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BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

Nebraska
Public Service Commission

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

COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES

The Nebraska Rural Independent Companies (“RIC”)¹ submit these Comments in response to the Order Opening Docket, Seeking Comment and Setting Hearing entered by the Nebraska Public Service Commission (the “Commission”) in this docket on June 29, 2021 (the “*NUSF-131 Order*”). RIC appreciates the opportunity to provide these Comments and looks forward to continuing its participation in this docket regarding the establishment of reverse auction procedures and requirements.

I. INTRODUCTION

The opening of this docket represents the second phase of the Commission’s response to the Legislature’s delegation of authority to the Commission regarding “the design, implementation, and operation of a reverse auction program”² pertaining to the distribution of Nebraska Universal Service Fund (“NUSF”) in certain circumstances. While the first phase resulted in the

¹ 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.

² *Neb. Rev. Stat.* § 86-330.

Commission's adoption of rules now codified at 291 *Neb. Admin. Code* Ch. 16, the Commission states that this second phase is aimed at "providing more detail to the reverse auction framework."³

In these Comments, RIC will provide input regarding selected sections of the *NUSF-131 Order*. These comments are premised on the presumption that the factual findings required to trigger a reverse auction in any area of Nebraska have occurred and that the Commission has thus determined to proceed with a reverse auction of NUSF support for specific geographic locations.⁴

RIC suggests that the Commission specifically confirm the following, previously announced standards for reverse auctions of NUSF support:

- (1) the NUSF support will be auctioned for use in the area where the original allocation was not utilized by the carrier to which it was allocated.
- (2) eligible locations in which such support may be used
 - (a) would be those that are defined as rural;
 - (b) are not eligible for federal Rural Digital Opportunity Fund ("RDOF") support;⁵
 - (c) are not already built to 25/3 Mbps or greater; and

³ See *NUSF-131 Order* at 1.

⁴ See Chapter 16, Section 001.03. For example, on July 15, 2021, Frontier Communications submitted a notification letter to the Commission that it would accept only \$6,368,563 of its allocated NUSF High Cost support totaling \$9,553,092.10 attributable to the period of 2017 through 2021. Since this acceptance is less than the required 95% utilization of allocated support, RIC understands that the remaining support will be forfeited, and used to fund a reverse auction to bring broadband to exchanges within Frontier's territory that do not have broadband projects planned. See *In the Matter of the Nebraska Public Service Commission, on its own motion, to administer the Universal Service Fund High-Cost Program*, Application No. NUSF-99, Progression Order No. 2, Order Authorizing Payments and Setting Project Selection Deadline at 2 (Jan. 12, 2021).

⁵ See generally *In the Matter of the Rural Digital Opportunity Fund, et al., Report and Order*, WC Docket Nos. 19-126, 10-90, FCC 20-5, released February 7, 2020 ("FCC RDOF Order").

- (d) do not already have competitive service, defined as broadband at 25/3 Mbps and voice service offered.⁶

RIC believes these parameters are appropriate and provide guideposts as to the proper use of a reverse auction after the preliminary findings are made.⁷ Of particular importance is the finding by the Commission noted above as (2)(b) which required Price Cap carriers in their recent July 2021 applications to eliminate RDOF Phase I areas.⁸ RIC notes this finding specifically because it is important that scarce NUSF support resources are not used to fund locations that will receive federal RDOF awards.

RIC notes that, since the entry of the Order referenced in footnote 5, additional sources of Federal and State funding for broadband buildout have become available or are expected to become available such as Nebraska Broadband Bridge Act (“Bridge Act”) grants and American Rescue Plan Act of 2021 (“ARPA”) grants. To the extent possible, the Commission should endeavor to avoid use of NUSF support distributed through the reverse auction process to locations that will receive or are likely to be eligible to receive Bridge Act and ARPA grants or other sources of funding for broadband build out, thus avoiding commitment of scarce NUSF resources that should be used to build out broadband in eligible locations that would thereafter be unserved or underserved. Further, in its administration of any reverse auction, RIC respectfully submits that the Commission should consider the fact that the FCC will, at some point in the future, proceed with the RDOF Phase II

⁶ See *In the Matter of the Nebraska Public Service Commission, on its own motion, to administer the Universal Service Fund High-Cost Program*, Application No. NUSF-99, Progression Order No. 2, Order Adopting Findings and Conclusions and Initiating Challenge Process at 36 (Nov. 4, 2020) (“November 4th NUSF 99 Order”).

⁷ See Chapter 16, Section 001.03.

⁸ See *November 4th NUSF 99 Order* at 36.

auction. While the RDOF I status is unknown as of now, the RDOF II process announced by the FCC (which would include unassigned RDOF I resources)⁹ can reasonably be expected to result in additional federal funding becoming available for then-existing unserved or underserved locations in Nebraska price cap carrier areas.

Pre-Auction Vetting Process/Application Process/Budgets

RIC respectfully submits that the Commission should continue to monitor and remain flexible to address any actual or perceived problems that may arise from the FCC's implementation of the first round of the RDOF.¹⁰ Specifically, and consistent with the Commission's prior ruling in the *November 4th NUSF 99 Order*, the Commission should reaffirm that locations that may otherwise be subject to a later reverse auction may be modified based on the FCC's administration of an RDOF Phase II auction).¹¹

RIC recommends that the Commission should not require the filing of both short-form and long-form applications in order to participate in the NUSF reverse auction process.¹² Rather, requirements for a single application should be sufficiently detailed so as to ensure that any qualified bidder can meet the Commission's requirements concerning the projects proposed to be deployed. This approach will provide administrative efficiencies for the Commission, the NUSF reverse auction participants and interested parties. RIC believes this approach is appropriate based

⁹ See *FCC RDOF Order* at ¶ 5.

¹⁰ *NUSF-131 Order* at 1.

¹¹ See *November 4th NUSF 99 Order* at 38 (In the context of providing NUSF in RDOF awarded areas, the Commission stated: "Excluding support in what will be RDOF Phase II areas would unreasonably disadvantage consumers that we know do not have access to broadband. However, at the point in which the RDOF Phase II auction appears imminent, an adjustment will be made to the remaining list of eligible blocks or exchanges.")

¹² *Id.* at 8-9.

on the Commission's anticipation, as stated on page 2 of the *NUSF-131 Order*, that reverse auction projects will be "smaller and more discrete."¹³ In an effort to ensure the anticipated administrative efficiencies associated with a single round of applications, it may be useful for the Commission to hold one or more workshops to develop the application requirements in order that all interested parties have an opportunity to weigh in with regard to application requirements.

Regarding the Commission's pre-auction vetting process,¹⁴ at a minimum such process should provide opportunities for interested parties to question the bona fides of the NUSF reverse auction participant and the representations made in a reverse auction application. NUSF is a limited resource and should be made available only to qualified entities. RIC's proposal provides the opportunity for a full factual record to be developed regarding the NUSF reverse auction participant's qualifications. Further, the Commission should explicitly determine whether the vetting process may be the basis for rejection of an application or the basis for imposition of participant-specific conditions. If the latter, and if the application is accepted, the Commission should also explicitly state that the participant's continuation in the reverse auction is subject to the participant's acceptance of any such Commission-established condition.

In addition to the foregoing, since voice service must be offered in connection with a reverse auction application award, an NUSF reverse auction participant must hold a certificate of public convenience and necessity ("CPN") or must apply for and be granted such CPN before a reverse auction award to the participant is made. Likewise, since NUSF is only available to Nebraska ETCs, that designation must be granted by the Commission or must be applied for and granted

¹³ *Id.* at 2.

¹⁴ *Id.* at 1.

before the reverse auction award is made. Further, as part of any reverse auction application, the participant must unequivocally acknowledge and accept the Commission's jurisdiction over the participant's operations in the State of Nebraska at least in the area addressed in its reverse auction application. In this way, no question should exist as to the Commission's jurisdiction over a reverse auction winner, and thus the Commission's on-going ability to monitor and take any required remedial actions regarding a reverse auction award.

RIC also suggests that the following requirements should be applied to reverse auction applications:

1. Only minor amendments identified in Chapter 16, Section 001.04(D)(iii) of the Commission's Rules should be permitted. As indicated in Section 001.04(D)(iv) of the Commission's Rules, major modifications should be prohibited after the deadline for submission of applications.
2. All applicants must provide voice service and broadband service with speeds of at least 100/100 Mbps beginning January 1, 2022 via networks provided to all locations subject to the application.¹⁵
3. Future reverse auction standards for broadband service speeds should be based on changes in the applicable Nebraska statutes.

¹⁵ On May 5, 2021, the Governor approved LB 338 (which contained the emergency clause) in which Section 4 requires that "[b]eginning on January 1, 2022, the commission shall ensure that funds distributed from the Nebraska Telecommunications Universal Service Fund for construction of new broadband infrastructure shall go to projects that provide broadband service scalable to one hundred megabits per second or greater for downloading and one hundred megabits per second or greater for uploading." For the purposes of this docket and in the implementation of the Reverse Auction Rules that became effective on May 12, 2021, the Commission should utilize the Legislature's updated scalable network speed standard rather than the former 25/3 Mbps speed standard.

4. The Commission should ensure that, when moving forward with a reverse auction, the Commission is identifying specific geographic areas and requesting applications for such areas in order to allow meaningful explanation of any differences associated with non-geographic elements between applicants such as speeds and proposed technology platforms. As a general matter, therefore, the minimum area for reverse auction should be a Census Block Group.

Term of Support

RIC respectfully submits that the Commission should establish progress reporting requirements for projects awarded through the reverse auction process. RIC suggests that once every six (6) months, a winning bidder should be required to submit, under oath, the extent to which that winning bidder is in compliance with the deployment and service availability representations (listing service speeds and locations) contained in its application. Such compliance filing should also include the winning bidder's compliance efforts related to applicable NETC-related advertising requirements including broadband speeds (including samples of such advertisements).

No extension of the 24-month build out requirement should be permitted absent a force majeure event that results in such deployment and service availability being impossible to achieve within the 24-month award period. Any such extension, in turn, would then be provided only for the time period within which the force majeure event was in existence.

The Commission should retain the flexibility to apply any and all remedial measures it has available to it should the winning bidder fail to meet any service speeds, service locations, advertising, or deployment and service availability representations within its application. By placing all applicants on notice of this fact, issues regarding the bona fides of and representations made by an applicant should be reduced.

Deployment Obligations/Service Offerings and Reasonable Comparability

On page 4 of the *NUSF-131 Order* the Commission seeks comment “on whether we should set baseline performance at 25/3 Mbps speeds . . .” As noted by RIC in footnote 15 above, the plain language of LB 338, Section 4 requires that after January 1, 2022, any disbursements from the NUSF to support broadband build out shall be used to construct networks that support “broadband service scalable to one hundred megabits per second or greater for downloading and one hundred megabits per second or greater for uploading.” Based upon this statutory directive, RIC submits that the Commission must set its baseline performance standard to require networks deployed by auction winners to meet the above-quoted standard rather than a 25/3 Mbps baseline standard.

Areas Eligible for Auction Support

With regard to areas eligible for auction support as discussed on page 7 of the *NUSF-131 Order*, consistent with its comments in the preceding paragraph, RIC again submits that the Commission’s references to 25/3 Mbps speeds must be updated to conform to the Legislature’s new speed standard of networks capable of supporting 100/100 Mbps scalable broadband service.

Budget/Reserve Pricing

RIC respectfully submits that the Commission’s discussion of “reserve” pricing for a reverse auction requires additional input based on the need to balance various competing objectives such as: (1) the fact that NUSF is a scarce resource and any allocated budget may not meet the State Broadband Cost Model investment levels for remaining unserved or underserved areas that are anticipated to be more costly to serve;¹⁶ (2) the objective of ensuring the availability of broadband

¹⁶ See *NUSF-131 Order* at 8.

to all rural end users; and (3) whether any mandated governmental discount of the investment levels based on NUSF budget available should supplant an applicant's judgment as to how it can best deploy a scalable network in the given reverse auction area. In RIC's view, the balancing of these concepts can best be achieved through a workshop or series of workshops on focused topics, where robust discussion and alternatives can be identified and debated among all interested parties, the Commission and its Staff.

II. CONCLUSION

As stated above, the Rural Independent Companies appreciate the opportunity to provide these Comments in response to the *NUSF-131 Order*. RIC reserves its rights to address other parties' comments during the reply comment cycle that has been established by the Commission in the *NUSF-131 Order*.

Dated: July 30, 2021

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of July 2021, an electronic copy and one paper copy of the foregoing pleading were delivered to:

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