

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Safeguarding and Securing the Open Internet

WC Docket No. 23-320

COMMENTS OF THE NEBRASKA PUBLIC SERVICE COMMISSION

The Nebraska Public Service Commission (“NPSC”) respectfully submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“FCC”) on September 26, 2023 in the above-captioned docket. The NPSC wishes to provide some comments regarding the topic of state and local preemption raised in the NPRM. Additionally, the NPSC wishes to highlight the importance of broadband to public safety and access to essential services.

I. State Investment is Essential to Effective Broadband Deployment

While federal broadband investment is at a historic high, states are beginning to report that available grant funding is unlikely to be enough to reach all unserved and underserved locations. Nebraska, for example, was allocated \$405,281,070.41 in Broadband Equity Access and Deployment (“BEAD”) funding,¹ but estimated in its Five-Year Plan that a full buildout of

¹ NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, Funding by State/Territory, *available at* <https://internetforall.gov/funding-recipients>.

broadband throughout the state would require approximately \$870,225,369.² Other states have released similar estimates that available funding will fall short.³

Nebraska has been heavily involved in recent years with the development of broadband networks in previously unserved or underserved areas. The Nebraska Universal Service Fund (“NUSF”) supports the development of broadband-capable voice networks in Nebraska, allocating approximately \$40 million annually for these networks in the form of grant-based and ongoing support. Additionally, the NPSC administers the Nebraska Broadband Bridge Program (“Bridge”), which provides \$20 million annually in state funding for the development of new broadband networks. Both the NUSF and Bridge are state-funded programs; the NUSF is funded through carrier remittances, and Bridge is funded through state tax dollars. These programs have been tremendously successful. Over 21,000 unserved households either have service or will have 100/100 Mbps service as a result of NUSF projects since 2019, and Bridge programs have committed 100/100 Mbps service to 15,000 locations since 2021. The NUSF also provides ongoing maintenance support to certain carriers. The NPSC hopes that investment and participation in these programs will continue to be robust for years to come.

II. A Complete Preemption of State Broadband Regulation Could Harm State Investment in Broadband

Paragraphs 46 through 51 of the NPRM raise several questions regarding how the classification of broadband internet access service (“BIAS”) as a telecommunications service

² NEBRASKA BROADBAND OFFICE, BEAD Five-Year Action Plan, at 83-84 *available at* <https://broadband.nebraska.gov/media/vfmfalrm/final-nebraska-five-year-action-plan.pdf>.

³ *See, e.g.*, NEW MEXICO OFFICE OF BROADBAND ACCESS & EXPANSION, BEAD Five-Year Action Plan, *available at* https://connect.nm.gov/uploads/1/4/1/9/141989814/new_mexico_bead_five-year_action_plan_-_final_20230828.pdf (estimating a shortfall of approximately \$325 million); MINNESOTA OFFICE OF BROADBAND DEVELOPMENT, Initial Proposal Volume 2, *available at* https://mn.gov/deed/assets/bead-volume2_tcm1045-599320.pdf (“Minnesota does not believe that its BEAD funding allocation will be adequate to fund all applications submitted that would reach all unserved and underserved locations”).

might impact the deployment of and public investment in broadband networks. The NPSC supports measures which will result in increased access to BIAS and the development of broadband networks to unserved and underserved locations. However, the NPSC is concerned that a complete preemption of state regulatory authority, as proposed in the NPRM, could result in a loss of much-needed state broadband funding. A complete preemption could also undermine the state regulatory authority needed to ensure that the broadband services provided to consumers through state programs are delivered as promised.

Despite Nebraska's substantial state investments into broadband access, the NPSC has found that once a broadband network is developed, its ability to ensure consumers receive quality service is limited. The scope of state versus federal authority to regulate matters of broadband service quality is currently unclear, leading to confusion among consumers, regulators, and the industry alike. For example, while Nebraska statutes require the NPSC to collect speed test data from providers, the state's authority to require remedies from providers who do not meet speed test requirements is limited.⁴ This creates a conflict for the NPSC in that it administers programs that support the deployment of broadband-capable networks, but ultimately has limited ability to enforce their terms.

The NPRM proposes a regulatory framework in which the FCC has full regulatory control over all matters pertaining to broadband. The NPSC urges the FCC to modify this approach to allow for cooperation between the FCC and state authorities. States which are investing substantial amounts of money into broadband networks should be reserved the regulatory authority to ensure the networks they have funded are operational in the long term and that they deliver the speeds

⁴ See generally NEB. REV. STAT. § 86-324.02; NPSC Docket No. NUSF-133, *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*, Order Setting Speed Test Requirements (Nov. 8, 2022).

promised to consumers. A state faced with the prospect of providing funding to a network without any ability to ensure the network will be operational may – reasonably – choose to reduce or eliminate state funding for broadband networks. While the NPSC does not advocate for this approach, it is a foreseeable consequence of a regulatory framework which preempts states completely. The NPSC therefore requests that the FCC delegate some aspects of regulatory authority to states to promote continued investment and oversight of network functionality. At a minimum, the FCC should make clear that its proposed actions will not preempt state authority over service quality and other accountability measures put in place as a condition of receiving state universal service support or broadband grant funding.

III. States Must Retain the Ability to Ensure Public Safety Services are Resilient

In recent years, Nebraska has, unfortunately, received numerous reports of broadband service outages. These outages cause significant issues for consumers, who use broadband for essential activities, including work, school, telemedicine, and access to emergency services. These issues pose significant public safety risks to Nebraskans, and the NPSC is currently conducting investigations into these outages to assure Nebraskans that their public safety services will not experience additional outages.

The NPSC welcomes and appreciates any FCC initiatives that support and encourage the adoption of Next Generation 911 (“NG911”). However, we are concerned that the classification of BIAS as a telecommunications service may significantly impair the ability of states and local jurisdictions to investigate and respond to future BIAS outages that disrupt local 911 service. Broadband telecommunications technology is fundamental to NG911, beginning with the emergency service IP networks (“ESInet”), and extending the Next Generation Core Services (“NGCS”) and Geographic Information Services (“GIS”). If BIAS were to be deemed a

telecommunications service, states and local jurisdictions may be federally preempted from conducting investigations of outages that have a significant local impact, or taking corrective measures to ensure such outages do not reoccur.

Emergency response is primarily a local responsibility executed by local agencies serving their local residents. State and local oversight of 911 service providers will continue to be critical to ensure a robust, resilient, and reliable NG911 system. The FCC is well positioned to investigate and respond to future multi-state outages that impact NG911. However, local service quality issues or smaller outages affecting only a portion of a single state, or even a single county, might escape federal scrutiny. Therefore, local government entities must retain jurisdiction to investigate and seek redress for NG911 telecommunications failures that may not be deemed significant enough to warrant federal action, but still have a serious impact in local jurisdictions.

IV. An Existing Regulatory Framework Exists Which Should Be Adopted for Broadband Regulation

The NPSC believes that broadband regulation should be a cooperative process between the states and the federal government. Because states often are the “front line” to receive information or complaints about these services, they are in the best position to quickly and effectively respond to issues which arise. As described above, while some outages or service quality issues may be small in scope, they can have significant impact for consumers, and can cause very serious safety concerns.

The NPRM contemplates a regulatory framework in which state and local authorities are entirely preempted from the oversight of broadband services. However, there exists a collaborative regulatory framework between the federal government and the states which could be easily adopted for broadband regulation as well. Designation of eligible telecommunications carriers (“ETC”s) is a cooperative process: Congress and the FCC have set forth minimum standards for

carriers to meet, and the states are given the duty of enforcing those standards. This approach has recently proven essential to protecting the integrity of the FCC’s Rural Digital Opportunity Fund (“RDOF”) auction. Nebraska, along with several other states, did not grant ETC designation to one bidder based on the federal standards set forth.⁵ On review, the FCC echoed this decision, finding financial and operational concerns which likely would have resulted in wasted RDOF funds had the bidder been given ETC designation.⁶

The NPSC believes a similar approach would work well for purposes of broadband regulation. The FCC could set forth certain standards for items such as minimum speeds delivered, the number and length of outages, time to repair, or customer service. The FCC could also set forth recommended penalties or other remedial measures if these standards are not met. With that framework in place, the FCC could then delegate authority to state authorities to enforce the minimum standards.

This approach would ensure that state authorities can address local issues promptly, even if the issue is small in scope. Consumers would benefit from being able to reach local authorities. This approach would not be burdensome to ISPs as the standards would be uniform across jurisdictions. However, additional scrutiny from state authorities on large carriers would incentivize the carriers to increase investment into their networks and prioritize repairs – which, unfortunately, appears in many cases to have lagged significantly for some carriers operating in Nebraska.

⁵ See NPSC Docket No. C-5256/NUSF-130, *In the Matter of the Application of LTD Broadband LLC, Las Vegas, Nevada, seeking designation as an Eligible Telecommunications Carrier in the State of Nebraska*, Order Denying Application for Eligible Telecommunications Carrier Status (Dec. 14, 2021).

⁶ WC Dockets Nos. 10-90, 20-34, and 19-126, *In the matter of Application for Review of LTD Broadband, LLC Denial of Application for Rural Digital Opportunity Fund/Auction 904*, Order on Review (Dec. 4, 2023). Notably, this decision was issued almost two years after the NPSC’s denial of LTD’s application for ETC status.

Conclusion

The NPSC appreciates the efforts of the FCC to reestablish open internet protections, and hopes our concerns will be taken into account. We encourage you to reach out to us if you have any questions or wish to discuss this matter further.

Respectfully submitted,

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