

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public) Application No. NUSF-131
Service Commission, on its own Motion,)
to establish reverse auction procedures)
and requirements.)
)

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 Opening Docket, Seeking Comments and Setting Hearing* (“Order”) entered by the Public Service Commission (“Commission”) on June 29, 2021.

Introduction

The proposals made in the Commission’s Order are generally sensible, especially in that they preserve both the Commission’s authority to demand accountability and regulatory flexibility necessary to allow rural consumers a say in the process of withholding and redirecting support.

As the Commission suggests, reverse auctions of federal support have not served rural Nebraskans well. The signs of real progress are few. To date, support has been used merely to acquire existing, privately funded infrastructure. Reverse auctions also resulted into a race to the bottom, favoring inferior technologies. The Nebraska Commission rightly expressed concerns about this on a national stage.² For the same reason, the Commission attempted to

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

² *Rural Digital Opportunity Fund, Report and Order*, 35 FCC Rcd 686, 695 ¶ 19 (2020): “The Nebraska Public Service Commission, on the other hand, raised concerns that a reverse auction focuses on ‘the cheapest way to get to the minimum speed of a given speed tier to a coverage area’ rather than ‘focusing on robust and scalable technology.’”

establish a more consumer-based option to reverse auctions in promulgated rules pursuant to LB994 (2018).³ Unfortunately, the Rural Independent Companies (“RIC”) opposed the program established by the Commission, and in October 2020, the Attorney General rejected the program as exceeding the Commission’s statutory authority. Without dissent, however, the Legislature in 2021 essentially restored the consumer-based program of redirecting support.⁴

The NRBA commends the Commission for narrowing the focus of its inquiry in this proceeding to the more specific requirements of reverse auctions, especially those shoring up the showing necessary to prove technical capability. The Commission exercised good judgment in refraining from recommending a fixed protocol for rural-based plans under LB338. Retaining regulatory flexibility will foster innovation and accelerate broadband infrastructure deployment in rural areas. That said, the Commission’s proposals set forth in the Order, give all a clear sense of the Commission’s expectations with regard to such rural-based projects.

Pre-Auction Vetting Process

The Commission seeks comment on whether it should use lessons learned from the RDOF auction to validate that each auction participant has the technical capability to deliver the promised speeds prior to the auction. Unquestionably, the Commission should learn from past federal auctions. There has been *de minimis* deployment of new infrastructure using either RDOF or CAFII auctioned support. There has been woefully inadequate deployment

³ In the Matter of the Commission, on its own motion, seeking to amend Title 291, Chapter 16, to adopt Reverse Auction and Wireless Registry rules and regulations in accordance with Nebraska Legislative Bill 994 (2018), Rule & Reg. No. 202, *Order Issuing Certificate of Adoption*, p. 6 (July 14, 2020). After the Attorney General’s partial rejection of rules proposed July 14, 2020, the Commission remove the rural-based plan regulations and re-certified the rules and regulation. Those rules and regulations were approved by the Attorney General and the Governor and became effective May 12, 2021. They were codified at NEB. ADMIN. CODE, tit. 29, ch. 16 (“202 Rules”).

⁴ LB338, § 6 (2021).

of new infrastructure using CAF II auctioned support and the RDOF reverse auction program has been mired in controversy. The RDOF's over-hyped benefits are increasingly being called into question including by the Federal Communications Commission itself, which has thus far only approved funding for a small percentage of the actual winning RDOF bids. The 202 Rules require information related to an auction participant's technical capability. The Commission should require specific proof to demonstrate the participant's past record of service in rural Nebraska and that the technologies it will deploy are capable of serving all locations in the support area.

The Commission would be prudent to allow pre-auction vetting of potential participants. Doing so will allow the Commission and the recipients to expedite deployment. Such vetting should not only include thorough review of an applicant's technical ability, but also its financial strength. Carriers subject to current or recent bankruptcy actions ought to be disqualified automatically.

The NRBA supports imposition of penalties on recipients of redirected support that fail to provide services in compliance with state laws, rules and regulations, and orders of the Commission. The Commission possesses significant authority to levy civil penalties for lack of compliance. The 202 Rules make it clear that the Commission can claw back support not used to deploy compliant infrastructure.⁵

Term of Support

The NRBA supports a two-year project completion period, as well as allowance of extension for good cause. Consistent with the positions of most parties submitted in the Commission's proceeding on the implementation of LB388 (2021), simplifying the payment

⁵ 202 Rules, § 001.04(E).

process would be wise.⁶ Further, redirected Broadband Deployment Support (“BDS”) for a two-year project, could be paid over a longer period of time consistent with current practices under both NUSF-99 and NUSF-108.

The Commission must also continue to recognize that after deployment is complete, ongoing support will be critical to maintain and operate the infrastructure.

Budget

In its Order, the Commission stated that it planned to establish a budget for each auction once the Commission knows how much support allocated to price cap carriers will go unused. The NRBA supports this proposal to the extent that it applies to reverse auctions. An action to redirect support pursuant to a rural-based plan, however, should trump an incumbent local exchange carrier’s election of BDS support for the same area.⁷ Under current law and regulation, this would be true not only for price cap territories, but also for rate-of-return territories.

As the Commission correctly notes, “At this point, only the census blocks which are considered wholly unserved because no provider is offering both voice service and 25/3 Mbps terrestrial fixed broadband service will be eligible for the auction.”⁸ Effective January 2, 2022, however, this speed standard will increase to 100/20 Mbps.⁹

The Commission also recognizes that universal service objectives evolve, together with service standards. For this reason, the Commission must remain mindful of the need for ongoing support to assist with the costs of operating and maintaining infrastructure in rural areas.

⁶ In the Matter of the Nebraska Public Service Commission, on its own motion, to implement the Nebraska Broadband Bridge Act, App. No. NUSF-5272, evidence presented at hearing July 13, 2021.

⁷ See NEB. REV. STAT. § 86-330(3).

⁸ Order, p. 2.

⁹ NEB. REV. STAT. § 86-330(4).

Deployment Obligations

The Commission questions whether it should establish an eligibility baseline of 25/3 Mbps speeds for projects receiving redirected support. As a practical matter, any support redirected pursuant to either a reverse auction or a rural-based plan will be for projects completed after January 1, 2022. For that reason, approval of any project receiving redirected support should require infrastructure capable of delivering minimum 100/100 speeds.¹⁰

Proposed Performance Tiers, Latency, and Weights

The NRBA has no comment on the proposals or issues raised under this category of inquiry at this time.

Service Offerings and Reasonable Comparability

No comment at this time.

Areas Eligible for Auction Support

The Commission is right to prioritize areas that are presently unserved even under current standards that require speeds of only 25/3 Mbps to qualify for support.¹¹ Carriers that have so badly neglected rural ratepayers should be relieved of their responsibilities for such areas as soon as possible. The Commission, however, should not protect infrastructure incapable of providing speeds of at least 100/20 Mbps speed against supported overbuild for reasons set forth above.¹²

The NRBA agrees that the Commission should allow withholding and redirection of high-cost support at a smaller than exchange level. That said, economies of scale may drive larger projects. The Commission smartly maintains the flexibility to consider the impact of a

¹⁰ LB338, § 4 (2021).

¹¹ Under LB338, these standards expire for BDS on January 1, 2022. Accordingly, the current standard should be extinguished or sun-setted by Commission for ongoing support in the near future.

¹² See text related to fn. 7 above.

withholding/redirection action at the most granular area feasible. The Commission’s policy of requiring compliant services to every location in a supported area should continue to guide its regulatory oversight of such actions. While the Commission is wise to be cautious about projects involving non-contiguous areas to avoid cherry-picking, it is also right not to tie its own hands. Flexibility and caution are advisable, but the Commission nevertheless should remain true to its objective of withholding and redirecting support at an exchange level.

The Commission is correct to acknowledge that consumer complaints may drive withholding actions under the 202 Rules.¹³

The Commission asked whether it should “restrict the carrier from whom support has been withheld from bidding on the area.”¹⁴ For reasons elaborated on in testimony presented at the July 13, 2021, hearing in the proceeding on the implementation of LB388, the NRBA agrees that the Commission should not allow the ILEC ETC from which support has been withheld to participate in either a reverse auction under the 202 Rules or a rural-based plan under LB338.¹⁵ Carriers with a track record of non-service should not be rewarded with what is well more than a second chance.

Reserve Prices

The Commission should continue to establish what are essentially reserve prices for BDS support for exchanges for which price cap carriers are currently responsible. The Commission should do so for rate-of-return carriers, as well.

Application Process

The NRBA has no comment at this time.

Authorization and Release of Auction Support

¹³ 202 Rules, § 001.03.

¹⁴ Order, p. 7.

¹⁵ See fn. 6 above.

See comments above related to the category *Terms of Support*.

Non-Compliance Measures

No comment at this time.

Non-Compliance Framework

No comment at this time

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 filed with the Public Service Commission on July 30, 2021, and a copy was served via electronic mail, on the following:

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