

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska	)	Application No. NUSF-108
Public Service Commission, on its	)	Progression Order No. 6
own Motion, to make adjustments	)	
to its high-cost distribution	)	
mechanism and to make revisions	)	
to its reporting requirements.	)	

**REPLY COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES**

Arlington Telephone Company, Blair Telephone Company, Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Eastern Nebraska 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, Rock County Telephone Company, Sodtown Communications, Inc. and Three River Telco (the "Rural Independent Companies")

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**REPLY COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES**

The Nebraska Rural Independent Companies (“RIC”)<sup>1</sup> submit these Reply Comments addressing the contentions raised in the comments filed by other interested parties in response to the Order Opening Docket and Seeking Comment entered by the Nebraska Public Service Commission (the “Commission”) in this docket on April 27, 2021 (the “*PO 6 Order*”).<sup>2</sup> RIC appreciates the opportunity to provide these Reply Comments and looks forward to continuing participation in this docket and other pending dockets regarding the Nebraska Universal Service Fund (“NUSF”).<sup>3</sup>

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<sup>1</sup> Arlington Telephone Company, Blair Telephone Company, Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, LLC, Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Sodtown Communications, Inc. and Three River Telco, each of which is a Rate of Return Nebraska Eligible Telecommunications Carrier (“ROR NETC”). As referenced in these comments, the terms “carrier” or “carriers” are used interchangeably with NETCs.

<sup>2</sup> In addition to RIC, four sets of comments were filed in responses to the *PO 6 Order* by CTIA, the Nebraska Rural Broadband Association (“NRBA”), the Rural Telecommunications Coalition of Nebraska (“RTCN”) and Windstream Nebraska, Inc. (“Windstream”). In addressing these parties’ comments, RIC will use the party’s name followed by the word “Comments”. The same structure will be used to refer to the comments submitted by RIC.

<sup>3</sup> Unless otherwise indicated, RIC uses the term “NUSF” in these Comments to refer to the NUSF High Cost Program and the term “EARN form” to refer to the reporting form used by the Commission to ascertain NUSF eligibility by ROR NETCs since NUSF is only available to such NETCs. *See, e.g.*, 47 U.S.C. § 214(e); *Neb. Rev. Stat.* § 86-324(1). Moreover, as referenced in these comments, the terms “NUSF” and “High Cost Program” are also used interchangeably.

## I. EXECUTIVE SUMMARY

Only RIC provided comments based upon a data-driven analysis of the primary issues raised in the *PO 6 Order*. As demonstrated by RIC in its Comments, the Commission issued the *PO 6 Order* for the primary purpose of addressing the following two issues:<sup>4</sup>

1. Whether changes should be made to the administration of the Commission's current Broadband Deployment Support ("BDS") mechanism that precludes ROR NETCs that elected Alternative Connect America Cost Model ("A-CAM") federal Universal Service Fund ("USF") support from receiving BDS for those locations partially funded by federal USF ("capped locations");<sup>5</sup> and
2. Whether a ROR NETC's overearning amount should be available to fund BDS for build out of 25/3 Mbps-capable broadband networks to serve capped locations and other unserved or underserved locations in the overearning carrier's service area.

These two issues were addressed in the RIC Comments as part of the RIC BDS Proposal.

For the reasons stated in the RIC Comments and notwithstanding opposition to certain aspects of the RIC BDS Proposal submitted by other commenters in response to the *PO 6 Order*,

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<sup>4</sup> See, *PO 6 Order* at 1. RIC notes that one such issue area – transferability of NUSF among affiliated NETCs (*see id* at 5) – was addressed in RIC's February 18, 2020 Comments in response to the Commission Progression Order No. 5 in NUSF-108. See *Comments of the Rural Independent Companies, Application No. NUSF 108, Progression Order No. 5*, filed February 18, 2020 at 13. As reflected in Attachment A hereto (the entirety of which is incorporated herein by reference), RIC stands by those comments and will not present additional comments herein regarding this issue.

<sup>5</sup> RIC notes, however, that in October 2019, the Commission adopted the policy applicable to capped locations served by A-CAM-electing ROR NETCs stating that "[o]nce the locations built out have been identified, the Commission proposed that the remaining cost - (the total modeled cost to serve minus the capped amount and the benchmark) would be calculated on a per location basis for the carrier. . . . We find this portion of the proposal should also be adopted." (emphasis added) *In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements*, Order, Application No. NUSF-108, Progression Order No. 4, Findings and Conclusions at 27-28 (Oct. 29, 2019) ("*NUSF-108 PO#4 Order*"). Therefore, this Commission has already found that partially funded A-CAM locations should be eligible for NUSF support. Notwithstanding the Commission's adoption of the above-quoted policy, BDS has not been and is not currently being provided to capped locations.

the Commission should adopt the RIC BDS Proposal and reaffirm its policy declaration in the *NUSF-108 PO#4 Order* (cited above in footnote 5). Coupled with RIC's proposed findings of fact submitted in the RIC Comments,<sup>6</sup> RIC respectfully submits that this action will accomplish the following results:

1. Implementation of established Nebraska public policy that all Nebraska consumers should have access to 25/3 Mbps capable networks.
2. Reversal of the current NUSF distribution practice that denies A-CAM-electing ROR NETCs BDS to supplement federal USF for such ROR NETCs to accomplish additional deployment of 25/3 Mbps-capable networks to serve capped locations.
3. Provision of BDS to fund the nearly \$83 million of unfunded investment determined by the State Broadband Cost Model ("SBCM") as needed for build out to 25/3 Mbps broadband service to Nebraska capped locations served by RIC members that elected to receive A-CAM support.<sup>7</sup>
4. Elimination of the current BDS distribution practice that denies BDS for capped locations and thus discriminates against A-CAM-electing ROR NETCs serving capped locations and the consumers residing therein.
5. Affirmation of the Commission's existing Accountability Framework<sup>8</sup> which RIC supports, and which addresses any concerns regarding duplicative federal USF

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<sup>6</sup> See *RIC Comments* at 8-10.

<sup>7</sup> See Confidential Exhibit A attached to RIC's Comments. RIC notes that additional Nebraska ROR NETCs have also elected to receive federal A-CAM support: Arapahoe Telephone Company d/b/a ATC Communications; Dalton Telephone Company; Elsie Telephone Company; Hooper Telephone Company; and Pierce Telephone Company. RIC has calculated the additional aggregate unfunded SBCM cost to build out capped locations served by the aforementioned NETCs (excluding Hooper) to 25/3 Mbps to be approximately \$7.8 million. RIC estimates that the addition of such unfunded cost to the \$83 million as referenced in the RIC Comments (*see, e.g., RIC Comments* at 5) would result in total unfunded costs of **almost \$90.5 million** to build out ROR NETCs' capped locations in Nebraska.

<sup>8</sup> As stated in the RIC Comments at 5, the "Accountability Framework" applicable to the ROR NETCs is comprised of a

combination of the broadband project application process, mandatory federal broadband speed testing and upcoming state speed testing authorized by LB 338, reporting of locations to the federal High Cost Universal Broadband ("HUBB") mechanism that are built out to 25/3 Mbps, the experience derived from the

and supplemental NUSF support provided to A-CAM-electing ROR NETCs serving capped locations.

6. Recognition that approving the use of overearnings to fund a portion of the BDS costs to build out capped locations is consistent with and serves the Legislature's policy that NUSF should be used to support the costs to build out 25/3 Mbps-capable networks in the areas for which SBCM identifies such costs.<sup>9</sup>

Ultimately, with respect to the additional broadband deployment that the RIC BDS Proposal is aimed at achieving,<sup>10</sup> the consumers located within an A-CAM-electing ROR NETC's service area will no longer be relegated to broadband service "have nots" while other NETCs' consumers are broadband service "haves." Prompt adoption of the RIC BDS Proposal is supported by facts, rational policy and is in the public interest. Other tangential issues raised in the *PO 6 Order* can be addressed through additional progression orders if and as necessary.

## II. DISCUSSION

The RIC BDS proposal is comprised of two principal components:

1. The explicit adoption by the Commission that, consistent with its prior ruling,<sup>11</sup> ROR NETCs that elected A-CAM are eligible for BDS for capped locations; and

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adoption and use of the SBCM, and the Commission's oversight of ROR NETCs.

<sup>9</sup> As more fully discussed on pages 9 through 12 of these Reply Comments, making overearnings amounts available to A-CAM-electing ROR NETCs is only one of several sources for funding the provision of BDS to capped locations. Even if this funding source is approved by the Commission, based on the publicly available data, the total amount of overearnings available for BDS funding would not be sufficient to meet the unfunded SBCM-determined costs to provide 25/3 Mbps broadband service to all capped locations in Nebraska. Thus, other funding sources will need to be approved by the Commission to support the unfunded costs to deploy 25/3 Mbps broadband service to capped locations.

<sup>10</sup> See RIC Comments at 9 citing *In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements, Order Seeking Further Comment*, Application No. NUSF-108, Progression Order No. 3, Findings and Conclusions at 39-41 and 45-46 (Nov. 19, 2018) ("*NUSF-108 PO#3 Findings*").

<sup>11</sup> See fn. 5 above.

2. A carrier's overearning amount should be made available as one funding source to provide supplemental NUSF support to fund BDS for build out of 25/3 Mbps-capable broadband networks to serve capped locations and other unserved or underserved locations in the carrier's service area.

In its Comments, RIC demonstrated that adoption of the RIC BDS Proposal in its entirety was supported by the facts, law and public policy. Further, the RIC BDS Proposal eliminates the discriminatory treatment caused by denial of BDS in capped locations for A-CAM-electing ROR NETCs as compared to other NETCs which receive BDS, and the harmful effects that continuation of this discrimination will have on the rural consumers located within such ACAM-electing ROR NETCs' service areas.

**A. The Commission Should Reject any Suggestion that would Preclude the Provision of BDS to Capped Locations.**

RIC will first review the content of comments filed by interested parties relative to Issue B presented in the *PO 6 Order* – “Calculation and Use of BDS Support” and thereafter will provide responses to those comments. Although the NRBA presented its view of the history of the NUSF-108 docket laced with over-heated and baseless rhetoric attacking RIC and its member companies,<sup>12</sup> the NRBA nonetheless acknowledged: “For carriers with exchanges that remain significantly unserved or underserved, the Commission should specifically allocate BDS on an

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<sup>12</sup> See NRBA Comments at 1-4. NRBA's repeated criticism that the *PO 6 Order* represents an improper reconsideration by the Commission of its decisions in the *NUSF-108 PO#4 Order* must be rejected. First, and most obviously, if the Commission agreed with NRBA's position, it would not have voted unanimously to approve and adopt the *PO 6 Order*. RTCN expressly acknowledged in its Comments at page 2 that the Commission, in its Progression Order #5 indicated that it would reconsider the BDS funding issue for capped locations “in a further proceeding designed to specifically address RIC's concerns.” Further, one need look no further than the Commission's findings in the *NUSF-108 PO#4 Order* quoted in footnote 5 above compared to the actual denial of BDS for capped locations since 2019 to recognize that it is necessary for the Commission to review, clarify and correct the implementation of its policies regarding provision of BDS to capped locations so as to carry out the Legislature's stated intentions that all Nebraska consumers have access to broadband at minimum speeds of 25/3 Mbps. See *Neb. Rev. Stat.* § 86-1101.



exchange-by-exchange basis, as it now does for price cap carriers.”<sup>13</sup> While RIC disagrees that BDS should be allocated on an exchange basis, it is very telling to observe that NRBA acknowledged that BDS should be allocated to unserved and underserved locations – which must include capped locations that are not built to at least 25/3 Mbps and reported in the HUBB.

The NRBA’s claim that RIC had not previously presented a basis to support provision of BDS to capped locations<sup>14</sup> is wrong.<sup>15</sup> Furthermore, the *PO 6 Order* directed simultaneous filing of Comments by all interested parties on May 28 and the RIC Comments unquestionably set forth both the legal and factual reasons that compel a decision by the Commission to explicitly confirm the Commission’s intention that BDS shall be provided to supplement federal A-CAM support provided to capped locations.<sup>16</sup>

With regard to the comments filed by the RTCN, RIC is pleased that RTCN took the opportunity in its first statement regarding this issue to declare: “RTCN supports the establish [sic] of a separate allocation for BDS support for capped locations. . . .”<sup>17</sup> RTCN also states that

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<sup>13</sup> NRBA Comments at 5.

<sup>14</sup> *See id.* at 4.

<sup>15</sup> RIC has previously submitted testimony of its witness, Scott Schultheis, that addressed the provision of BDS to capped locations. This testimony is summarized in detail in the Commission’s Progression Order No. 5 entered in this docket. *See In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements, Order, Application No. C-108, Progression Order No. 5, Order at 7-8 (Feb. 23, 2021); see also* fn. 5 and 12 above. RIC’s presentation of evidence in connection with Progression Order No. 5 regarding provision of BDS to capped locations resulted in the Commission’s decision to open this proceeding. *See PO #6* at 1. The RIC Comments provide further details regarding this earlier testimony.

<sup>16</sup> *See* RIC Comments at 3-18.

<sup>17</sup> *See* RTCN Comments at 2.



provision of BDS to capped locations should not be prioritized over the provision of ongoing support to ROR NETCs<sup>18</sup> (and RIC does not advocate for such prioritization in its Comments).

RTCN further states that, “without additional information or evidence to the contrary, the RTCN suggests that current support for capped locations is sufficient to incentivize deployment and that no increase is warranted.”<sup>19</sup> Of course, when RTCN posited this “suggestion” it did not have the benefit of the facts and evidence presented in the RIC Comments that the unfunded costs for build out of only those capped locations served by RIC members aggregates nearly \$83 million over the remaining duration of the A-CAM program.<sup>20</sup> RIC’s evidence in this regard establishes without question that current universal service support for capped locations is *insufficient*.

At the same time however, RIC is pleased that agreement on a variety of significant issues exist between RTCN and RIC as outlined in Section II.C below. This consensus should encourage the Commission to proceed to promptly enter an order adopting the RIC BDS Proposal. It is worth noting that the Comments filed by RTCN and RIC reveal a number of concurring positions on sub-issues relating to provision of BDS to capped locations:

- Both groups support a separate accounting of BDS used for capped locations.<sup>21</sup>
- There should not be duplicative USF support.<sup>22</sup>

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<sup>18</sup> *Id.* at 2-3.

<sup>19</sup> *See* RTCN Comments at 3.

<sup>20</sup> *See* RIC Comments at 5, 9, 11-13 and Confidential Exhibit A.

<sup>21</sup> *Compare* RTCN Comments at 4 with RIC Comments at 13-14.

<sup>22</sup> *Compare* RTCN at 4, 5 and RIC Comments at 9.

- The Commission should retain its current rural area definition.<sup>23</sup>
- There should be no per-location cap.<sup>24</sup>

CTIA does not provide responses to the Commission's inquiries in the *PO 6 Order* relating to the provision of BDS to capped locations. Rather, CTIA generally posits the proposition that new sources of federal and state funding for broadband deployment are on the horizon. "As a result, the Commission should not make any significant decisions to expand the NUSF high-cost program at this time, but rather should wait to see how these other funding sources are implemented to determine how best to meet the State's needs."<sup>25</sup>

Even if the factual presumption were true – *i.e.*, that such additional funding for capped locations will be made available in sufficient amounts – the essential problem with CTIA's position is CTIA's failure to reconcile its position with the Legislature's express intention that all Nebraska consumers should have access to broadband service at minimum speeds of 25/3 Mbps.<sup>26</sup> One need look no further than the Legislature's passage of LB 338 and LB 388 during its recently concluded session to discern the urgency of the Legislature's desire to accomplish ubiquitous broadband deployment in this State. In short, CTIA's contentions regarding additional funding and that the Commission should delay addressing the provision of BDS to capped locations is inconsistent with governing legislative policy.

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<sup>23</sup> Compare RTCN Comments at 5 and RIC Comments at 17.

<sup>24</sup> Compare RTCN at 5 and RIC Comments at 17-18.

<sup>25</sup> See CTIA Comments at 3-4.

<sup>26</sup> See *Neb. Rev. Stat.* § 86-1101; see, e.g., RIC Comments at 8, 15.

Moreover, CTIA does not reconcile its contentions with (1) the fact that capped census blocks are typically less densely populated and thus higher cost to build out; and (2) grant program dollars have been and are being generally prioritized for project areas that serve the greatest number of households.<sup>27</sup> The fact that capped locations in Nebraska tend to be low population density, high cost to build out areas is illustrated by the color-coded map of the State reproduced on page 6 of the RIC Comments. This map confirms that capped locations predominate in the Sandhills and southwest portions of the State – well known to the Commission to be low density, high cost areas.

Equally important for the Commission’s consideration in its review of the record regarding provision of BDS to capped locations is what these commenters did *not* say in their comments.

- No commenter questioned the legislative statement of intention that all Nebraska consumers should have access to broadband at minimum speeds of 25/3 Mbps as reflected in *Neb. Rev. Stat.* § 86-1101.
- No commenter provided any data to demonstrate that capped locations do not require supplemental BDS funding for 25/3 Mbps buildout.
- No commenter submitted any data to demonstrate that provision of BDS to capped locations will result in duplicate USF funding.
- No commenter provided any information that refutes RIC’s position that denial of BDS to capped locations is discriminatory treatment of A-CAM-electing ROR NETCs and their customers.

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<sup>27</sup> A current example of this practice is the Commission’s proposal in the Order opening Application No. C-5272 which states that “[i]n order to maximize the benefits of this program, the Commission also proposes that *projects covering the most households are given additional points . . .*” See *In the Matter of the Nebraska Public Service Commission, on its own motion, to implement the Nebraska Broadband Bridge Act*, Application No. C-5272, Order Opening Docket, Seeking Comment and Setting Hearing at 13 (June 8, 2021) (emphasis added).

- No commenter questioned or otherwise seriously challenged the effectiveness of the Commission’s “Accountability Framework”<sup>28</sup> to provide the Commission with the tools to assure that BDS is used to build out 25/3 Mbps-capable networks to currently unserved or underserved locations, including capped locations.
- Since no commenter filed data-driven comments other than RIC, there is nothing in the record to dispute:
  - (1) that nearly \$83 million of additional investment is required to build out capped locations served by A-CAM-electing RIC member NETCs;<sup>29</sup>
  - (2) that nearly 22% of the State’s land area consists of capped Census Blocks that are not fully funded for 25/3 Mbps buildout;<sup>30</sup> and
  - (3) that federal A-CAM funding for “reasonable request” locations will not meet the funding gap that exists for capped locations.<sup>31</sup>

**B. Other Parties’ Comments on Use of Overearnings for BDS Funding.**

Only NRBA and RTCN submitted comments that directly respond to this issue. While RTCN opposes RIC’s proposal regarding use of overearnings for BDS funding, it acknowledges that “RTCN does not deny that such a shift may incrementally increase deployment.”<sup>32</sup> This acknowledgement is appreciated. RTCN recognizes that the RIC Overearnings Proposal will advance the legislative policy goal of providing access by all Nebraska consumers to broadband at minimum speeds of 25/3 Mbps.

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<sup>28</sup> See fn. 8 above.

<sup>29</sup> See RIC Comments at 5, 9, 11-13 and Confidential Exhibit A.

<sup>30</sup> See *id.* at 5-6.

<sup>31</sup> See *id.* at 9, n.16.

<sup>32</sup> See RTCN Comments at 2.

In its Comments, NRBA claims that RIC is challenging the Commission's Accountability Framework regarding use of NUSF support.<sup>33</sup> NRBA's effort to mischaracterize RIC's position regarding this issue should be rejected outright.

RIC's Comments confirm its support for the Commission's accountability measures including continued use of the EARN form.<sup>34</sup> The remainder of NRBA's comments on this subject are a continuation of the overheated rhetoric presented in the first three pages of the NRBA Comments.<sup>35</sup> No substantive arguments against Commission adoption of the RIC Overearnings Proposal are presented by NRBA.

NRBA's contentions on one aspect of the RIC Overearnings Proposal – the elimination of over-earnings redistribution – require RIC's specific response. While NRBA suggests the continuation of the current NUSF distribution process for ROR carriers, that process provides NUSF support originally allocated to A-CAM-electing ROR NETCs' capped locations in accordance with the SBCM to other ROR NETCs serving other locations in the State. This redirection of NUSF support is contrary to the Legislature's requirement that any NUSF support withdrawn from its original recipient "shall be utilized in the exchange area for which the funding was originally granted."<sup>36</sup> Equally important, however, is the fact that this requirement

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<sup>33</sup> See NRBA Comments at 4.

<sup>34</sup> See RIC Comments at 5 and 15-16. The RIC Comments make no recommendation to discontinue use of the NUSF EARN form or the current earnings limitation approved by the Commission. See also fn. 8 above.

<sup>34</sup> See *In the Matter of the Commission, on its own motion, seeking to establish Title 291, Chapter 16, to adopt Reverse Auction and Wireless Registry rules and regulations in accordance with Nebraska Legislative Bill 994 (2018)*, Rule and Regulation No. 202, NRBA (formerly RTCN) Comments filed April 18, 2019 at 9 and Comments filed Dec. 6, 2019 at 5.

<sup>35</sup> See NRBA Comments at 4.

<sup>36</sup> *Neb. Rev. Stat.* § 86-330.

of *Neb. Rev. Stat.* § 86-330 was expressly acknowledged by NRBA (then known as RTCN) in comments previously filed with the Commission.<sup>37</sup> Commission adoption of the RIC Overearnings Proposal is consistent with the requirements of section 86-330 and will result in additional deployment of 25/3 broadband service in capped locations.

RIC acknowledges that the use of overearnings to fund BDS for capped locations is, however, only one source of funding that could be made available to build out of 25/3 Mbps broadband to such locations. Other sources include (a) revisions to the current allocation of overall High Cost budget between PC and ROR carriers in order to increase total NUSF support available to ROR NETCs for unfunded buildout costs as was advocated by RIC at the Commission's hearing of Application No. NUSF-99, Progression Order No. 2; (b) uncommitted NUSF surplus funds; (c) possible grants of Broadband Bridge Act support; and (d) possible additional federal funding through programs such as the American Rescue Plan Act of 2021 ("ARPA").<sup>38</sup> Whatever the funding source, RIC urges the Commission to take such actions as necessary to provide sufficient funding for capped location buildout.

**C. General Areas of Agreement on Significant Points that Complement the Underlying RIC BDS Proposal Framework.**

As indicated on pages 7-8 above, RIC notes that the record reflects general agreement on the following matters related to the distribution of NUSF to ROR NETCs as well as the

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<sup>37</sup> See *In the Matter of the Commission, on its own motion, seeking to establish Title 291, Chapter 16, to adopt Reverse Auction and Wireless Registry rules and regulations in accordance with Nebraska Legislative Bill 994 (2018)*, Rule and Regulation No. 202, NRBA (formerly RTCN) Comments filed April 18, 2019 at 9 and Comments filed Dec. 6, 2019 at 5.

<sup>38</sup> In a U.S. Treasury release regarding the Capital Projects Fund of ARPA issued on May 10, 2021, the statement is made that "Treasury will begin to accept applications for review in the summer of 2021 and will issue guidance before that date."

Nebraska-specific policy embraced by the Legislature and the Commission to make 25/3 Mbps-capable broadband networks available to all Nebraskans.

1. As a general matter, continued recognition of the need for ongoing support for 25/3 locations;<sup>39</sup>
2. As a general matter, continued use of the SBCM to model costs of deploying broadband networks is appropriate;<sup>40</sup>
3. Agreement by the majority of RLECs<sup>41</sup> to the four bullet points set forth on page 7 above.

These general points of agreement complement and effectively are integrated into the RIC BDS Proposal. Where either general agreement on the overarching principle is present (with details needing to be addressed in additional proceedings for the reasons outlined in Attachment A) or where the majority of ROR NETCs agree on points, RIC respectfully submits that the appropriateness of Commission adoption of the RIC BDS Proposal is reinforced by these agreements.

**D. Other Issue Areas Require Additional Proceedings to Avoid Delays in Adopting the RIC BDS Proposal.**

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<sup>39</sup> Compare RTCN Comments at 5-6, 7-8; NRBA Comments at 5-6, 7); and RIC Comments at 7. As discussed in Attachment A to these Comments, the policy-based positions and factual allegations related to modification of ongoing support articulated by RTCN and NRBA are best addressed in additional Commission proceedings. RIC respectfully submits that only in such proceedings can the underlying positions of RTCN and the NRBA be tested, and a robust record developed. These additional proceedings, in turn, need not and should not delay the adoption of the RIC BDS Proposal.

<sup>40</sup> Compare RTCN Comments are 11; NRBA Comments at 10; Windstream Comments at 3; and RIC Comments at 7, 9, 12, 15, 19, 21-22.

<sup>41</sup> It is not altogether clear what NRBA's position on these issues may be. RIC would hope, based on its general familiarity with prior positions of the ROR NETCs that were formerly members of the RTCN that the NRBA positions have not changed.



RIC has already expressed its concern that several of the issue areas<sup>42</sup> raised in the *PO 6 Order* are far afield of the BDS-related issues associated with capped locations that drove the Commission's issuance of the current progression order.<sup>43</sup> RIC continues to be concerned with delays in adopting the RIC BDS Proposal that could result from Commission consideration of these tangential issues. Nonetheless, RIC provides in Attachment A reactions to the commenters' positions on these Additional Issue Areas that, in turn, demonstrates why additional separate proceedings are necessary, thus allowing for the prompt adoption of the RIC BDS Proposal in response to the *PO 6 Order*.

### III. CONCLUSION

As stated above, the Rural Independent Companies appreciate the opportunity to provide these Reply Comments in response to the *PO 6 Order* and look forward to continuing participation in this docket.

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<sup>42</sup> See *PO 6 Order* at 4-7 (Section C: Adjustments to Allocations for Ongoing Support; Section D: Transferability of Support to Affiliated Providers; Section E: Speed Requirements; Section F: State Broadband Cost Model / Broadband Mapping Data; and Section G: Affordability of Service Offerings). These five areas are referred to as the "Additional Issue Areas."

<sup>43</sup> See *PO 6 Order* at 1; see also RIC Comments at 22. Specifically, the "introduction of the twenty-one (21) additional topics listed on pages 4 through 7 of the *PO 6 Order* appear" to either "(1) delay [ ] the proper treatment of the core issue of providing BDS for capped locations and the use of overearnings advocated by RIC or (2) in certain instances dismantl[e] the existing ROR NETC NUSF disbursement program." *Id.*

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of June 2021, an electronic copy and one paper copy of the foregoing pleading were delivered to:

**Nebraska Public Service Commission**

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Also, electronic copies of the foregoing pleading were electronically delivered to the other parties to this docket.

  
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Paul M. Schudel

## ATTACHMENT A

### RIC Reply Comments Regarding Issues C through G of the *PO 6 Order*

#### 1. **Adjustments to Allocations for Ongoing Support**

While the parties agree that ongoing support should continue under the NUSF program (NRBA at 6; RTCN at 6; RIC at 7), any modification of ongoing support levels is an area that RIC recommends be addressed by the Commission in a separately issued progression order.

RTCN suggests, without factual support, that the maintenance of a fixed amount of ongoing support “has resulted in a death spiral in the total amount of ongoing support received by carriers that have completed their deployment,” a result that RTCN further contends “must be remedied by the Commission in this proceeding.” RTCN Comments at 7. RIC is not opposed to a fact-based and transparent process – which a further progression order should permit – to examine the need to alter the current level of SBCM-established ongoing support for ROR NETCs. However, any such examination at this time is premature due to, for example, the discriminatory disallowance of BDS for capped locations addressed in the discussion of the RIC BDS Proposal as presented in RIC’s Comments and in the foregoing Reply Comments.

The NRBA, in turn, suggests that the Commission migrate BDS for infrastructure that has already been deployed (and presumably meeting the 25/3 Mbps standard) to ongoing support, while, at the same time, noting that further Commission proceedings are necessary. *See* NRBA Comments at 6 (The general issue of “transition” from BDS to ongoing support “needs to be addressed more clearly by the Commission” and the NRBA “looks forward to providing further comments on the matter.”). RIC agrees. Additional proceedings separate and apart from the prompt adoption of the RIC BDS Proposal could appropriately address ongoing support and what, if any, SBCM-based and Commission-established changes are appropriate.

Further, RTCN and NRBA each advance their so-called “principles” associated with ongoing support modifications. Specifically, RTCN’s five principles are set forth on pages 7 and 8 of its Comments. The NRBA four principles are set forth on page 7 of its Comments.

RIC does not oppose the development of future-oriented policy frameworks when necessary. But it is axiomatic that any such efforts must be based on reasoned decision making which, in turn, relies on facts and the development of a full record so that those facts and the legal and public policy impacts can be properly evaluated. That it not the case here.

At the very least, RTCN’s “principles” regarding ongoing support levels raise the following issues that, due to the importance of broadband to all Nebraskans, must be addressed.

1. With respect to the “relative percentage of total support” derived from the “2020 NUSF-108 distribution model results”:
  - a. What level of recovery from ongoing support is required on a going-forward basis beyond that provided today?
  - b. Is such ongoing support level necessary for the maintenance, deployment and upgrading of services for which the supplement NUSF ongoing support is intended?
  - c. How would such determination be consistent with the SBCM?
  - d. What impact would increasing speed levels have on broadband networks’ cost levels?
  - e. If additional network deployment is required to meet increased speed benchmarks, would that deployment properly be considered “ongoing support”?
2. What level of additional funding sources need to be assigned to ROR NETCs to meet ongoing support level increases?
3. What mechanism would be used “for adjusting the ongoing support allocation upwards each year to account for increased deployment in the preceding year”?
  - a. How would the increased percentage be expressed, *i.e.*, as a percentage or dollar amount increase from prior year?
  - b. What changes would be required in the Commission’s accountability framework

to ensure that such ongoing support is “sufficient” as required by the NUSF Act?

- c. How would any fluctuation in ongoing support from year to year meet the “predictability” requirement of the NUSF Act, particularly if the “mechanism should be reviewed annually, with opportunity for comment on necessary adjustments”?

Such issues also should include at least the following based on the NRBA ongoing support principles:

1. Is it appropriate to use the “Broadband Bridge Act” speed requirements for all supplemental NUSF ongoing support when such standards have only been applied to “ratepayer funds used for BDS” and have not been applied to the current NUSF High Cost program distribution amounts?
2. With respect to the NUSF budgets applicable to ROR NETCs, what mechanism is required to establish “sound working principles” applicable to increased ongoing support derived from the SBCM?
  - a. What are the current NRBA-proffered “sound working principles”?
  - b. What modifications are required to ensure compliance with the “sufficiency” and predictability” requirements of the NUSF Act?
  - c. What mechanism should be used to ensure that the ongoing support funding is not “duplicative” and is otherwise “complementary” to federal support for a ROR NETC receiving legacy federal support?
  - d. What modifications, if any, would be required in the EARN Form to reflect any such new mechanism?

While RTCN and the NRBA are free to advance their principles, RIC respectfully submits that any such principles and the ramifications arising therefrom cannot be based solely on mere allegations. The preliminary issues stated above, in RIC’s view, demonstrate that mere allegations are insufficient. Thus, a full record is required to be developed in a new proceeding to test how any such positions/contentions are consistent with the facts, with the law and with rational public policy. Opening of this new proceeding should not delay the adoption of the RIC BDS Proposal in response to the *PO 6 Order*.

## 2. Affordability Issues

RIC recognizes that affordability of broadband is part and parcel of reasonable rates. Yet, it is unclear based on the federal characterization of broadband as an interstate service, what jurisdiction the Commission possesses to facilitate affordability through, for example, “benchmark rates” as proposed in the *PO 6 Order*. See *PO 6 Order* at 6-7. Compounding this issue is the fact that *Neb. Rev. Stat.* § 86-329 addresses the Nebraska Telephone Assistance Program (“NTAP”) in terms of providing NUSF support for voice service only. See *Neb. Rev. Stat.* § 86-329.

The issue of the Commission’s underlying authority relative to affordability of broadband service requires more in-depth analysis. As part of this analysis, RIC respectfully submits that the need for an affordability program should be reviewed in light of the limited take rate of NUSF support for consumer broadband rate relief during the COVID-19 pandemic (see RTCN Comments at 12 and Windstream Comments at 4).

Most importantly in terms of this *PO 6 Order* proceeding, no demonstration has been made with respect to the nexus of “affordability” issues regarding consumer broadband pricing and the need for ACAM-electing ROR NETCs’ BDS for capped locations which is the impetus for the issuance of the *PO 6 Order*. See *PO 6 Order* at 1.

Accordingly, RIC respectfully submits that, to make the most efficient use of Commission and party resources, the Commission may want to consider requesting an advisory opinion from the Nebraska Attorney General concerning the Commission’s legal authority regarding affordability of broadband service. Moreover, such advisory opinion, in RIC’s view, could also address with specificity the necessary legal guidance that this issue demands.



However, such request need not delay prompt adoption of the RIC BDS Proposal but rather, can be made in parallel with such action.

### **3. Speed Issues**

As a general proposition, RIC understands that speed requirements for broadband will likely need to increase based on consumer demand, a function permitted through the deployment of fiber-based, future proof networks that the Commission has embraced. *See NUSF-108 PO#3 Findings* at 39-41 and 45-46. Commenters have also noted the changes in broadband speed requirements contained in both LB 338 and LB 388. *See RTCN Comments* at 9; *NRBA Comments* at 5, 8-9.

While RIC continues to believe that consumers will help drive broadband speed levels, the record reflects that the issue of speed is part and parcel of any inquiries regarding ongoing support levels. Thus, RIC would not oppose combination of such issue areas – ongoing support and spend levels – in a separate proceeding.

Currently, however, RIC agrees with RTCN that ongoing support eligibility should remain at the current 25/3 Mbps standard. *See RTCN Comments* at 9. Whether NRBA's suggestion that the Commission should take guidance from LB 338 and employ a 100/100 Mbps capable standard (*see NRBA Comments* at 8-9) cannot be viewed in a vacuum, particularly because LB 338 only applies to "construction" of broadband networks (which is akin to BDS). NRBA's issue on applying LB 338's speed levels also raises, in RIC's view, the "fairness" concept articulated by RTCN (*see RTCN Comments* at 9), and the need for a factually-based impact analysis by the NRBA as to effect of such standard on ROR NETCs.

RIC respectfully submits that this brief review of the record amply demonstrates that a proposed change in the broadband speeds to be provided to Nebraska consumers from the current

25/3 Mbps standard to a possible 100/100 Mbps standard warrants opening of a new docket.

More detailed review and comments from all interested parties, data as to the cost impacts of such a policy change and consideration of the sources of funding such costs are required.

This new proceeding could also review the impacts of RTCN's proposed establishment of two "buckets" of ROR NETCs ongoing budget amounts – one for 25/3 Mbps capable networks and one for 100/100 Mbps capable networks. *See* RTCN Comments at 10. While this proposal may have some merit, RTCN's proposal presents, by way of example, unknown factual issues regarding NUSF costs and funding impacts, expansion of LB 388 beyond its terms, and current NETC ROR Accountability Framework impacts. Consequently, should RTCN be interested in such proposal, it should provide a fact-based request on the methods by which such budgets would be established, the impact on ROR NETCs and the legal basis for such framework and propose the Commission issue a further progression order to address such a request. Likewise, Windstream's questions regarding speed test criteria (*see* Windstream Comments at 2-3) could be addressed in this new proceeding as well.

#### **4. Broadband mapping**

RTCN suggests the goal of collecting "the most detailed and transparent information possible from carriers to accurately gauge existing broadband deployments, coverage areas, and speed in individual census blocks." RTCN Comments at 11. However, the practical issue left wholly unaddressed by RTCN is at what cost?

The NRBA suggests that the costs "associated with [ ] testing might be part of the funding or [a] transitional plan." NRBA Comments at 10. Left unexplained is the meaning of this suggestion. No explanation is provided by NRBA as to what any type of "plan" may be.

While the NRBA suggestion may have some merit, more facts are required. Marshalling such facts requires a separate proceeding.

**5. Transfers of NUSF among affiliated NETCs**

RTCN and NRBA each oppose RIC's framework for the "transferability" of supplemental NUSF support among affiliated ROR NETCs (*see* RTCN Comments at 8; NRBA Comments at 7-8). RIC stands by its comments on this issue (*see* RIC Comments at 22, n 37) and would not oppose the Commission deferring consideration of this issue.