

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Application No. C-5561
Public Service Commission, on)
its own motion, to administer)
the Nebraska Broadband Bridge)
Program in the 2024 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 (“Commission”) February 6, 2024 Order (“Order”) seeking comment on issues relating to the 2024 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 as 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 programs and program years maintain substantially similar and consistent provisions.

To that end we offer the following comments.

1) Procedural Schedule

Charter has no comments regarding the proposed procedural schedule.

2) Adjustment to Scoring System

Additional comments on scoring are reflected in the Benchmark Rates and Approval from Local Authorities sections below.

3) Challenge Process

First, Charter agrees that providers should submit Type 1 and Type 2 challenges to a single application separately. Charter believes this process will eliminate any administrative issues in evaluating and responding to such challenges.

In addition, Charter continues to urge the Commission to revisit the speed testing requirements to support a challenge and recommends that the Commission adopt a flexible approach to testing that allows the Commission to evaluate evidence presented to support a challenge.

As a threshold matter, a challenge to a proposed project is based on service being available to indicated locations. Not all locations where service is available actually subscribe to service – and testing can only be done in locations where a customer has subscribed. Typical take rates for broadband in rural areas are approximately 40%, which would exclude 60% of locations in areas where service is indisputably available from testing. Importantly, the take rate or penetration of each project will vary. For example, penetration rates might be significantly lower than 40% if the deployment was completed only a few weeks or months before the challenge testing is due.

In addition, testing can generally only be done at the specific speed tier to which the customer subscribes. Most providers offer a variety of speed tiers, some with speeds slower than 100 Mbps upstream and 20 Mbps downstream – and the lower speed tiers are more affordable

and more popular. So, when customers subscribe to a lower-priced offering with lower upload speeds, such as Charter's Spectrum Internet product (currently offering 300/10 speeds at a promotional price of \$49.99 that includes a mobile phone with unlimited data), Charter can test only to verify that the customer is getting the 300/10 speeds they subscribe to. This means that the locations available for speed testing – **in areas where service at speeds far in excess of 100/20 Mbps is indisputably available** – are quite often less than the sampling numbers set by the Commission require. Consider this hypothetical, which is consistent with Charter's experience in prior challenge rounds:

- A hypothetical project area of 200 locations
- The challenger has gigabit service available to 100 proposed locations.
- Only 30 of those 100 locations subscribe to any service at all.
- Of those 30 subscribed locations, 22 subscribe to lower speed tiers, and only 8 subscribe to speed tiers above 100/20 Mbps.
- But because the challenge area includes 100 locations, current NBBP rules require testing at 10 locations.

Or consider a small project and challenge area: a 10-location project with 4 locations challenged. Current rules require speed testing for at least 5 locations, which automatically disqualifies the challenge and allows overbuilding of those 4 locations.

To avoid these situations, the Commission should build in some flexibility to its speed testing rules. Specifically, the Commission should allow challengers to submit evidence that the facts of a particular challenge make meeting the testing thresholds impractical, and then allow the Commission to consider that evidence and decide for itself whether the speed tests and other

evidence submitted in support of a challenge sufficiently prove that a particular area is served with broadband service at speeds of 100/20 Mbps or better.

Taking a flexible approach is the best approach to serve the public interest. A rigid, formulaic approach to speed testing thresholds that results in duplicating existing broadband infrastructure means that NBBP dollars are wasted, truly unserved locations miss out on funding, and the rural digital divide grows worse. To avoid this result and allow the Commission appropriate flexibility to determine the served, underserved, or unserved nature of locations in connection with the NBBP, Charter suggests the following changes to the speed testing guidelines for the 2024 NBBP funding cycle, shown in legislative format below:

At least one week of 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. ~~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 the locations chosen to be tested were randomly selected. If the challenger cannot test the required number of locations specified below, the challenger must present (a) an explanation as to why the required speed testing thresholds cannot be met, (b) an attestation regarding the speeds available in the challenged area, and (c) speed testing at the maximum number of locations possible, together with other, sufficient evidence to prove that the claimed speeds are available to each of the challenged locations. The Commission shall determine whether the information submitted for items (a)-(c) is sufficient to prove that a challenge should be upheld. 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
50 or fewer	5
51-500	10% of Total Subscribers
Over 500	50

4) Benchmark 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 scoring based on a program-specific benchmark for one specific speed tier. The wide variances and unpredictability of the benchmark – from \$80.50 to \$65 to a proposed \$49.99 in three program years – should indicate that a more objective, predictable, and stable measure is required. These benchmarks are not measures of the general market for broadband services, but only measure offerings from nine providers – they do not take into account offerings by providers outside the NBBP program at all, and even exclude some providers who received grants under the NBBP program.¹ The proposed scoring benchmarks also are focused on one particular speed tier – 100/100 Mbps – that not all broadband providers offer.² The statutes enabling the NBBP provide the path for scoring and giving preference based on price, and Charter urges the Commission to follow the statute word-for-word.

Neb. Rev. Stat. § 86-1306(2)(C) 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. In the

¹ See footnote 7 at page 3 of the Order.

² Charter, for example, does not currently offer that specific speed tier, but offers 300/10 Mbps, 500/20 Mbps, and 1000/35 Mbps options in most of its existing footprint, and symmetrical 1000 Mbps options where fiber-to-the-premise infrastructure is available.

past, however, NBBP guidelines have added two requirements to its rate comparability scoring criteria that are not in the statute:

- (1) language in § 4.2(5)(a) indicating that rate comparability scoring is to be judged only on offerings “in Nebraska;” and
- (2) language in § 4.2(5)(b) that awards five points if rates are below a Commission-specified benchmark for 100/100 Mbps service (in 2023, this was \$65.00).

To conform with the statute, Charter proposes two options. First, the Commission should delete the language that only measures rate comparability “in Nebraska” from its scoring system, and more closely hew to the statutory language which does not have the Nebraska-only limitation. Second, Charter proposes deleting § 4.2(5)(b) from the scoring criteria and awarding all ten affordability points to applicants that comply with subsection (a) (as amended consistent with Charter’s proposal above). Alternatively, the Commission could retain subsection (b) but peg the NBBP scoring benchmark to the FCC’s reasonable comparability benchmarks published at <https://docs.fcc.gov/public/attachments/DA-23-1172A1.pdf>.

Those reasonable comparability benchmarks are based on industry-wide and nationwide surveys using well-established and disclosed methodologies, and reflect a number of different speed tiers that applicants could use if they do not offer the specific 100/100 Mbps offering the Commission currently uses as the scoring benchmark, as shown in the below chart from the most recent FCC rate survey:

Download Bandwidth (Mbps)	Upload Bandwidth (Mbps)	Capacity Allowance (GB)	2024 U.S.	2024 Alaska
4	1	660	\$89.76	\$62.62
4	1	Unlimited	\$89.94	\$64.22
10	1	660	\$89.17	\$82.24
10	1	Unlimited	\$89.35	\$84.38
25	3	660	\$87.83	\$83.24
25	3	Unlimited	\$87.83	\$85.18
50	5	660	\$88.38	\$71.24
50	5	Unlimited	\$88.38	\$71.29
100	20	660	\$92.26	\$125.89
100	20	Unlimited	\$92.26	\$145.75
1000	500	660	\$118.24	\$240.58
1000	500	Unlimited	\$118.24	\$240.58
25	5	660	\$87.93	\$83.24
25	5	Unlimited	\$87.93	\$85.18
100	10	Unlimited	\$88.07	\$129.41
250	25	Unlimited	\$89.98	\$172.75
1000	100	Unlimited	\$117.26	\$167.09

5) Project Budget and Reimbursement

Charter has some concern about developing a standard budgeting template. Different providers budget and estimate costs differently, and applying rigid categories may make comparison among proposals more difficult. For example, there is no category listed for construction labor. Many companies, including Charter, estimate construction labor as a specific category. Other applicants may employ other approaches – but because a one-size-fits-all form requires providers to re-categorize their expenses, and not all applicants may re-categorize their expenses in the same way, comparisons may not be as accurate as evaluating applicants’ budgets separately.

Moreover, consider the category in the proposed spreadsheet for permitting approvals. Many applicants, such as Charter, do not specifically analyze or apply for each construction or right of way permit before applying, but instead provide bids based on their experience and engineering analysis. Final walkouts and permit assessments are not performed until after an application is selected for an award. As such, precise numbers are not available, and cost

estimates for certain categories are combined with others to create the budget estimates that support a bid.

6) Approval from Local Authorities

Charter appreciates the Commission's decision to avoid requiring local approval as a threshold condition to present an application but agrees that community support for projects is important. Charter suggests that the Commission follow the example of several other states who provide additional scoring points to projects that have demonstrated community support. For example:

- Indiana's Next Level Connections program provides scoring points for "Evidence of community support and demonstration of community engagement. This may include, but is not limited to, "personalized" letters of support, attendance at events/meetings demonstrating community engagement at-large, and planning/organizing events for community members."³
- Michigan's ROBIN program provides points for "Evidence of community support,"⁴ providing that "Applicants can show community support in a variety of ways. Formal Public-Private Partnerships (PPPs) are the strongest evidence of community support. ... Applicants without a formal PPP are encouraged to submit letters of support from communities within the proposed service area. These letters, ideally, would include commitments from the communities or interested parties to materially support the project. This support could be in the form of matching funds, permit fee or process reductions, dedication of a single point of contact within the community to ensure project timeliness,

³ <https://www.in.gov/ocra/nlc/files/NLC-4-Application-Instructions-Round4-8-9-23.pdf>

⁴ https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/MIHI/ROBIN-Grant/ROBIN_Program_Guidance.pdf

waiver of certain requirements, or other methods the community offers in support of the project. Letters of support without such commitments will also be considered.

Applicants should provide links to any relevant and published community plans that specifically call for the expansion of service like those proposed in the application.”

- Texas’ BOOT program assigns 15% of applications’ scores to three categories of “Community Support and Involvement:”⁵
 - “Public Outreach and Support: Extent to which community outreach has gathered input from a broad array of stakeholders, including historically underrepresented groups;
 - Level of Coordination with Stakeholders: Breadth of community involvement and political support for the proposed project, as evidenced by partnership agreements with impacted political subdivisions and/or local non-profit organizations, or letters of support from non-profit organizations, elected officials, local governments, and/or other entities; level of coordination with the local broadband planning committee (if applicable); and
 - Integration of Community Feedback: Extent to which stakeholder feedback has been integrated into the scope of the proposed project.”

Charter suggests that the Commission adopt some approach like these examples or the other states that measure and award ten points for projects that have customer support. This could be done by eliminating the scoring points awarded for rates that are close to the benchmark (for the reasons noted above), and reducing or eliminating the points available simply for an applicant having ETC certification.

⁵ <https://www.txsmartbuy.com/esbddetails/view/BDO-NOFA-001#>

Awarding applicants points for securing required permits and approvals is not likely a helpful policy, however. The Commission should not encourage applicants to require local permitting and rights-of-way authorities to process applications and permits for projects that may not gain approval. Such a process would waste significant resources of applicants and permitting authorities and could create false expectations in the communities where permits are obtained that approval is assured, when the NBBP is an extremely competitive process. In addition, most experienced providers have processes in place such that the required permits and rights-of-way access are readily obtainable without adding significant delays to broadband deployment projects, so the benefits of getting permits in advance are not significant. Charter recommends not adopting such a policy.

7) Maximum Per Location Cost

Charter does not believe a per-location funding cap is appropriate, but to maximize efficient use of NBBP funds, recommends that the Commission adapt its scoring approach to prioritize projects with low per-location costs. Charter agrees with the Commission's observation in its *November 7, 2023 Order* establishing the CPF-2 funding round guidelines that "a bright line cap may hinder the flexibility to allocate funds in accordance with the unique demands of" specific high-cost locations in the state. At the same time, however, the policy regarding the question of establishing a cost cap – how to most effectively and efficiently utilize limited NBBP funds – is important. The current scoring guidelines incentivize inefficient spending, because: (a) the scoring guidelines do not prioritize low-cost projects; and (b) the scoring for matching contributions tops out at 60%, which creates an inefficient incentive for applicants to limit their matching contribution, as contributing beyond a 60% match gains no points or priority under the current system.

To improve efficiency and avoid awarding support for projects with extremely high per-location costs, Charter suggests: (a) changing the matching contribution scoring so that applicants get one point percentage matched, up to 95% (a maximum of 95 points); and (b) awarding additional points to projects based on their per-location cost net of NBBP support such that projects in the lowest cost quartile get 10 points, the second lowest quartile scores 7 points, the third lowest quartile scores 3 points, and the projects in the highest per-location cost quartile score 0 points. This approach would increase the total number of points available in the 2024 NBBP to 200 from 155 and create appropriate bidding and application incentives so that the NBBP reaches the most unserved and underserved locations possible given limited funding.

8) Past Performance and Useful Life of Facilities

The Order seeks comment on the proper approach to measure applicants' compliance capabilities and long-term commitment to projects. These items are already assigned 20 out of a possible 155 points in the prior NBBP round in the financial and legal capability sections; Charter does not recommend any additional consideration for these items.

9) Submission of Serviceable Locations

Charter agrees with the Commission's prior conclusions that applicants should choose their project areas and agrees that the Commission should be able to track whether applied-for locations have received promised and funded access to internet service. At the same time, the FCC's fabric and BDC submission process is ever-changing and improving, but will never be 100% accurate. Therefore, Charter urges the Commission to require submission of BDC locations in connection with applications, but also allow flexibility in the application and compliance phases of the NBBP, recognizing that there may always be some variance between locations identified as serviceable or served in the FCC datasets and what the actual locations are

once facilities are deployed, and allow for a dialogue between applicants and the Commission to flexibly work towards resolving any variances to the extent practicable.

10) Cybersecurity and Prohibited Equipment

Charter agrees that NBBP funding should not support the purchase of equipment prohibited for use by the Federal Communications Commission pursuant to 47 U.S.C. § 1601. Indeed, most providers already are required to certify that they have no such equipment to the Commission each year, pursuant to the Commission's orders in Application Nos. C-5493 and C-5520, Governor Pillen's Executive Order No. 23-05, and Neb. Rev. Stat. §§ 86-125 (4)(c) and 86-324 2(d). It does not seem that additional requirements to report the same information are needed or helpful, but Charter would not object if the Commission required applicants to certify that they are complying with the above-cited orders and statutes.

Cybersecurity plans require careful treatment. Any disclosure of specific cybersecurity tactics and measures, even if protected by confidentiality agreements or protective orders, could undermine those plans. Charter, and many other providers, have robust cybersecurity programs and plans. An extensive discussion of the publicly available aspects of Charter's various cybersecurity plans can be found at pages 27-30 of our most recent Environment, Social and Governance report accessible at <https://corporate.charter.com/esg-report.pdf>. If the Commission determines to require or score cybersecurity plans, discussions at this level of detail and specificity, disclosed publicly, should be sufficient to meet any requirements or score full points.

11) Program Structure

Charter's comments regarding program structure are captured above. Importantly, however, Charter appreciates that the Commission regularly evaluates and seeks comments on how to improve the NBBP program. Even though the program is maturing, given ever-changing

technology and laws, as well as the impact of BEAD funding programs, that regular evaluation process will remain helpful going forward, and Charter urges the Commission to continue it.

Dated: March 1, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of March, 2024, the above Comments of Charter Fiberlink – Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC in Application No. C-5561 was delivered via electronic mail to the following:

Nebraska Public Service Commission:

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