

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Application No. C-5368
Public Service Commission, on)
its own motion, to administer) ORDER OPENING DOCKET AND
the Nebraska Broadband Bridge) SEEKING COMMENT
Program in the 2022 program) AND
year.) NOTICE OF HEARING
)
)
)
) Entered: February 1, 2022

BY THE COMMISSION:

The Nebraska Public Service Commission ("Commission") hereby initiates this proceeding on its own motion to administer the 2022 program year of the Nebraska Broadband Bridge Program ("NBBP"). Pursuant to the Nebraska Broadband Bridge Act, Neb. Rev. Stat. §§ 86-1301 - 1310 ("the Act"), the Commission is tasked with the distribution of \$20 million in grants annually for the purpose of facilitating and funding the development of broadband networks in unserved and underserved areas in Nebraska.¹

The Commission released the grant awards from the first year of the NBBP on January 4, 2022.² Following this initial program year, the Commission finds that a review of the application and challenge process is appropriate prior to beginning the 2022 NBBP program year. The Commission therefore sets forth below a proposal for changes to the NBBP beginning in the 2022 program year. The proposal includes various topics for comment. The Commission requests that interested parties provide comments responsive to the issues described below on or before **March 1, 2022 at 5:00 p.m. Central Time**. Comments should be submitted via email to psc.broadband@nebraska.gov. Comments submitted before this deadline will be posted to the Commission website for public review.

Commission Proposal and Issues for Comment

The Commission seeks comment on various proposed changes to the NBBP materials and requirements, set forth below.

¹ Neb. Rev. Stat. § 86-1303.

² Commission Docket No. C-5272, *In the Matter of the Nebraska Public Service Commission, on its own motion, to implement the Nebraska Broadband Bridge Act, Order Issuing Grant Awards and Results of Challenges* (Jan. 4, 2022).

1) Program Overview

The Commission proposes to generally maintain the overall structure of the NBBP, with some exceptions described below. Applications for the 2022 program year will be due to the Commission via email on or before July 1, 2022. Challenges will be due on Friday, August 5, 2022. Applicants will be given an opportunity to supplement and/or modify applications until August 24, 2022. Grant awards and the results of challenges will be released on October 4, 2022.

A full proposed procedural schedule is attached to this Order as Attachment A. The Commission proposes that this schedule shall be strictly enforced. Applicants who do not provide complete information prior to the dates listed in the procedural schedule will receive a score deduction in the relevant categories. Applicants who fail to provide required information may be subject to disqualification. Challengers who do not meet required deadlines may be disqualified. While Commission staff intends to communicate with applicants and challengers regarding incomplete information or defects, it is the responsibility of the participant to correct any errors prior to the deadline listed. The Commission encourages participants to file all information as early as possible in case of any defects or missing information.

The Commission welcomes comments and suggestions regarding this proposal and the dates set out in this proposed schedule.³

2) Adjustments to Scoring System

The Commission proposes that the scoring system be adjusted for the 2022 program year. A copy of the proposed scoring system is attached to this order as Attachment B. Certain changes are highlighted below. Interested parties are invited to comment on each of these topics.

³ The proposed procedural schedule does not include dates for applicants whose projects were denied due to challenges to modify and resubmit the application, as was allowed in the 2021 grant cycle. It is the intent of the Commission that as a result of the changes in the program and the challenge process outlined in this order, the modification and resubmission process will not be necessary in future program years.

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a) Financial Capability

The Commission proposes a requirement that applicants show projections of cash flow for a minimum of 5 years, and must show cash flow for at least 3 years beyond the date the project reflects positive cash flow. Projections reflecting a negative cash flow for the last year listed would not be acceptable.

b) Technical Capability

As previously described in Commission Docket No. C-5272, it is the expectation of the Commission that applicants funded by the NBBP program will maintain the network beyond the life of the grant program.⁴ The Commission currently requires applicants to describe how the proposed network will be funded over the expected useful life of the facilities. The Commission proposes that for the 2022 program year, applicants must identify the expected useful life of the facilities proposed to be built with NBBP funding. This information would be considered as part of the Commission's review of an applicant's technical capability.

Additionally, the Commission is considering allowing for deductions in this category based on past performance of Commission-funded projects. Deductions could be applied for reasons including but not limited to missed deadlines, damage to private property, frequent outages and customer complaints, or failing to address in application known past issues. These deductions would apply for issues identified within the five (5) years prior to the filing of an application. Should this proposal be adopted? If so, would any modifications be necessary?

c) Legal Capability

The Commission proposes modifying its scoring for an applicant's legal capability. First, the Commission will require that the listed legal contact for an applicant be an attorney licensed to practice in Nebraska. Additionally, the Commission proposes to allow for deductions in this section for applicants who have been the listed respondent in complaints filed by any

⁴ See LB 388, Sec. 8(2): "As a condition of accepting a grant under the program, the applicant shall agree to provide broadband Internet service in the project area until released from the applicant's commitment by the commission." Successful applicants will need to apply to the Commission to be released from their commitments under the NBBP.

department of the Commission within the five years preceding the filing date of the application. This would include, but is not necessarily limited to, NUSF and TRS remittance complaints and Communications annual report complaints. Late-filed remittances, annual reports, or NUSF-25/66 filings would also be considered a deduction in this category.

3) Tiebreaker

The Commission seeks comments as to what should occur in the event that two applications receive the same score, and only one of the projects can be funded. The Commission proposes a tiebreaker mechanism in this situation, where the winning application would be the application requesting the lower amount of NBBP funding. Should this tiebreaker mechanism be adopted? If so, are there any other factors the Commission should consider?

4) Challenge Process

The Commission proposes several adjustments to the challenge process in the 2022 program year, as set forth below. The Commission invites interested parties to comment upon these proposed changes.

a) Geographic Area Identification and Speed Testing

In addition to what was required to be submitted with challenges the first year, the Commission proposes that challengers should be required to submit as part of a challenge, at a minimum, a polygon shapefile (.shp) identifying the portion(s) of an application that the challenger currently serves with 100/20 Mbps speeds. Challengers must also submit speed test data supporting the availability and access to 100/20 Mbps speed service for each serviceable location in the challenged area. Speed test data must include the location where the speed test was run, the date and time of the test(s), and the speed tier to which the customer at the location is subscribed.

Similar to the testing requirements for successful applicants, the Commission proposes to require challenging parties to provide tests of a specific percentage of the locations being challenged. The number of locations to be tested is as follows:

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<u>Number of Locations in Challenge</u>	<u>Number of Test Locations</u>
50 or fewer	10
51-500	10% of Total Number of Locations
Over 500	50

In the absence of this information, the Commission proposes to find the challenge not credible.

b) Challenges to Portions of Applications and Modification of Applications

The Commission proposes to continue allowing challenges to portions of applications to be submitted in the 2022 NBBP program year.⁵ However, the Commission proposes that following the submission of such a challenge to an application, the applicant should be required to submit a modified application to the Commission that covers the same application area, with the challenged portions of the application removed. If the applicant does not submit a modified application prior to the deadline for modification or supplementation of an application, the application will be considered withdrawn.

The modified application should reflect changes in buildout cost, locations served, and any other items that would differ if the challenged portion is excluded from the grant award. The modified application should not extend beyond the original geographic boundaries of the application. Applicants may increase the amount they wish to contribute towards a proposed match percentage, but cannot increase the amount of grant support being requested.

The Commission will not make a determination as to the credibility of a challenge prior to receiving the modified application. Applicants will be able to submit documentation supporting a position that a challenge is not credible to supplement the original application; however, the modified application is required to be submitted in all cases. In the event applicants wish to submit speed test information to supplement

⁵ This type of challenge was previously referred to as a "partial challenge."

their application, we propose to apply the same basic requirements as for challengers. Specifically, that speed tests must show the location/address where the speed test was completed, as well as the speed tier to which the customer is subscribed. The Commission will make a determination as to the credibility of the challenge, and following that determination, will include either the original application or the modified application in the scoring process as appropriate.

The Commission proposes these changes in order to ensure that the full amount of NBBP funding available is distributed in the 2022 program year. The Commission invites comments on this proposal.

5) Speed Testing

The Commission seeks to re-evaluate its approach to speed testing within the NBBP grant program, including requirements as to the time of day and day of the week on which speed testing must be performed. The Commission also seeks input as to how the Commission can ensure the validity of speed tests performed by successful applicants and by challenging providers. Should providers be required to use certain platforms? What other safeguards should be put in place?

6) Remaining Grant Funding; Additional Federal Funds

It is the intent of the Commission to issue the entire funding allocation for the 2022 NBBP program year in its initial grant award. However, in the 2021 program cycle, the Commission was unable to issue the entire funding allocation due to the number and type of challenges received. Should any funding remain following the October 2022 distribution of awards, how should the Commission distribute the remaining funding before the end of the 2022-2023 fiscal year? Should the Commission open a second full round of applications and challenges to be completed before June 2023? Alternatively, should any remaining funds following the final distribution of awards be carried over to a subsequent grant cycle? Additionally, if additional federal funding becomes available for use in the NBBP, when should the Commission open a grant cycle to utilize that funding?

7) Revisions to Applications

In the 2021 program year, the Commission reached out to applicants when it determined that a discrepancy was found between the information provided in an application and publicly available data as to whether an application fit under Priority Tier 1, 2, or 3. The applicant was then afforded an opportunity to supplement or modify its application. Following that opportunity, the Commission reclassified the priority tier of some applications. The Commission proposes that this process be formalized for the 2022 program year, and applicants will be provided a Notice of Intent to Reclassify Application.

The Commission seeks comment on this process. Was it effective in the 2021 program year? Are any modifications needed for the 2022 program year?

8) Overbuilding of Existing Networks

The Commission has historically been opposed to using public funds to overbuild existing networks.⁶ Should the Commission allow a certain level of overbuilding to be completed as a result of NBBP grants? If so, how should the Commission make that determination, and what metrics and thresholds should be a factor in the determination? For example, should the Commission determine that if a certain percentage of the locations in an application cannot receive the required speeds, that the entire application area can be overbuilt regardless of what is available in portions of the application area? The Commission seeks comment on this topic.

9) Data Plans and Usage Caps

The Commission proposes that, as in the 2021 program year, plans with any kind of usage cap, including a "throttling" mechanism, will be disallowed. Plans must be unlimited in nature, and there must be no restrictions or slowing down of service following any threshold of usage. This requirement is across all applications and is not restricted to projects serving underserved areas. The Commission further proposes that plans using a per-

⁶ In this context, overbuilding means the construction of a new network which would provide the same services as a network currently existing in the same location.

usage or "pay as you go" model will be disallowed. The Commission invites comments upon this proposal.

10) Digital Inclusion Plans; Additional Points Available

The Commission appreciates the efforts of applicants in the 2021 program year in submitting digital inclusion plans. In the 2021 program year, these plans were required to be submitted, but were not scored. For the 2022 program year, the Commission proposes to provide for a maximum of 16 points to be available to applications that include specific, carrier-driven plans for increasing access to low-income customers and historically disadvantaged community members.

The Commission proposes that up to 10 additional points may be granted to applications describing discounts or assistance programs made available by the applicant to low-income or historically disadvantaged community members other than federal or state assistance already available to consumers (i.e., Lifeline, Emergency Broadband Benefit (EBB), Affordable Connectivity Program). Up to 5 points will be available per discount or assistance program described, with a maximum of two programs per project. Furthermore, up to 6 additional points may be granted to applications describing initiatives to build free public Wi-fi access points providing 100/100 Mbps service. Up to 2 points will be available per public Wi-fi access point, with a maximum of three access points per project.

The Commission seeks comment on this proposal. Should this proposal be adopted? Additionally, should applicants be required to participate in the FCC's Affordable Connectivity Program? How else can the Commission encourage providers to increase broadband access for low-income and historically disadvantaged community members?

11) Rates

The Commission has compiled a document showing the rate structures offered by successful NBBP applicants in the 2021 program year. This information is made available on the Commission's website for public review, and will be updated annually. Given that this information is now readily available and public, the Commission proposes to eliminate its previous requirement that an applicant not currently offering 100/100 Mbps

service reference advertisements from other Nebraska providers to show that the proposed rates are comparable. Instead, the Commission proposes referencing the rates approved in past NBBP cycles to determine if an applicant's rates are comparable. The proposed rates must be no higher than fifteen percent greater than the median rate offered by other NBBP providers. The Commission seeks comment on this proposal.

Additionally, the Commission seeks comment as to the length of time for which a successful applicant must provide rates that are within the scope of the described project. Should successful applicants be required to maintain the rates as included within the application for a certain period of time after project completion? The Commission seeks comment on this topic.

12) Match Source

a) In-Kind Labor Costs

In the 2021 NBBP program year, in-kind labor costs were not allowed as a source of match funding. The Commission seeks comment on this structure. Is this an appropriate restriction? If so, how can the Commission ensure that this restriction is applied equally across applications? Is it likely that applicants could disguise in-kind labor costs as other internal expenses? If so, how could this be prevented? If the Commission were to allow in-kind labor costs as a source of match funding, how should the Commission determine whether the in-kind labor costs are appropriate and calculated at fair value?

b) State and Federal Support

The Commission proposes that applicants should be required to proactively identify all sources of state and federal funding the applicant is currently receiving in Nebraska. The applicant should further be required to identify what, if any, portions of Nebraska are meant to be served by that funding. Is this proposal appropriate? Should it be modified? Additionally, with regard to A-CAM funding, how can the Commission ensure that an applicant is calculating A-CAM in the same way as calculated by the Commission? Does the Commission need to strictly define how federal funding such as A-CAM can be used as a match source?

13) Public-Private Partnerships

Currently, the NBBP application scoring system does not include additional points for public-private partnerships ("PPPs"). Should additional points be available for such partnerships? In the event that additional points are made available for PPPs, the Commission seeks comment as to what would and would not constitute a partnership. Does a letter of support from a community or other public entity constitute a partnership? Should a financial contribution, and/or being listed in application materials as a co-applicant, be required? The Commission seeks input on these questions.

14) Invoices & Reimbursement

The Commission proposes that successful applicants should be required to submit all invoices justifying project expenses within ninety (90) days of project completion. The Commission proposes that invoices not received within this timeframe will not be considered for reimbursement, unless a request for extension of time is submitted prior to the expiration of the 90-day timeframe. The Commission seeks comment on this proposal.

Public Hearing

A hearing in this matter will be held on **March 22, 2022, at 9:30 a.m. Central Time** in the Commission Hearing Room, 300 The Atrium Building, 1200 N Street, Lincoln, Nebraska 68508, and via WebEx, available at <https://psc.nebraska.gov/stream>.

If auxiliary aids or reasonable accommodations are needed for attendance at the meeting, please call the Commission at (402) 471-3101. For people with hearing/speech impairments, please call the Nebraska Relay System at (800) 833-7352(TDD) or (800) 833-0920 (Voice). Advance notice of at least seven (7) days is needed when requesting an interpreter.

O R D E R

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IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the above-captioned docket be, and it is hereby, opened.

IT IS FURTHER ORDERED that Comments responsive to the foregoing proposal and questions may be filed on or before **March 1, 2022 at 5:00 p.m. Central Time** in the manner prescribed herein.

IT IS FURTHER ORDERED that a hearing will be held in this matter on **March 22, 2022, at 9:30 a.m. Central Time** in the Commission Hearing Room, 300 The Atrium Building, 1200 N Street, Lincoln, Nebraska 68508 and by videoconference as indicated above.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 1st day of February, 2022.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Rod Johnson
Crystal Brader
Mary Keddin
Tom Schram

David Woodruff
Chair

ATTEST:

Thomas W. Golden
Executive Director

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Attachment A: Proposed Procedural Schedule

<u>Event</u>	<u>Date</u>
Comments due	Tuesday, March 1, 2022
Hearing	Tuesday, March 22, 2022
Commission enters order setting out application	Monday, April 25, 2022
Application period begins	Monday, June 13, 2022
Deadline to submit applications	Friday, July 1, 2022
Applications posted to Commission website	Thursday, July 7, 2022
Notices of intent to challenge due to Commission and to Applicant	Thursday, July 14, 2022
Challenges due	Monday, August 8, 2022
Commission to notify applicants of defects that must be cured and of areas of overlap with other applications	Thursday, August 11, 2022
Commission to notify applicants of challenges received	Tuesday, August 16, 2022
Deadline for applicants to supplement or modify application defects and/or areas of overlap with other applications	Tuesday, August 30, 2022
Deadline for applicants to supplement challenged applications	Tuesday, August 30, 2022
Grant awards released; results of challenges released	Tuesday, October 18, 2022
State of Nebraska W-9 and ACH enrollment form due from successful applicants	Friday, October 21, 2022

ATTACHMENT B – Scoring and Weighting Sheet

Criteria	Points Available	Y/N	Points	Reference Sheet Lookup
Financial Capability	N/A		N/A	A
Financial Capability - Points	10			
Legal Capability	N/A		N/A	B
Legal Capability - Points	10			
Technical Capability	N/A		N/A	C
FCC Form 477	0-10			
Website Offerings	0-10			
Rate Comparability	0-10			D
Speed Additive	0-10			E
Match Source	0-10			F
Match Percentage	0-30			G
Digital Inclusion Plan				H
Discount/Assistance program	0-10			
Wi-Fi HotSpots	0-6			
ETC Certification	0-5			I
TOTAL	121		0	

Reference Sheet – Scoring Criteria

A – Financial Capability – (Yes/No), and up to 10 points

- In order to be considered for grant support, non-ETC applicants must submit audited financial statements that demonstrate overall financial viability. ETC and carriers certificated in Nebraska already do this on an annual basis. This item will be scored as a Yes/No, where the lack of required financial information demonstrating financial capability (No) would disqualify the applicant from receiving a grant.
- Long-term viability of the project is a priority, and up to 10 scoring points will be available if a business plan is included that provides details about how the proposed network will be maintained over the expected useful life of the facilities.

B – Legal Capability – (Yes/No), and up to 10 points

- Applicants are required to include contact information for their legal representation. Omission of this information will disqualify the applicant from grant consideration.
- If this information is included, applicant will be awarded up to 10 points, but deductions will be made if: applicant/carrier partner has late filed annual reports (2 points), applicant/carrier partner has late-filed NUSF or TRS remittances (2 points), applicant has late filed NUSF filings (2), applicant fails to identify legal challenges that are anticipated, such as local zoning, permitting, access to rights-of-way, etc. (2 points).

C – Technical Capability – (Yes/No), and up to 20 points

- Applicants are required to include information with their application that demonstrates their technical ability to deploy and operate broadband Internet service at speeds of at least 100/100 Mbps. This item will be scored as a Yes/No, where the lack of required information demonstrating technical capability (No) would disqualify the applicant from receiving a grant.
- FCC Form 477 – Does the most recent publicly-available FCC Form 477 data demonstrate that the applicant offers 100/100 Mbps (or greater) service in Nebraska? If Yes, 10 points will be awarded. If no, 0 points will be awarded.
- Website Offerings – Does the applicant’s (or carrier partner’s) public-facing website clearly state that they offer services that meet the 100/100 Mbps or greater speed minimum? If yes, 10 points will be awarded. If no, 0 points will be awarded.

D – Rate Comparability – 10 points available

- Are the rates planned to be offered by the applicant/carrier partner comparable (i.e. equivalent) to what they offer elsewhere in Nebraska? If yes, 10 points will be awarded. If no, 0 points will be awarded.
- Plans with usage caps, early termination fees, or that otherwise lock customers into a particular plan or term will be disallowed.

E – Speed Additive – Up to 10 points available

- Additional points will be awarded if applicant/carrier partner includes evidence that they plan to offer speeds in excess of the 100/100 Mbps minimum. These additional speed tiers must be available to customers at the time of application, and offerings have to meet both the upload and download speed minimums to be awarded points. Points will be awarded as follows:
 - o 100/100 Mbps only – 0 points
 - o 500/500 Mbps – 5 points
 - o 1 Gbps/1Gbps – 10 points

F – Match Source – Up to 10 points available

- Sources of match that are outside of existing federal or state broadband programs will be given additional points, as outlined here:
 - o NUSF High Cost – 0 points
 - o Federal Broadband Funds match – 5 points
 - o Applicant and/or carrier outside funds – 10 points

G – Match Percentage – Up to 30 points available

- a. Additional weight will be given to applications that make up more than the 50% requirement for matching funds. If the applicant has sources of funds that make up more than the 50% requirement, one point will be awarded for each additional percentage point above 50%, up to a maximum of 30 points (80%).

H – Digital Inclusion Plans – Up to 16 points available

- Does the applicant include in their digital inclusion plan a description of a program allowing for discounts or assistance for low-income individuals that isn't already available to customers through a federal or state assistance program (i.e. Lifeline, EBB, or the Affordable Connectivity Program)? (10 points)
- Does the digital inclusion plan include initiatives to provide free public wi-fi hotspots (2 points per hotspot, maximum of 6)

I – ETC Certification – Up to 5 points available

- If the applicant/carrier partner is an ETC at the time of application, 5 points will be awarded.
- If an ETC application is pending, 3 points will be awarded.
- If the applicant/carrier partner plans to file for ETC Certification within 30 days of the application deadline, 1 point will be awarded.
- If the applicant does not fall under an ETC certification category as listed above, 0 points will be awarded.