

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

In the Matter of the Nebraska Public Service Commission, on its own motion, to administer the second round of federal Capital Projects Funds for broadband development in Nebraska.	) ) ) ) ) )	Application No. CPF-2  Progression Order No. 1
---	----------------------------	--

---

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

---

In response to the Nebraska Public Service Commission’s *Order Opening Docket and Seeking Comment*, entered August 15, 2023, Charter Fiberlink - Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC (collectively, “Charter”) submit the following comments:

As we have noted in previous comment cycles, Charter supports the Nebraska Broadband Bridge Program’s (“NBBP’s”) goal to provide quality broadband internet to every Nebraskan, and the Commission’s regular review of the various NBBP guidelines to ensure compliance with applicable law, funding source requirements, and the fair treatment of all consumers and providers.

**1. Should the PSC establish a per-location subsidy cap and if so, how much should the cap be?**

No. Applicants should be given flexibility to submit any projects at any subsidy request and the Public Service Commission (“Commission” or “PSC”) should evaluate those projects based on their merits, with an emphasis on minimizing per-location outlay. Applications with a lower cost to the state should score more than high-cost applications, but capping the subsidy per location

that an applicant could request will limit what projects can be submitted and give the PSC fewer projects to choose from.

**2. Are there any instances where the Commission should consider an applicant ineligible due to past performance issues? What issues should the Commission consider as precluding a grantee from consideration? What sort of due process should be given by the Commission prior to any decision to exclude an entity from grant eligibility?**

As a core principle, the Commission should continue the current process that encourages the submission of projects from every provider to give the Commission the most options to choose from. Performance issues and defaults differ in both kind and degree, and a bright-line rule would likely be underinclusive or overinclusive. The Commission should enhance its flexibility to exclude or limit providers' participation upon analyzing the particular performance issues or defaults in a given case, after a notice and hearing. This approach gives the Commission the ability to take into consideration the circumstances of any issues while also discouraging bad actors.

**3. How should the PSC classify DSL?**

Residents who are provided service only by Digital Subscriber Line ("DSL") broadband technology should be considered "unserved." DSL technology has limited speed capacity and works only over short distances from core network equipment. Investing in DSL technology or discouraging investment to homes who receive service via DSL technology will leave some Nebraskans without appropriate broadband infrastructure both now and in the future. Indeed, the FCC has concluded that "DSL broadband ISPs ... continue to advertise 'up-to' speeds that, on average, exceed the actual speeds experienced by their subscribers," and specifically determined that "DSL speeds lag far behind" the speed of other technologies. For example, in the FCC's *Twelfth Measuring Broadband America Report*, FCC data revealed that the weighted mean advertised download speed for DSL technology was just 24 Mbps, which "lagged considerably

behind” the weighted advertised download speed of fiber technology at 510 Mbps. (FCC, *Twelfth Measuring Broadband America Fixed Broadband Report*, at 11-13 (Jan. 6, 2023) (“FCC MBA Report”)).

As a result, the majority of states that have released draft BEAD challenge processes have proposed to adopt this targeted modification, which NTIA has concluded will “better reflect the locations eligible for BEAD funding because it will facilitate the phase-out of legacy copper facilities and ensure the delivery of ‘future-proof’ broadband service.” (NTIA BEAD Model Challenge Process at 8). While the CPF-2 program is not BEAD and is not governed by the same rules, the policy articulated by the NTIA and many states to emphasize robust infrastructure scalable to multiple gigabits per second in both the upstream and downstream directions makes sense for the Nebraska Broadband Bridge Program as well.

#### **4. Should the PSC further regulate the project area of submitted applications?**

The Commission should maintain the flexible nature of how applicants can define their project areas to encourage participation and the submission of the best possible projects.

Allowing prospective subgrantees to define their own proposed project areas makes sense given the nature and scope of Nebraska’s unserved and underserved areas. This approach reflects the reality that many unserved and underserved locations have unique circumstances, such as difficult terrain or right-of-access issues that prevent providers from otherwise connecting and serving those locations. By continuing to allow applicants the flexibility to define their own proposed project areas, the Commission will facilitate more efficient bidding. Free from the unnecessary and artificial constraint of conforming project areas to a defined geographic level, providers will be able to propose serving areas that are most contiguous to their existing broadband

network footprint, which will maximize the number of unserved and underserved locations they can reach at the most efficient cost and help the Commission stretch Broadband Bridge Program funding to connect as many unserved and underserved residents as possible.

- 5. The Commission seeks comment on whether to require applicants to certify that they have adopted cybersecurity plans, software, firewalls, or taken other steps to improve cybersecurity practices. If so, how should the Commission assign points within its scoring metric for this area? Should the Commission require an attestation that cybersecurity practices are in place, and if so, what should be included in the attestation?**

The Commission should avoid regulating the cybersecurity policies of Broadband Bridge Program applicants. Requiring a certification begs the question of what applicants will certify to – and what kinds of cybersecurity policies are best for a given provider, a particular technology, or a specific applicant. The Commission is not equipped to make those evaluations. While cybersecurity is important, at most the Commission should require is an applicant’s description of their cybersecurity plans and measures as a portion of the evaluation of an applicant’s technical and managerial ability to build and sustain proposed projects. The specifics of any described cybersecurity plans should be left up to the individual provider and adopted according to their own business practices, and the Commission should avoid ranking or evaluating – and especially should refrain from regulating –different cybersecurity approaches.

- 6. Are there other factors that the PSC should consider? Should the Commission require approval of the impacted governmental entities? Should the Commission require that grantees certify that projects funded through NBBP cover all costs to reach the customer premise, including drops to the residence or business for all serviceable locations?**

- a) *Do not require local approval for broadband projects.* The Commission must not require local government approval to initiate grant funding. Funding decisions under the NBBP have been assigned to the PSC, not local governments. Local preferences should be given

appropriate weight, but approval should not be required. Requiring local government approval for projects can create – or exacerbate – conflicts of interest, particularly if a local government is considering building broadband infrastructure. And none of the statutes underlying the NBBP or any of the federal funding sources that the program uses contemplate giving municipalities “veto power” over broadband deployment funding decisions.

- b) *Prefer projects that are designed to reach substantially all locations in a proposed project area with standard installations.* While some locations may not be able to be reached with a standard installation due to extraordinary circumstances or the lack of access, the Commission should be mindful of the possibility that applicants may build a bare-bones network – not fiber to the premise – that requires significant contribution from customers in the form of installation or line extension charges, and prefer applications where non-standard installations are the exception, not the rule.
- c) *Eliminate pricing benchmarks.* Charter appreciates the steps the Commission has taken to eliminate rate regulation and price freeze requirements in the NBBP. Artificially restricting prices or product offerings increases the costs of the program and will make it difficult for providers to bid in high-cost areas where below market rates and prescribed speed tiers will force providers to request more NBBP subsidies up front to build networks, and build in the need for permanent subsidies to support service over time. By allowing providers to meet affordability targets by pricing services in NBBP-subsidized areas the same as offered in their non-subsidized areas, NBBP grant dollars will go further and the need for future subsidies will be reduced.

d) *Adopt flexible speed testing rules.* Charter continues to observe challenges with the testing benchmarks. The sample sizes required are often prohibitive. In served areas, not every customer subscribes – and only subscribers can be tested. Moreover, even in areas that are actually served with gigabit-class service, few customers currently purchase the higher speed tiers, which means that only a fraction of customer locations in a given area are even able to be tested. Charter requests that the Commission clarify that when there are not enough active customers able to be tested in a particular area, providers can establish the existence of service through other means, and the Commission will assign the evidence of service provided the weight it is due given demonstrated challenges with the testing protocols and required sample sizes.

Respectfully submitted this 15<sup>th</sup> day of September, 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](mailto:Kevin.Saltzman@KutakRock.com)

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15<sup>th</sup> day of September, 2023, the above Reply Comments of Charter Fiberlink – Nebraska LLC and Time Warner Cable Information Services (Nebraska), LLC in Application No. CPF-2 was delivered via electronic mail to the following:

**Nebraska Public Service Commission**  
[psc.broadband@nebraska.gov](mailto:psc.broadband@nebraska.gov)

*/s/ Kevin M. Saltzman*

---