

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service) Application No. NUSF-133
Commission, on its own motion, to) Progression Order No. 1
implement standards for the verification)
of broadband service provider coverage)
and speed data.)

COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES

The Nebraska Rural Independent Companies (“RIC”)¹ submit these Comments in response to the Order Seeking Comment and Notice of Hearing entered by the Nebraska Public Service Commission (the “Commission”) in this matter on June 25, 2024 (the “*NUSF-133, P.O. #1 Order*”).

I. INTRODUCTION

On March 1, 2022, the Commission entered its Order Opening Docket and Seeking Comment in this matter. On April 15, 2022, RIC filed Comments in response to such Order (the “*4/15/22 Comments*”) and on May 4, 2022, RIC filed Reply Comments in this docket. On July 26, 2022, RIC’s witness, Dan Davis, testified at the public hearing relating to this docket. RIC continues its participation in this docket through the submission of these Comments in response to the *NUSF-133, P.O. #1 Order*.

In the below Comments, RIC will first set forth the topic or question in response to which comments are requested in the *NUSF-133, P.O. #1 Order* followed by RIC’s responsive

¹ Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Great Plains Communications, LLC, Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K & M Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Sodtown Communications, Inc., and Three River Telco.

comments. RIC appreciates the opportunity to provide these Comments to the Commission and to participate in this docket.

II. RIC'S RESPONSES TO THE COMMISSION'S QUESTIONS

1. Overview of Requirements

The Commission seeks comment on the efficacy and practicality of these requirements [set forth in its November 8 Order]. Is the framework adopted in the November 8 Order sufficient to ensure that adequate connectivity is being provided to customers, without being overly burdensome to carriers? What impediments exist to carriers in meeting these requirements? The Commission seeks comment on any general program changes which should be adopted.

Responses: In its *November 8 Order*² the Commission appropriately found that “[g]enerally, the Commission finds that the existing performance measures testing framework put in place by the Federal Communications Commission (“FCC”) should be used as a model for speed testing in Nebraska.”³ RIC believes that insofar as possible, the Commission should utilize the FCC’s performance measures testing framework as it now exists or may be amended in the future for speed testing in Nebraska. The foregoing statement should be the guiding principle regarding all inquiries set out in the *NUSF-133, P.O. #1 Order*. Adherence to the foregoing principle will minimize undue burdens on service providers required to perform speed testing. Further, if a location or locations are to be tested in conjunction with a federal support program enforceable commitment, duplicate testing should not be required by the Commission for such location(s).

Based upon experiences by RIC member companies to date in their efforts to comply with the Commission’s speed testing requirements announced in the *November 8 Order*, RIC

² 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, Order Setting Speed Test Requirements, Nov. 8, 2022 (the “*November 8 Order*”).

³ *Id.* at 2.

identifies the following impediments to compliance with such testing requirements: (1) problems with crosstalk during testing and the Commission's current requirement to replace a customer with observed crosstalk during testing with a new testing location which approach differs from the FCC's resolution of this problem that eliminates the customer with crosstalk from the final speed and latency test calculation;⁴ (2) many grant-funded projects with testing requirements consist of small numbers of locations which, together with low initial take rates, create problems with selection of an adequate number of test locations to comply with the Commission's current minimum testing requirements;⁵ and (3) costs of conducting testing exceed the benefits of such testing, particularly regarding (a) fiber installations which presumptively will meet speed requirements and (b) locations not subject to FCC testing requirements. Each of these impediments is more fully discussed below.

FCC testing requirements recognize that customer Internet usage (referred to as "cross talk") can and does occur during testing periods. As such, any tests where consumer internet usage exceeds the crosstalk thresholds (see footnote 4) during the testing window are reported as such and are not utilized by the FCC.⁶ In these instances where the crosstalk threshold is met,

⁴ According to the FCC, "[a] carrier may report that no test was successfully completed due to "crosstalk" caused by consumer activity if the consumer traffic meets thresholds of 64 Kbps for download tests or 32 Kbps for upload tests, and if the carrier begins attempting speed tests within the first 15 minutes of a testing hour and repeatedly retries and defers tests at one-minute intervals. See FCC 15-104 at para. 26.

⁵ Particularly with regard to reverse auctions of NUSF High Cost Program broadband deployment support, it is common for a designated MBU to consist of only one or two locations and thus compliance with minimum testing requirements is impossible.

⁶ If the crosstalk threshold is detected during this first minute of the testing hour, that test is marked as unsuccessful due to crosstalk and another test commences during the second minute of the hour. If that test detects crosstalk, then the test is marked as an unsuccessful test due to crosstalk and the next test occurs during the third minute of the hour. This process repeats itself every minute of each hour until a valid test without crosstalk is registered. If, after the end of the

the FCC does not penalize the service provider for inability to submit 100% of all valid speed tests for the location.

RIC believes that current issues presented by crosstalk during testing windows will be resolved if the Commission adopts the FCC testing requirements rather than continuing with the Commission's current response to crosstalk when experienced during carrier testing. Therefore, as stated above, RIC recommends adoption of the FCC testing requirements.

Many grant-funded broadband deployment projects include only a small number of locations. Such circumstances create compliance problems with the Commission's current minimum testing requirements. Please refer to RIC's discussion of this issue in response to item 2 below for further comments on this subject.

The financial burdens of testing, particularly regarding fiber installations which will presumptively meet speed requirements and testing of locations funded by State grants, i.e. Nebraska Broadband Bridge Act funding, should be minimized by the Commission. The Nebraska Legislature has provided that "[a]ny recipient of ongoing high-cost support from the Nebraska Telecommunications Universal Service Fund shall agree to submit to speed tests *as determined by the commission.*"⁷ (emphasis added) Thus, the Legislature has delegated to the Commission the discretion to set the testing regime to be employed by service providers. RIC submits that it is reasonable for the Commission to apply a cost-benefit analysis to its testing requirements. Locations built using fiber technology should be presumptively regarded as satisfying the Legislature's specified 100/100 Mbps speed threshold. RIC recommends that the

first hour there are zero valid tests due to crosstalk, the service provider does not report a valid test for that hour. This process can sometimes repeat over ensuing hours or even throughout the testing window due to consumer Internet usage causing the crosstalk threshold to be met.

⁷ *Neb. Rev. Stat.* § 86-324.02(1).

Commission authorizes a speed test waiver for fiber-equipped locations unless a consumer complaint is submitted to the Commission regarding available broadband speeds.⁸

2. Minimum Number of Subscribers

What factors might influence the take rate [for broadband services] in a given area? What impact do providers' rates, customer service, and general reputation have on a provider's ability to ensure residents subscribe to service? Are these factors the Commission should weigh when reviewing project applications to ensure the take rate will be sufficient to conduct speed testing?

In general terms, the Commission also seeks comment as to whether the minimum numbers of locations are appropriate, or if they should be adjusted. Should the Commission adopt advertising requirements or other measures to ensure funding recipients achieve a take rate sufficient to conduct speed testing? What other steps might carriers and/or the Commission take to ensure adequate speed testing can be conducted? Should exceptions be granted if competing providers are providing service in the area?

Responses: This paragraph responds to the first paragraph of the above inquiry. There are various factors that impact take rates. These include user demographics (i.e. elderly persons are less likely to subscribe), lack of customer premises hardware, lack of user training, etc. RIC's position is that the purpose of this docket is to investigate whether the Commission has implemented adequate measures to assure that public funds allocated for broadband deployment have been properly used and that the service provider receiving funding has constructed network facilities consistent with funding requirements. As such, RIC respectfully submits that it is not the role of the Commission in this docket to pursue inquiries as to market penetration or take rates for broadband service once deployed. Specifically, the Commission should not undertake to require service providers to implement advertising campaigns or other promotional efforts. These activities are uniquely within the purview of the management of service providers. Nor is

⁸ Completion of fiber build out at a location could be confirmed by (a) photographic evidence of the final installation; (b) invoices presented for reimbursement evidencing fiber buildout; and/or (c) service provider certifications.

the matter of scoring broadband deployment project applications a subject that is properly investigated in this docket.

The following paragraphs respond to the second part of the above inquiry. In order to implement speed testing that is more workable for projects in locations with a single service provider and projects in locations with multiple service providers, RIC recommends that changes should be made regarding the minimum number of locations required to be tested, as enumerated in the table located on page four of the *November 8 Order*,⁹ as well as the manner by which additional customers may be selected to supplement the lack of testing locations.

The Commission's current requirement in the *November 8 Order* that projects with 50 or fewer locations require a minimum of 10 test locations, regardless of project size, is especially problematic.¹⁰ For example, if a funded area contains 20 locations, at least half of the locations in the project area must be tested under the current requirements to meet the minimum of 10 test locations. Because testing locations may only be comprised of active customers,¹¹ if the service provider in this example does not have a 50% take rate within the construction timeline, then the service provider will not have enough customers at the end of the project to satisfy the testing requirements of the *November 8 Order*. This issue of the number of customers available for testing at project completion occurs more frequently in a project where a competitive provider has received grant funding to overbuild an incumbent provider, i.e. reverse auctions.

⁹ Regarding the number of locations in a funded area, current Commission requirements are as follows: 50 or fewer locations in the funded area require 10 speed testing locations; 51-500 locations require 10, or 10% of the total number of locations, whichever is greater; and over 500 locations require 50 test locations.

¹⁰ The number of locations required to be tested in the NBBP and CPF programs according to the NBBP and CPF Program Guides is five when there are 50 or fewer locations.

¹¹ *November 8 Order* at p. 5.

Additionally, there are instances in which Commission-funded projects have fewer than ten total locations, i.e. MBUs in reverse auctions. Modifications to the current minimum testing requirement of ten locations as referenced on page 3 of the *NUSF-133, P.O. #1 Order* and page 4 of the *November 8 Order* are necessary to allow service providers receiving grant funds to complete project closeout requirements in a timely manner. Making the minimum number of locations consistent with the NBBP and CPF programs could ameliorate if not alleviate this issue depending on project size.

The *November 8 Order* does allow a service provider to supplement speed testing locations with its served locations outside of the project area.¹² However, because the supplemental locations are required to be locations that are “nearby” (which is not a defined term), this workaround is not helpful when the project area is remote from the service provider’s existing network.

RIC recommends that the following modifications be made to speed testing requirements for grant programs:

1. The number of speed test locations required for a project should constitute 10% of the locations in the project area with a maximum of 50 locations.
2. The required number of speed test locations should be changed from ten to five when the number of locations in a project area is 50 or fewer.
3. If fewer than 10% of the locations in a project area can be tested, a service provider should be required to test all customers in the project area (there would be no need to randomize as all capable locations would be tested).

¹² *Id.* fn. 5.

4. In instances where fewer than 10% of locations are capable of being tested, the Commission should retain the ability to inquire about locations within that project area and require the recipient of support to conduct speed testing at locations within the project area to coincide with that service provider's annual speed testing conducted under the *November 8 Order*.¹³

Ultimately, RIC's recommended speed testing modifications for grant projects would create requirements that allow for service providers to complete closeout activities for a project regardless of the number of customers, while at the same time providing the Commission with the ability to require additional speed testing for projects that do not have sufficient customers to conduct speed testing at project completion. In the alternative, in those instances with a limited number of locations to satisfy minimum testing requirements, RIC believes that it is entirely reasonable for testing to be waived in connection with fiber-based projects and for the Commission to assess successful buildout based upon the attestations and other documentation regarding the project.

3. Minimum Adequate Threshold

The Commission therefore proposes to adjust the requirement to an 80/100 adjusted framework, where at least 80% of the tests are required to meet the speeds required by statute or grant program.

The Commission also seeks to review latency requirements. Given that latency measurements improve the closer they are to zero, the 80/80 standard cannot be appropriately applied. Should the Commission revisit this requirement so that at least 95% of test results must demonstrate less than 100 milliseconds latency in alignment with the FCC's framework?

Responses: As set forth at the outset of these Comments, RIC advocates that the Commission should adhere to the testing protocols and requirements established by the FCC. Thus, the

¹³ RIC also recommends that for projects that are fiber-based, the Commission should implement a testing waiver procedure. See RIC's suggestion at pages 4-5 above.

current 80/80 standard should not be changed to an 80/100 standard. RIC does not believe that latency concerns are applicable to the fiber technology deployed by RIC member companies.

4. Speed Testing for Past Projects

The Commission seeks comment on whether it is still valuable to seek speed testing information at speeds of 4/1 Mbps, 10/1 Mbps, or 25/3 Mbps. Should the Commission revise its testing requirements to reflect this difference?

The Commission also seeks comment as to how it can best ensure current, accurate information is being obtained with regard to older projects. What steps should the Commission take to revise its testing requirements for past projects? Should providers be required to submit speed testing reflecting the maximum capability of the network, rather than the minimum speeds required to receive support?

Responses: RIC advocates that speed testing should be done once and should not be repeated.

In the unlikely event that a customer location experiences issues with broadband speeds, such issues should in the first instance be resolved by customer contact with the service provider. If the customer is unsatisfied with the service provider's response, an informal complaint may be filed with the Commission and the Commission Staff can intercede to assist with resolution of the complaint.

With regard to testing of "older projects" and possible testing for maximum network capabilities, RIC reiterates its position that the Commission should adhere to FCC testing requirements. RIC believes that providers should not be required to submit speed testing reflecting maximum network capabilities, but rather should test for minimum speed capabilities in order to receive support. Maximum network capabilities depend on the network design/architecture, type of electronics installed, and equipment at customer locations. Requiring providers to test only for maximum speeds creates administrative burdens and does not provide useful information reflective of the network deployed.

5. Reimbursement Process and Ongoing Support

The Commission seeks comment on whether the existing speed test approach should be adjusted in light of statutory changes. Should recipients of ongoing high-cost support be required to meet certain speed testing thresholds before support is distributed? If so, what should those thresholds be, and how frequently should testing be conducted?

Responses: In light of the costs and other burdens associated with speed testing, RIC advocates that the Commission should only require testing to be completed one time unless the Commission receives an informal customer complaint that advertised and invoiced charges for specific speed levels are not being delivered by a service provider. It would be wasteful and unnecessary to require multiple speed tests absent a customer complaint.

6. Department Discretion

The Commission also seeks comment on whether speed test requirements should be revised to provide for additional flexibility and/or discretion for the NUSF Department in reviewing test results. For example, if a carrier is struggling to meet the minimum testing requirements due to project overbuild or a low take rate, should the department have the ability to provide exceptions to testing requirements? Similarly, should grant projects serving a low number of locations be subject to ongoing annual testing? Alternatively, if a carrier can demonstrate clearly adequate results for a subset of locations, should the department be allowed the discretion to waive the remainder of tests? In what scenarios might additional flexibility be appropriate, or inappropriate? The Commission seeks comment on whether there should be established criteria or guidelines to govern when and how discretion should be applied.

Responses: RIC respectfully submits that the problems that would be created by affording “flexibility and/or discretion” to the NUSF Department regarding testing requirements are that subjectivity and non-uniform regulation would be introduced into speed testing protocols. As an alternative, RIC recommends that the Commission refine testing requirements in such a manner that small projects with limited access to subscribers can satisfy the requirements as recommended above by RIC. It should be a Commission objective to craft rules that fit all projects and circumstances. Eliminating the subjective nature of exceptions that are created on a case-by-case basis will help ensure that the rules are applied fairly to all carriers. Further and as

suggested previously, RIC believes that it would be desirable for the Commission to establish criteria that, if met, would allow for a waiver of testing requirements in certain contexts.

7. Other Topics

The Commission welcomes comments on other topics relevant to its speed testing framework.

Responses: At this time, RIC has no additional comments on other speed testing-related topics to offer.

III. CONCLUSION

The Nebraska Rural Independent Companies appreciate the opportunity to provide these Comments in response to the *NUSF-133, P.O. #1 Order*. RIC looks forward to further participation in this proceeding.

Dated: July 23, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of July 2024, an electronic copy of the foregoing pleading was served on the Nebraska Public Service Commission via email at psc.telecom@nebraska.gov and on the parties to this docket.



Paul M. Schudel