

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public) Application No. C-5272
Service Commission, on its own Motion,)
to implement the Nebraska Broadband)
Bridge Act.)
)

COMMENTS OF THE NEBRASKA RURAL BROADBAND ALLIANCE

The Nebraska Rural Broadband Alliance (“NRBA”),¹ by and through its attorneys of record, submits these *Comments* (“Comments”), as allowed by the *Order Seeking Comments* (“Order”) entered by the Public Service Commission (“Commission”) on June 8, 2021.

INTRODUCTION

At the request of Governor Ricketts, Sen. Friesen and Speaker Hilgers introduced the Broadband Bridge Act (LB388) January 14, 2021. After the Legislature passed the bill unanimously, it became effective upon the Governor’s signature May 26, 2021. The Governor and Legislature are to be commended for their prioritization of infrastructure critical to serve the needs of Nebraskans. The Commission is also to be applauded for its swift action to begin consideration of the details of proper administration of the Broadband Bridge Program.

Under the Act, the Legislature directed the Commission to establish a weighted scoring system to evaluate and rank applications.² The Act also identified the minimum factors that should be scored.³ In its Order, the Commission has largely proposed a well-structured scoring system. As a general matter, the NRBA urges the Commission not to tie

¹ For purposes of this proceeding, the NRBA is made up of the following carriers: Cambridge Telephone Company; Diller Telephone Company; Glenwood Telecommunications, Inc.; Hemingford Cooperative Telephone Co.; Mainstay Communications; and Stanton Telecom, Inc.

² LB388, § 6 (2021).

³ *Id.*

its hands or limit its discretion too much beyond what the Legislature has mandated. Ensuring that carriers have a solid record of service in areas of similar geography and population density and holding carriers accountable for performance are critical factors, but the Commission should be open to imaginative ways of deploying broadband infrastructure in areas where carriers, which have received substantial federal and state universal service support, have not deployed.

The NRBA will address issues under the categories of inquiry generally identified by the Commission.

COMMENTS

Grant Priorities

The NRBA urges the Commission not to tie its hands unnecessarily by adopting a rigid approach to prioritizing projects. The Commission must prioritize applications as directed by the Legislature. Yet, no one knows all of the challenges lying ahead or opportunities. For example, what if a community proposes a digital inclusion plan that uniquely meets the needs of that particular community? Perhaps a project of lower priority will propose a creative approach to ensuring affordable access to broadband.

Certainly, the Commission must follow the direction of the Legislature, but it may and should do so without denying itself the flexibility to encourage smart new ways of bridging the digital divide. The Legislature chose to give the Commission that flexibility. There is no reason for the Commission to unnecessarily limit its own regulatory discretion.

Geographic Area Identification

The NRBA takes no issue with the Commission's proposals under this category of inquiry.

Speed Data

The NRBA takes no issue with the Commission's proposals under this category of inquiry.

Non-Contiguous Geographical Areas

The NRBA takes no issue with the Commission's proposals under this category of inquiry.

Unserved and Underserved Areas

The NRBA urges the Commission not to require separate applications for unserved and underserved areas. In fact, applicants should be encouraged to propose projects that do not strand the hardest to reach. By building infrastructure that reaches both unserved and underserved areas, providers can leverage resources and more cost-effectively serve customers in more remote locations. The Commission would certainly be justified to require the application to include a breakdown between the unserved and underserved locations it proposes to serve.

Overlapping Areas

The NRBA takes no issue with the Commission's proposals under this category of inquiry.

Digital Inclusion Plan

The NRBA encourages the Commission to be open to innovative proposals to provide affordable service to low-income residents. As mentioned above, maintaining a flexible system of priorities will encourage innovative proposals that meet different communities' unique needs.

Matching Funds

The Commission should not allow federal or state universal service support to be used as a match for an LB388 project. Universal service support at both the federal and state levels

is based on complex methodologies that already cause discord in the industry about whether support is distributed equitably among service territories. Allowing commingling of Broadband Bridge Program funds and universal service support would throw off the relative balance of today's complementing federal and state systems of high-cost support.

Moreover, the principles of universal service go beyond extending networks. Specifically, these policies declare that support is intended “for the **preservation** and advancement of universal service.”⁴ In other words, a critical role of USF support is the preservation of networks where they exist today – operating and maintaining those networks. That is as true at the state level as it is the federal. Based on how companies are treated for support at the federal level, the Nebraska Commission has developed different methodologies for using limited NUSF funds to both incentivize new deployment and sustain the network once constructed. The proper division of such funds is currently the subject of investigation by the Commission.⁵ The Commission should consider this division, but must not slow down the Broadband Bridge Program to do so. At this time, there are more pitfalls to using high-cost support to match Bridge Program funds than potential benefits. Perhaps, after time, there might be a clearer picture of how universal service support and Nebraska Broadband Bridge funding might be used together. If the Commission considers this issue in the future, it should be guided by the following principles:

- Budgeted ongoing support should not be jeopardized;
- Allocations of ongoing support should not be used as matching funds;
- Carriers that have previously received or were eligible for BDS or ongoing support for an area, should not be allowed Bridge Act funding for the same area; and
- No high-cost support should be used outside the exchange to which it is allocated.

That said, the Commission should exercise its discretion in considering applications under the Broadband Bridge Program together with requests for high-cost broadband

⁴ 47 U.S.C. §254(b) (emphasis added); *see also* NEB. REV. STAT. § 86-323.

⁵ NUSF-108, Progression Order No. 6, opened April 21, 2021.

deployment support (“BDS”) for nearby areas, especially in actions pursuant the Commission’s rules for withholding and redirecting support.⁶ A BDS project in geographic proximity to a Bridge project in a city may ensure that rural residents do not remain stranded. This, for example, might be a reason for the Commission to move a Priority 2 project ahead of a Priority 1. In short, Bridge funds and BDS funds should not be used for the same locations, but might be used prudently in adjacent areas.

The Commission should not allow in-kind matches other than quantifiable savings arising from public-private partnerships, such as those involving collocations and leasing arrangements.

Eligibility and Priority Determination

Under this category, the Commission mainly discussed consideration of the eligibility of areas for project support, which is wise, but other issues merit inquiry. Under the *Scoring and Criteria* category below, the Commission sets forth the common standards for judging fitness of an application and applicant and proposes specific criteria it would consider. The Commission, however, did not establish any threshold eligibility requirements. The NRBA strongly urges the Commission to declare ineligible the following:

- The incumbent local exchange carrier (“ILEC”) and all other ETCs currently receiving NUSF support for the exchange or exchanges in which the project is located, unless the ILEC began receiving support after October 1, 2016.
- The recipient of an award under the Rural Digital Opportunity Fund for any area subject to the award.
- The recipient of Connect America Fund II support for any area subject to the award.
- Any eligible telecommunications carrier that has received NUSF BDS support for any area subject to the award.
- Any provider that received CARES Act funding through the Nebraska broadband grant program administered by the Nebraska Department of Economic Development in 2021 for any area subject to the award.

⁶ NEB. ADMIN. CODE, tit. 291, ch. 16; LB338 (2021).

- Any provider that has received any other government grant-type advance funding for construction in any area subject to the award, except to the extent the funding is part of the matching cost of the Bridge Act project for the same area.

There is no public policy justification for giving taxpayer funds to companies that previously received other taxpayer or ratepayer subsidies to serve the same area. In particular, incumbent telecommunications carriers that have not used support in the past to build out rural areas of exchanges should not be rewarded for past neglect of cities in the exchanges, too.

With regard to determination of whether an area itself is eligible for support, the NRBA supports use of Form 477 data as a base, but urges the Commission to give greater deference to speed data that is locally generated. The Commission in its discretion can consider the credibility of all data submitted. To the extent conflicting data is submitted for the same area, the Commission should give the weight to any submission the Commission in its discretion deems appropriate, but the Commission should make clear its factual findings in the order.⁷

Scoring and Criteria

Financial Capability

The NRBA recommends the Commission require audited financial statements unless the applicant either directly or through an affiliate has been providing affordable and reliable NUSF-supported service throughout another rural Nebraska exchange since before October 1, 2016. Such applicants should be considered financially capable of providing service throughout the state. In the alternative, the Commission could consider allowing these entities to submit other documentation accepted by the FCC for its Universal Service Fund programs, such as financial statements subject to review by an independent certified public

⁷ See NEB. REV. STAT. § 75-134(1).

accountant, or a RUS Operating Report for Telecommunications Borrowers for the applicant or affiliated companies.⁸ Allowing this flexibility will ensure applicants are financially viable without imposing additional financial burdens of an audit.

Technical Capability

The Commission has good reason to propose clear criteria for determining technical capability, but the NRBA encourages it not to adopt an all or nothing approach to assessing technical capability. Rather than making a yes or no determination as to an applicant's ability to provide the proposed service, the Commission should assign weight to this factor.

Certainly, a qualified applicant must have technical ability to provide broadband services, but such ability – in a vacuum – means little. Many companies may possess the basic ability to provide broadband service. The Commission should instead focus its inquiry on whether the applicant is capable of addressing the unique characteristics and needs of the project area.

The NRBA recommends the Commission attribute a possible 50 points (better than all or nothing) to this factor. While this weight might seem high at first glance, one should bear in mind that it is now an absolute requirement. Assigning the factor a high weight will continue to allow the Commission to insist on technical ability. For these reasons, the NRBA specifically suggests consideration of the following weighing criteria:

- 50 points for an applicant with a strong history of providing 100/100 service throughout a rural Nebraska exchange
- 40 points for an applicant with a strong history of providing 100/100 service in rural areas
- 30 points for an applicant with a strong history of providing 100/100 service in similar areas
- 20 points for an applicant with a strong history of providing 100/20 service in rural areas
- 10 points for an applicant with a strong history of providing 100/20 service in similar areas

⁸ 47 C.F.R. §54.313(f)(2).

Legal Capability

The NRBA takes no issue with the Commission's proposals under this category of inquiry.

ETC Status

The NRBA supports the Commission proposal, but recommends the Commission not base its analysis on the number of years the applicant has been an ETC. The NRBA agrees that weight should be given for providers that were ETCs prior to application deadline, and for those that provide affordable service in similar areas.

Rates

Consistent with its suggestions above with regard to technical comparability, the NRBA urges the Commission to give greater weight to carriers with a proven record of providing comparable rates in comparable areas, in terms of geography and population density.

Minimum Speeds

The Commission is correct to reiterate that actual speeds must comply with the clear requirements of the Broadband Bridge Act. The NRBA recommends that the Commission make this an all or nothing criteria. If the infrastructure is immediately scalable to 100/100 speeds, then it should qualify. If it cannot comply with state law, it should not be subsidized.

Project Match

The NRBA supports the concept of giving additional weight for matching funds above the fifty-percent minimum. The NRBA, however, would recommend the Commission reduce the total possible weight for this criterion to 10 points, consistent with the Minnesota weighting for matching funds.⁹ Further, rather than basing the weight strictly on fixed

⁹ Broadband Grant Program / Minnesota Department of Employment and Economic Development (mn.gov)

percentage levels, the NRBA encourages the Commission to weight based on the sources of funding, with greater weight given for local funding sources.

Under this sub-category, the Commission also proposes different weighting based on the number of households served in the project area. While the NRBA agrees with the need to make the best use of taxpayer funds, the Commission should be mindful not to put rural customers in a more precarious situation than they may now be in. The NRBA therefore recommends elimination of this criteria. It would only encourage cherry picking.

Challenge Process

The NRBA applauds the Commission for proposing a robust and detailed challenge process. To ensure that the proposed process work to serve the public interest, the NRBA requests the Commission, consistent with law, regulation and its own policies and practices, allow for protection of confidentiality of certain information, such as propriety financial information, specific development, construction plans, etc.

Distribution of Support

The Commission proposes to distribute the first thirty percent of the net grant award once the grant award is determined.

The NRBA strongly urges the Commission to refrain from making a distribution prior to April 1, 2022. The Broadband Bridge Act essentially requires the grant recipient “to complete the project within eighteen months after the date the grant is awarded.”¹⁰ If the Commission were to make any distribution prior to construction season, it would potentially jeopardize a project by counting months of force majeure inactivity against the statutory timeline for project completion. If one assumes a construction season of April 1 through

¹⁰ LB 388, § 4(2)(b).

December 1, a delay in the grant award from January 1 to April 1, for example, would allow and additional three months of construction season to ensure project completion.

Post Award Testing

The NRBA is confident the Commission will wisely use its discretion to recognize only reasonable and meaningful practices for testing speeds and looks forward to working with the Commission, customers, and others to determine the best practices for testing speeds.

Post Award Repayment

The NRBA takes no issue with the Commission’s proposals under this category of inquiry.

Timeline

The NRBA supports the timeline and transparent process the Commission has outlined.

DATED: June 29, 2021.

**NEBRASKA RURAL BROADBAND
ASSOCIATION**

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CERTIFICATE OF SERVICE

The undersigned certifies that an original of the above *Comments* of the Nebraska Rural Broadband Association were efiled with the Public Service Commission on June 29, 2021, and a copy was served via electronic mail, on the following:

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