

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its Own Motion, to Implement Standards for the Verification of Broadband Service Provider Coverage and Speed Data.

Application No. NUSF-133
Progression Order No. 1

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 these comments in response to the Commission’s June 25, 2024 Progression Order No. 1 seeking comment on issues relating to speed testing speed test requirements for Nebraska Telecommunications Universal Service Fund (“NUSF”) high-cost recipients and entities receiving funding from other Commission grant programs.

Introduction

Charter participates in the Broadband Bridge Program and the Capital Projects Fund programs, where the Commission’s speed testing protocols and rules apply. As such, Charter has participated in this proceeding and other proceedings before the Commission related to speed testing for state- and federally-funded broadband grant and support programs. In this Progression Order, Charter offers comments on Item 2 (“Minimum Number of Subscribers”) and Item 6 (“Department Discretion”). On these topics, Charter proposes a framework to provide the Commission discretion, when needed and where justified, to depart from the default or presumptive speed testing guidelines.

Analysis: A Flexible Speed Testing Framework

Charter agrees with the Commission’s observation in the Progression Order that “some carriers have difficulty in obtaining a minimum number of subscribers required for testing.” Charter has repeatedly encountered this difficulty, especially in the context of supporting challenges that specific locations within a proposed broadband project are already served by broadband networks and should not be overbuilt with public funding, because typically the number of locations that a proposed broadband project may overlap is quite small. Charter therefore continues to urge the Commission to revisit its speed testing requirements and recommends that the Commission adopt a flexible approach to testing that allows the Commission to evaluate evidence presented either to support a challenge or to establish that publicly funded broadband service has been deployed at the agreed-upon speeds.

As a threshold matter, speed testing should determine whether service is 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 required 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 – **at locations 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:

- 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 project or 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 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 for challenges 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. A rigid approach to post-deployment testing for grant-funded projects invites unnecessary disputes and litigation. To avoid these results and allow the Commission appropriate flexibility to determine the served, underserved, or unserved nature of locations in connection with its various broadband support programs, Charter suggests the following principles for speed testing guidelines, which can be applied in either a challenge or compliance context:

1. *At least one week of speed and latency testing data performed on active subscriber locations within an area subject to a testing requirement must be submitted. Speed test data and methodologies used should be consistent with the Performance Measures Testing standards set by the FCC with regard to the HUBB portal.¹*
 - a. *Consistent with the criteria described by the FCC, providers can choose from among three options for speed and latency testing:²*
 - i. *A carrier may leverage existing Measuring Broadband America (MBA) testing infrastructure by using entities that manage and perform testing for the FCC MBA program to conduct network performance testing. The carrier is responsible for all costs required to implement network testing.*
 - ii. *A carrier may use existing network management systems and tools, ping tests and other commonly available performance measurement and network management tools to implement performance testing.*
 - iii. *A carrier may develop its own self-testing configuration using software installed on subscriber gateways or in equipment attached to subscriber gateways to conduct speed and latency tests.*
 - b. *Providers are only required to test active subscribers to broadband service at 100/20 Mbps or better who have a modem or router that is capable of measuring both speed and latency.*
2. *Speed test data must support the availability and access to 100Mbps/20Mbps speed service the active subscriber locations in the area subject to a testing requirement (or a lower speed threshold if the locations are part of a grant or other support mechanism with lower speed threshold requirements). 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*

¹ A helpful summary of this testing approach is located at <https://www.fcc.gov/general/measuring-broadband-america-measuring-fixed-broadband>.

² <https://www.usac.org/high-cost/annual-requirements/performance-measures-testing/> (bullet points in original, hyperlinks removed)

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.

3. *Providers subject to speed testing requirements must demonstrate that the locations chosen to be tested were randomly selected. If the provider cannot test the required number of locations specified in paragraph 4 below, the provider 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.**

4. *The Commission shall determine whether the information submitted for paragraph 3.a- 3.c above is sufficient to prove that broadband service exists or has been deployed as claimed. The number of speed test locations presumptively required is based on the number of subscribers in the challenged area, as follows:*

<i>Number of Subscribers in Area</i>	<i>Number of Test Locations</i>
<i>300 or fewer</i>	<i>3</i>
<i>300-1000</i>	<i>1% of Total Subscribers</i>
<i>Over 1000</i>	<i>10</i>

Conclusion and Recommendation

Charter appreciates the opportunity to comment on these important matters, and appreciates the Commission’s dedication to reaching unserved Nebraskans with high-quality, high-speed broadband services. Charter urges the Commission to recognize these important areas of consensus in its speed-testing policies for NUSF and other broadband programs it administers: (1) follow FCC program testing rules as closely as possible, preferably using the methodologies used in the Measuring Broadband America program; and (2) use flexible, but evidence-based approaches to speed testing that require specific proof from providers and which are overseen and evaluated by the Commission.

DATED this 23rd day of July, 2024.

Charter Fiberlink - Nebraska, LLC and Time
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of July, 2024, a true and correct copy of the foregoing document was delivered via electronic mail to the following:

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s/ Mattea Fosbender

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