own motion,) Application No. C-5484
to administer the Nebraska Broadband)
Bridge Program in the 2023 program)
year.)

**COMMENTS OF CHARTER FIBERLINK – NEBRASKA, LLC AND TIME WARNER
CABLE INFORMATION SERVICES (NEBRASKA), LLC**

Charter Fiberlink - Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC (collectively “Charter”) submit the following comments in response to the Nebraska Public Service Commission’s (“PSC” or “Commission”) March 7, 2023 Order seeking comment on issues relating to the 2023 program year of the Nebraska Broadband Bridge Program (“NBBP”).

Charter supports the NBBP’s goal to provide quality broadband internet to every Nebraskan and the proposal to generally maintain the NBBP’s existing overall structure in the 2023 program year. Even so, the public interest is served by regularly reviewing and revising the NBBP guidelines to ensure compliance with applicable law, funding source requirements, and the fair treatment of all consumers and providers. As the program proceeds year-over-year, and with the advent of federally funded programs for broadband expansion through the Capital Projects Fund (“CPF”) and Broadband Equity, Access, and Deployment Program (“BEAD”), it is also important that guidelines for the various different programs and program years maintain substantially similar and consistent provisions.

To that end we offer the following comments:

1) Updates to the Procedural Schedule.

Charter recommends that the procedural schedule be amended to offer more time for providers to evaluate potential applications upon posting by the PSC prior to the time letters of intent to challenge are due to the Commission and applicants. Moreover, Charter is concerned that administrative issues could arise with the current procedural schedule given that July 4th, a federal holiday, falls within the time outlined for the PSC to post all received applications on their public website.

Currently, the procedural schedule would require providers to submit applications to the PSC no later than Monday, July 3, 2023. The PSC would then be required to post those applications to their public website by Friday, July 7, 2023. Given the timing of the holiday period, the PSC's ability to post such applications in only two business days might be negatively impacted.

Once applications are published, providers then have until Monday, July 17, 2023, to submit notices of intent to challenge. This affords providers only five business days to review all potential applications that are submitted in the state of Nebraska for potential overlap and submit the required notices. Providing sufficient time for providers to review applications helps avoid potential wasteful overbuilds of existing or already-funded infrastructure, and also enables parties to craft and submit well-considered challenges. These are important policies, because the NBBP and similar grant programs essentially create a zero-sum game, as every subsidized overbuild would directly take broadband expansion dollars away from areas of the state that today lack access to adequate broadband service. With this in mind, five business days may be insufficient time to properly review every application submitted in the state and submit letters of intent to challenge. Charter recommends that the Commission allow at least 15 business days for review of posted applications and submission of letters of intent to challenge.

2) Adjustment to Scoring System.

Charter supports of the PSC's intent to include the community outreach provisions of CPF-1 and a potential score deduction for negative feedback received in response to a proposed project into the next round of state-funded NBBP grants. Properly evaluating and objectively scoring such feedback is difficult, however. Charter therefore requests that the Commission require any negative feedback to have objective reasoning, and closely scrutinize such comments for potential conflicts of interest. Any provisions of the 2023 NBBP scoring system should be fair, reasonable, and nondiscriminatory – even those sections which aim to gauge public support.

Moreover, Charter does not, however, support returning to the 2022 NBBP cycle scoring system for matching funds, and the increase in points received for applications in “high cost” areas of the state. Instead, Charter proposes that all unserved locations and areas be evaluated and scored the same. With the requirement that all potential grants funded through the NBBP be to unserved or underserved locations and the extensive protections for served locations, including the challenge process, every location to be served by a NBBP application, whether in a defined “high cost” area or not, faces the same problem – a lack of adequate broadband internet access. Because these areas and the consumers that live in them face the same problem, every unserved or underserved resident of the state should be treated the same, and every application to serve such residents should have the same availability for matching fund points.

The NBBP, CPF, BEAD, and other broadband expansion projects all aim to ensure *every* resident of Nebraska receives access to broadband. Therefore, when evaluating potential applications to these programs the PSC should ask and answer a simple binary question: “Is this location served?” The PSC should not advance provisions that pit one Nebraskan who lacks broadband service over another. Yet, that is what the 2022 NBBP matching fund scoring provision

does. Charter suggests removing scoring preferences or advantages for different unserved areas, by amending item 7 in the scoring criteria from the 2022 program guidelines as shown in legislative format below:

7. Match Percentage – Up to 55 points will be awarded as follows:

a. ~~Non “high cost” project: If the applicant has sources of funds that make up more than the 50% requirement, one point will be awarded for each additional percentage point above 50%, up to a maximum of 30 points (80%).~~

b. ~~“High cost” project: If the applicant has sources of funds that make up more than the 25% requirement, One point will be awarded for each additional percentage point above 25%, up to a maximum of 55 points (80%).~~

3) Challenge Process.

Generally, Charter supports the PSC maintaining the challenge procedure outlined in the Dec. 13 CPF-1 order. Specifically, Charter agrees that Type 1 and Type 2 challenges from a single provider to a single application should be submitted separately, and believes this process will eliminate any administrative issues in evaluating and responding to such challenges.

However, Charter urges the Commission to revisit the speed testing requirements to support a challenge. In prior funding rounds and in NUSF-133, the Commission adopted speed testing methods that depart from FCC standard speed testing methods in important and burdensome ways. Now that the FCC has implemented location-specific broadband availability reporting, with a well-developed challenge process and penalties for providers that overstate coverage, it is even more important for the Nebraska speed testing processes to follow the FCC processes. By contrast, the current NBBP challenge processes require providers to test speeds hourly, for an entire week, and with sample sizes so large that they will likely be unable to support accurate testing results.

To illustrate, consider one of Charter’s recent challenges made in the CPF-1 grant round. Charter highlighted how the proposed project overlaps with 300 locations where Charter already

provides service at download speeds of up to 1000 Mbps and upload speeds of 35 Mbps. Under the current Commission guidelines, Charter had to test 30 of those addresses hourly for seven days: 2520 total speed tests. But not all of those addresses subscribe to Charter services even though broadband service is available, and among the homes that do subscribe to Charter services, most subscribe to lower speed tiers. Moreover, among the customers that subscribe to higher speed tiers, not all of them have modems that support remote testing — either they purchased their own modems or have older modems that do not have a remote testing capability. These factors left Charter with substantially fewer than 30 testable locations. Other providers likely face the same challenges. So, it is often difficult or impossible to find enough locations to test using the Commission’s guidelines – and it is nearly impossible for selection of the testing locations to be at random, as the guidelines indicate. Even when enough qualifying locations are available, testing hourly for a week is not required for accuracy nor is it required by FCC guidelines.

These onerous requirements for challenges increase the risk that the Commission will overbuild existing infrastructure – by making it impossible or impractical for providers to meet the “guilty until proven innocent” standards set up by the current testing requirements. Worse, establishing such difficult testing requirements may actually encourage applicants to propose projects in areas known to be served in hopes that the overbuilt provider won’t be able to test in the precise ways required by the Commission’s testing rules.

Charter therefore recommends that the speed testing guidelines be deleted. Instead, Charter recommends that the Commission adopt a rule that states the following: “For purposes of challenges and applications, the Commission shall presume that the data in the Federal Communications Commission’s Broadband Data Collection broadband maps accurately reflect the speeds available at a given location. An applicant or challenger is welcome to present information

that shows that a location is indicated to be served, unserved, or underserved for consideration by the Commission, and the Commission will determine the credibility and weight to be assigned to such information and shall make a decision based on the information presented.” At a minimum, Charter recommends that the current guidelines be amended as shown in legislative format below:

~~At least one week of~~ To the extent available, speed and latency testing data performed on active subscriber locations within the challenged area must be submitted. Speed test data and methodologies used should follow the Performance Measures Testing standards set by the FCC with regard to the HUBB portal or the Measuring Broadband America program. ~~Testing should be performed daily on an hourly basis between 9:00 am to 9:00 pm.~~ The speed test data must support the availability and access to 100Mbps/20Mbps speed service the active subscriber locations in the challenged portion of the proposed project area. The data provided must include the location where the speed test was run, the date and time of the test(s). The testing must have been completed within six months of its submission to the Commission and must reflect that at least 80% of the speed measurements reflect speeds at 80% or more of the 100/20 Mbps standard. Challengers must ~~demonstrate that~~ select the locations chosen to be tested ~~were~~ randomly to the maximum extent practicable ~~selected~~. The number of speed test locations required is based on the number of subscribers in the challenged area, as follows:

| Number of Subscribers in Area | Number of Test Locations |
|-------------------------------|---|
| 100 or fewer | 53 |
| 101 or more | 102.5% 2.5% of Total Subscribers |
| | 50 |

Finally, if testing requirements maintain the requirement to test locations for one week, Charter asks that the challenge period be lengthened by two weeks to allow time to set up and conduct the required testing.

4) Digital Inclusion Plans.

Charter believes that the 2023 NBBP program year guidelines should reflect the CPF-1 grant funding guidelines in regard to a digital inclusion plan and participation in the federal Affordable Connectivity Program (“ACP”).

5) Rates.

On the issue of how the Commission evaluates and regulates pricing for broadband services provided by NBBP grantees, Charter urges the Commission to follow the law and refrain from price regulation or requiring applicants to commit to price controls.

The Nebraska Legislature has twice weighed in on the issue of price controls, clearly identifying the limitations placed on the PSC's authority to regulate broadband. Since 2019, Neb. Rev. Stat. § 86-124 has prohibited Commission regulation of all internet protocol-enabled service, "including rates, service or contract terms..." Accordingly, the original language of the Broadband Bridge Act passed in 2021 through LB388 was fairly direct about limiting the authority of the Commission to regulate broadband services using Broadband Bridge Program support as a lever: Section 8(3) of LB388 read, "The commission shall not add to the obligations required of a grant recipient after the grant is awarded without the consent of the grant recipient." The only obligations that LB388 allowed are stated in section 8(2), and are limited to: (1) a commitment to provide service for 15 years; and (2) an obligation to provide 100 Mbps download and upload speeds. Long term price freezes are not among the obligations included in the required commitments in section 8(2) of LB388, and section 8(3) prohibited the Commission to "add to the obligations" of a recipient, such as a price freeze commitment.

Then, in the 2022 legislative session, the Legislature adopted LB1144 which further bolstered LB388's language prohibiting the Commission from "adding to" the obligations of Broadband Bridge Program participants. As amended by LB1144, Neb. Rev. Stat. § 86-1308 (2), retains the requirement that the Commission must enforce two key obligations upon providers: (a) a requirement to maintain service over NBBP-funded infrastructure for fifteen years, and (b) during that time, offer service that is 100 megabits per second ("Mbps") or better in both the

upstream and downstream directions. Then, LB1144 added subsection 1308(3) which makes clear that the Commission lacks authority to regulate the provided broadband service beyond what is permitted by subsection 1308(2): the Commission may only add obligations “specifically authorized under the Nebraska Broadband Bridge Act or as required by federal law to access and distribute federal funds appropriated for the purpose of broadband expansion.” The Broadband Bridge Act does not authorize price freeze requirements, and no federal law requires price freeze or price control commitments to access or distribute federal funds available under current broadband support programs.

Moreover, Neb. Rev. Stat. § 86-1311 (2) states: “The commission shall not deny an application based on prices or terms and conditions offered, or regulate any term of service.” Requiring applicants to commit to certain pricing controls, pricing limits, or price freezes in their applications thus violates both Neb. Rev. Stat. § 86-1308(3) and § 86-1311(2).

The C-5484 Order raises the question that “if rate information is not required to be filed and rates maintained for a certain period of time following completion of the project, how else could the Commission fairly evaluate projects for rate comparability?” Charter offers two responses. First, Charter has no objection to reporting to the Commission the rates that grantees charge. Some funding sources require this information, so reporting it would be consistent with the exception in Neb. Rev. Stat. § 86-1308(3) that allows additional obligations if “required by federal law to access and distribute federal funds.”

Second, Neb. Rev. Stat. § 86-1306(2)(C) already provides the Commission with the ability to evaluate rate comparability. That section allows the Commission to prioritize projects for which “an applicant [demonstrates the ability] to offer rates in the project area for the applicant's currently offered speed tiers that are comparable to the rates offered by the applicant outside the project area

for the same currently offered speed tiers.” This criterion can be scored by evaluating an applicant’s currently offered speed tiers and rates they plan to offer, with an attestation that the applicant will continue to price their services inside and outside a project area the same. So, while the statutory scheme allows the Commission to evaluate and prioritize rate comparability, the Legislature did not give the Commission the authority to regulate or control those prices.

Besides the legal prohibition on price controls, these regulations also represent bad policy. Price controls and limits inhibit private investment in upgrading technology and hinder the ability of an applicant to respond to market conditions. A requirement to freeze or limit prices locks providers into current speed tiers over the current infrastructure. Such controls ask providers to forego investment and upgrades in their networks and the flexibility to respond to consumer demand and changes in technology, in the name of short-term scoring advantages in the grant evaluation process. In the long-term, therefore, price freezes are bad for both the network and consumers.

The decision to implement a price-control regulatory scheme is bad for Nebraska and violates the law. At a bare minimum, however, the Commission should continue to allow for good faith estimates of rate increases during any potential five-year rate freeze period associated with the 2023 NBBP program year.

CONCLUSION

Charter thanks the Commission for the opportunity to file these Comments and respectfully asks it to adopt the changes suggested above.

Dated: March 28, 2023

Charter Fiberlink – Nebraska, LLC and Time
Warner Cable Information Services (Nebraska),
LLC

By: /s/ Kevin M. Saltzman

Kevin M. Saltzman, #20874

KUTAK ROCK LLP

The Omaha Building

1650 Farnam Street

Omaha, NE 68102-2186

Phone: (402) 346-6000

Kevin.Saltzman@KutakRock.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of March, 2023, the above Comments of Charter Fiberlink – Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC, in Application No. C-5484 was delivered via electronic mail to the following:

Nebraska Public Service Commission

psc.broadband@nebraska.gov

/s/ Kevin M. Saltzman