

# SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

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## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska ) Application No. NUSF-139  
Public Service Commission, on its ) Progression Order No. 1  
own Motion, to consider )  
appropriate modifications to the ) FINDINGS AND CONCLUSIONS  
high-cost distribution and ) ORDER AND ORDER COMMENCING  
reporting mechanisms in its ) CHALLENGE PROCESS  
Universal Service Fund program in )  
light of federal and state )  
infrastructure grants. ) Entered: November 28, 2023

BY THE COMMISSION:

The Nebraska Public Service Commission ("Commission"), on its own motion, initiated this proceeding on August 29, 2023 to consider appropriate modifications to the Nebraska Universal Service Fund ("NUSF") high-cost distribution mechanism and associated reporting requirements.<sup>1</sup> In that Order, the Commission invited interested parties to submit comments on issues necessary to determine the distribution for high-cost support in the 2024 calendar year. Those issues were set forth in Subpart II.A.<sup>2</sup>

Comments from interested parties were due on or before September 29, 2023. Comments were filed by the following entities: Charter Fiberlink-Nebraska, LLC and Time Warner Cable Information Services ("Charter"), Cox Nebraska Telcom, LLC ("Cox"), CTIA, the Nebraska Rural Broadband Alliance ("NRBA"), the Nebraska Rural Independent Companies ("RIC"), the Rural Telecommunications Coalition of Nebraska ("RTCN"), and Windstream Nebraska, Inc. ("Windstream").

A public hearing was held in Lincoln, Nebraska, on October 24, 2023. Appearances were entered by Mr. Paul Schudel on behalf of RIC, Mr. Andy Pollock on behalf of NRBA, Mr. Russell Westerhold on behalf of RTCN, Mr. Loel Brooks on behalf of CTIA, and Shana Knutson on behalf of the Commission Staff. Exhibits 1-10 were offered and received into the record.<sup>3</sup>

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<sup>1</sup> See *In the Matter of the Nebraska Public Service Commission, on its own motion, to consider appropriate modifications to the high-cost distribution and reporting mechanisms in its Universal Service Fund program in light of federal and state infrastructure grants*, Application No. NUSF-139, Order Opening Docket, Seeking Comment and Setting Hearing (August 29, 2023) ("August 29 Order").

<sup>2</sup> See *id.* at 6-8.

<sup>3</sup> The hearing exhibits included the Commission's August 29 Order, the hearing publication, and all comments filed by the interested parties.

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## O P I N I O N      A N D      F I N D I N G S

### ***Determination of Eligible Areas for Deployment***

While the Commission's past orders did not specifically require the use of FCC Form 477 data, the Commission has used Form 477 data, which was a publicly available data source, as a surrogate to determine the availability of broadband in a given census block.<sup>4</sup> As this data is no longer available, the Commission sought comment on using the FCC's broadband availability data, the Broadband Collection Data ("BDC"), as the replacement for the Form 477 data.<sup>5</sup>

Some commenters voiced concerns about the use of BDC data in both their written comments and at the hearing.<sup>6</sup> Instead, some commenters requested the Commission continue to rely on last year's list of eligible areas which was based upon FCC Form 477 broadband availability data, with carrier-certified updates.<sup>7</sup> RIC also pointed out that the Commission would also need to implement some process to resolve the fact that the State Broadband Cost Model ("SBCM") uses 2010 census location data while the BDC data uses 2020 census location data and other data sources.<sup>8</sup> Conversely, Cox,

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<sup>4</sup> See August 29 Order at 6.

<sup>5</sup> The Commission notes the FCC Form 477 data was last updated in September of 2022 reflecting broadband service availability reported by carriers as of June 2022.

<sup>6</sup> See, e.g., Comments of RIC at 2-4 (stating many of RIC's members have determined that the BDC tends to overcount Broadband Serviceable Locations ("BSLs") by including, for example, outbuildings, machine sheds, barns, and stacks of hay bales), and Comments of the RTCN at 2-3 (stating the BDC is an evolving dataset, and RTCN members believe more time is needed for it to evolve into a suitable data set for high-cost determinations). See also the Testimony of Dan Davis, TR 22-26; Testimony of Andy Pollock, TR 49:10-22. Compare e.g., Comments of Cox at 1 (supporting the Commission's proposal to aggregate BDC data in light of the discontinuance of the FCC Form 477 data); Initial Comments of CTIA at 3 (stating the Commission's proposal to use FCC BDC data as a substitute for the purpose of determining high-cost support distributions is an appropriate one); Comments of Charter at 2 (supporting the Commission aggregating BDC data for use in its current model to determine high-cost support distributions for the upcoming year); Comments of Windstream at 1 (supporting the Commission's proposal to utilize the FCC's most current published version of the BDC Map to determine high-cost distributions); and the Testimony of Cullen Robbins, TR 13:3-9 (stating while not perfect, the BDC data is the most up-to-date set indicating where service has been deployed).

<sup>7</sup> See RTCN Comments at 3.

<sup>8</sup> RIC Comments at 2.

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Charter, CTIA, and Windstream supported the Commission's proposal to utilize the FCC's most recent version of the BDC data.

Upon consideration of the Department's recommendation and the comments filed, the Commission is of the opinion and finds that the BDC data should be utilized to determine eligible areas for deployment in the 2024 distribution model. The BDC data was developed to collect "better quality, more useful, and more granular broadband deployment data"<sup>9</sup> and is currently being used by the FCC in the determination of eligible locations for the purposes of federal universal service support.<sup>10</sup> Likewise, both the U.S. Treasury and NTIA are utilizing BDC location data in the Capital Projects Funds ("CPF") and Broadband Equity Access and Deployment ("BEAD") programs<sup>11</sup> to determine eligible locations for broadband deployment. Relying on the same dataset for the purpose of determining eligible areas for state support will provide the benefit of consistent determination and reporting in relation to

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<sup>9</sup> *Establishing the Digital Opportunity Data Collection Modernizing the FCC Form 477 Data Program*, WC Docket Nos. 19-195, 11-10, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Rcd 7505, para. 9 (2019).

<sup>10</sup> See *Connect America Fund; ETC Annual Reports and Certifications; Telecommunications Carriers Eligible to Receive Universal Service Support; Connect America Fund - Alaska Plan; Expanding Broadband Service Through the ACAM Program*, WC Docket Nos. 10-90, 14-58, 09-197, and 16-271; RM-1168, Report and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 23-60, at 42, para. 34 (July 24, 2023) ("Enhanced A-CAM Order"). The Commission notes consistent with the federal Broadband DATA Act, we will continue to define a location as having broadband availability as a location where a provider provides service to the location or could provide service within 10 business days upon request through a standard broadband installation as defined by the FCC. See *Establishing Digital Data Collection; Modernizing the FCC Form 477 Data Program*, WC Docket No. 19-195 et al., Second Report and Order and Third Notice of Proposed Rulemaking, 35 FCC Rcd at 7465-66, paras. 12,14 (2020).

<sup>11</sup> See Infrastructure Investment and Jobs Act of 2021, Division F, Title I, Section 60102, Public Law 117-58, 135 Stat. 429 ("IIJA or Infrastructure Act"), Public Law 117-58, 135 Stat. 1205(2021) (In establishing the Deployment Locations Map, the Commission shall ensure that the Deployment Locations Map- (1) compiles data related to Federal funding for broadband infrastructure deployment provided by the Commission, the National Telecommunications and Information Administration, the Department of Agriculture, the Department of Health and Human Services, the Department of the Treasury, the Department of Housing and Urban Development, the Institute of Museum and Library Sciences, and any other Federal agency that provides such data relating to broadband infrastructure deployment funding to the Commission, including funding under- (A) this Act; (B) the Coronavirus Aid, Relief, and Economic Security Act (Public Law 116-136); (C) the Consolidated Appropriations Act, 2021 (Public Law 116-260); (D) American Rescue Plan Act of 2021 (Public Law 117-2); or (E) any Federal amounts appropriated or any Federal program authorized after the date of enactment of this Act to fund broadband infrastructure deployment).

the federal universal service fund broadband deployment obligations, and eligible locations used in other federal grant programs. The Commission understands the commenters' concerns that, as a newer data source, the BDC data and challenge process may still need corrections.<sup>12</sup> However, the Commission also anticipates that many of the past issues have been corrected in the updated version of the fabric which was publicly released on November 17, 2023. Moreover, as discussed below, we are providing a mechanism for providers to challenge block designations based on the BDC fabric data which should provide an adequate remedy to correct any flaws which remain in the updated version. The Commission notes that the BDC data would be utilized to provide an initial list of eligible census blocks for broadband infrastructure support, which can then be challenged during the Commission's challenge process. However, the cost model will continue to be utilized as in prior years to determine the maximum cost eligibility for the census blocks.<sup>13</sup>

### ***Challenge Process***

While the FCC's BDC process has an iterative challenge process, we agree with the commenters recommending that the Commission afford providers the opportunity to challenge the proposed list of eligible locations through a Commission-initiated challenge process.<sup>14</sup> Relying on the FCC's challenge process for determining corrections to the proposed list of eligible locations will not result in a timely adjudication of any flawed availability data that should be corrected.<sup>15</sup> We find that having our own challenge process will allow carriers to correct any missing broadband serviceable locations or correct any other misidentified information appearing in the FCC's updated broadband availability data.<sup>16</sup> Accordingly, we hereby open a challenge window concurrently with this order, which mirrors the prior challenge process used by the Commission, and which is discussed in more detail below.

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<sup>12</sup> See RIC Comments at 2; RTCN Comments at 2-3.

<sup>13</sup> We recognize that if we continue to utilize the SBCM cost model, it will need to be updated to reflect real world costs as they exist today. That update will take time and will need to be vetted. We anticipate that such issues will be determined during subsequent phases of this proceeding.

<sup>14</sup> See RIC Comments at 5; NRBA Comments at 3; and RTCN Comments at 3. *Contra* Windstream Comments at 2; Cox Comments at 2; and Charter Comments at 4.

<sup>15</sup> See RIC Comments at 4 (stating the data would not have been subject to the FCC challenge process and corrections resulting therefrom).

<sup>16</sup> We would, however, encourage the providers to continue to submit challenges to the FCC data through the FCC's online challenge portal.

***Speed Threshold for Support***

The Commission sought comment on whether the 100/100 Mbps benchmark should apply to its determination whether blocks and locations are considered eligible when evaluating the need for high-cost buildout support or ongoing support.<sup>17</sup> The Commission notes that in the NUSF Act, funds distributed from the NUSF for construction of new broadband infrastructure shall go to projects that provide broadband scalable to 100/100 Mbps and that change was implemented in the Commission's deployment support requirements in January 2022.<sup>18</sup> But for the purpose of determining eligible areas for buildout, the Commission questioned whether to continue to use the 25/3 Mbps benchmark to determine whether a census block is eligible for deployment support. Currently, if a provider reports broadband service speeds in a census block at 25/3 Mbps or greater, that area is ineligible for broadband deployment support.<sup>19</sup> An increase in the minimum speed would make locations that are currently served at speeds higher than 25/3 Mbps but below 100/100 Mbps now eligible for broadband deployment support.<sup>20</sup>

The Commission received comments regarding the standard for ongoing support but not many commenters weighed in on increasing the minimum speed standards for buildout support eligibility. Upon consideration of this and the Department's recommendation, the Commission retains the 25/3 Mbps benchmark as the standard to determine which census blocks are eligible for broadband deployment support in 2024. This standard does not mean that the Commission defines an area which has 25/3 Mbps as "served." The Commission, consistent with the definitions used by the FCC in its BDC reporting as well as the definition used by the NTIA in administering the BEAD program, considers an "unserved" location as one where a broadband serviceable location which lacks access to broadband service with a speed of 25/3 Mbps.<sup>21</sup> Service at or above the 25/3 Mbps benchmark to 100/20 Mbps is considered

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<sup>17</sup> See August 29 Order at 7.

<sup>18</sup> Neb. Rev. Stat. § 86-324.01.

<sup>19</sup> See August 29 Order at 7.

<sup>20</sup> See Testimony of Cullen Robbins, TR 14:1-7 (stating by making a change to 100/20 Mbps for broadband buildout support eligibility, funding would no longer be focused only on the locations that are unserved).

<sup>21</sup> See Infrastructure Act § 60102(a)(1).

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"underserved."<sup>22</sup> However, as a policy matter, any continued use of broadband deployment support should focus on those locations that lack broadband at speeds of 25/3 Mbps.<sup>23</sup> Again, recipients of NUSF support for capital improvement projects must provide evidence that the networks are constructed to meet the minimum speeds of 100/100 Mbps per § 84-324.01.<sup>24</sup>

A number of commenters suggested a transitional period for adjusting high-cost support ongoing support eligibility. The NRBA suggested the Commission terminate ongoing support for locations and/or service territories not receiving a minimum speed of 100/100 by June 30, 2025.<sup>25</sup> RTCN likewise agreed that the Commission should bring NUSF ongoing support in line with other state and federal programs.<sup>26</sup> RIC agreed it would be sound policy to transition at a future point in time to 100/100 Mbps.<sup>27</sup> However, RIC noted that a "flash-cut" migration from the current 25/3 Mbps speed standard to a 100/100 Mbps speed standard would have adverse impacts on a number of NUSF support recipients and their customers where speeds of 100/100 Mbps have not been deployed.<sup>28</sup> Windstream supported the Commission applying a 100/100 Mbps benchmark to determine if a location is "served" as long as the Commission would allow the existing service provider to receive support in the area to upgrade the service.<sup>29</sup> The Commission echoes the concerns for customers in areas that today lack 100/100 Mbps service should ongoing support be discontinued for those locations. However, the Commission is also open to a potential transitional mechanism as areas are built out to support 100/100 Mbps service. The Commission will initially leave the 25/3 Mbps threshold in place while the transitional mechanism is discussed, and expects to take the length of any potential transition period under further review during the next phase of this proceeding.

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<sup>22</sup> See Infrastructure Act § 60102(a)(1); See also Neb. Rev. Stat. § 86-1302 regarding the definition of "unserved" for purposes of the Nebraska Broadband Bridge Program.

<sup>23</sup> This means BDS support will not be allocated to areas that have service at speeds above 25/3 Mbps to increase the speed to 100/100 Mbps. As such, there is no need at this time to determine whether 100/20 Mbps is an appropriate benchmark for the purpose of BDS support.

<sup>24</sup> Neb. Rev. Stat. § 84-324.01 (Cum. Supp. 2022).

<sup>25</sup> See NRBA Comments at 4.

<sup>26</sup> See RTCN Comments at 4.

<sup>27</sup> RIC Comments at 5.

<sup>28</sup> *Id.*

<sup>29</sup> Windstream Comments at 2.

***Payment Schedule***

The Commission sought comment on the broadband buildout support payment structure.<sup>30</sup> The Commission implemented a reimbursement-based mechanism as an accountability measure.<sup>31</sup> However, since that time, the Commission has implemented other broadband infrastructure grant programs such as the Nebraska Broadband Bridge Program ("NBBP") and the CPF program which provide advance payments at particular milestones.<sup>32</sup> The Commission proposed adopting a similar payment structure for NUSF support. A number of commenters supported the adoption of an alternate payment structure. Windstream recommended a monthly payment schedule,<sup>33</sup> while RIC suggested structuring payments in three equal installments.<sup>34</sup> The NRBA recommended the retirement of broadband infrastructure funding altogether.<sup>35</sup>

The Commission finds that as an interim measure, the payment structure for NUSF broadband buildout support should be modified so that it is consistent with the NBBP and CPF programs.<sup>36</sup> The Commission adopts this payment structure for all NUSF supported broadband infrastructure projects where project notices were previously filed and also for the infrastructure projects designated in the 2024 calendar year. Specifically, consistent with the payment structure in those programs, one-fourth of the funds awarded will be processed for distribution upon award of the support and receipt of the provider's Acknowledgment and Attestation Form regarding the use of support. One-fourth of the funds will be processed for distribution in the ninth month following the initial installment upon receipt and acceptance of the provider's Interim Progress Report.<sup>37</sup> The final payment for NUSF supported broadband infrastructure projects will be made upon the filing and acceptance of sufficient demonstration of project completion which includes: the Project Completion Form certifying

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<sup>30</sup> See August 29 Order at 7.

<sup>31</sup> *Id.* at 8.

<sup>32</sup> *Id.*

<sup>33</sup> Windstream Comments at 3.

<sup>34</sup> RIC Comments at 6.

<sup>35</sup> NRBA Comments at 5.

<sup>36</sup> The Commission emphasizes that this is an interim measure as it is considering holistic changes to the high-cost distribution mechanism and anticipates that such changes will be implemented for the 2025 calendar year distributions.

<sup>37</sup> The Commission reserves the right to withhold payment, and to require additional reporting based upon concerns related to the company's progress in meeting deployment milestones, concerns related to program documentation, or for the company's failure to comply with Commission' orders or regulations pursuant to Neb. Rev. Stat. § 86-324 (Cum. Supp. 2022).

the company has made the described investment for the provision, maintenance and upgrading of facilities and services in the project area, the filing of invoices and other documentation justifying eligible project expenses, and speed test documentation as required by the Commission. Such information must be filed within ninety (90) days of project completion. The above-listed forms and report templates will be made available on the Commission's website.

***Window and Process for Filing Challenges***

The proposed list of eligible areas is posted on the Commission's website at <https://psc.nebraska.gov/telecommunications/high-cost-information>. All challenges must be filed with the Commission on or before **December 29, 2023**, by 5:00 p.m., Central Time. Challenges must include the specific list of blocks being challenged and the basis for which the challenge is being offered. We encourage carriers to submit most recent BDC data to us along with their challenges. Challenges should be submitted only for blocks listed in the Commission's published list of blocks. Challenges should only address whether a block is served to 25/3 and whether it is competitive. Examples of such grounds may include, but are not limited to, the following: 1) blocks that are served at 25/3 by the incumbent provider; 2) blocks that are served by a competitive wireline provider at 25/3 or greater which offers voice service; 3) blocks that are incorrectly identified as being served at 25/3, and should be eligible for buildout support; or 4) A-CAM eligible locations that have been built to 25/3 during the calendar year 2023. Interested parties filing challenges to the staff's initial list of census blocks must file an electronic copy with the Commission on or before the deadline set forth above. Electronic copies may be sent to [psc.nusf@nebraska.gov](mailto:psc.nusf@nebraska.gov), [Cullen.Robbins@nebraska.gov](mailto:Cullen.Robbins@nebraska.gov), and [Brandy.Zierott@nebraska.gov](mailto:Brandy.Zierott@nebraska.gov). In addition, notifications of challenges and documentation filed in support must also be served on any other carrier(s) whose census blocks may be affected by the challenge.

Unless otherwise subsequently determined, the Commission plans to release the final list of census blocks on or around **January 23, 2024**, along with an updated high-cost support distribution for calendar year 2024.

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O R D E R


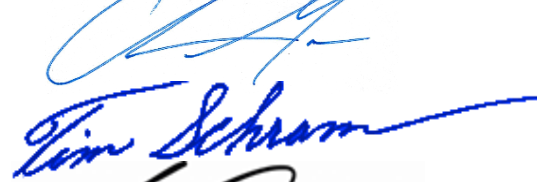

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the opinions and findings set forth above be, and are hereby, adopted relative to the 2024 high-cost distribution mechanism.


IT IS FURTHER ORDERED that interested parties may file challenges to the list of proposed eligible support areas consistent with the findings herein on or before **December 29, 2023**, by 5:00 p.m., Central Time.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska this 28th day of November, 2023.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

  
Chair

ATTEST:

  
Executive Director