

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own motion, to implement standards for the verification of broadband service provider coverage and speed data.

) Application No. NUSF-133

Nebraska Public Service Commission

MAY 04 2022

Received

REPLY COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES

The Nebraska Rural Independent Companies (“RIC”)<sup>1</sup> submit these Reply Comments in response to the Order Opening Docket and Seeking Comment entered by the Nebraska Public Service Commission (the “Commission”) on March 1, 2022,<sup>2</sup> and comments filed herein by other interested parties. RIC appreciates the opportunity to provide these Reply Comments and looks forward to continuing its participation in this docket which addresses verification of broadband service provider coverage and speed data.

Subjects on which Consensus Exists Among Commenters

In the *NUSF-133 Order* the Commission proposes to adopt the “general framework” of the Universal Service Administrative Company’s performance testing framework known as the Performance Measures Model (the “PMM”).<sup>3</sup> Five of the seven interested parties that submitted

<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., 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.

<sup>2</sup> *In the Matter of the Nebraska Public Service Commission, on its own motion, to implement standards for the verification of broadband service provider coverage and speed data.*, Application No. NUSF-133, Order Opening Docket and Seeking Comment (Mar. 15, 2022) (the “*NUSF-133 Order*”).

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

comments in this docket support the Commission's proposal to adopt the PMM as the general framework for testing broadband service coverage and speeds in Nebraska.<sup>4</sup>

Consistent with this support for the PMM, RIC submitted "Proposed Speed Test Protocols" attached to its Comments as Exhibit A. Six of the eight protocols set forth in this proposal are derived from the PMM. The two added proposed protocols relate (1) to the suggested adoption of an Excel spreadsheet random sampling tool to select locations to be tested by a recipient of Nebraska Universal Service Fund ("NUSF") support; and (2) to limit the frequency of testing if successful testing is achieved rather than requiring repeat testing.<sup>5</sup> RIC reiterates its request for the Commission to adopt and approve the Proposed Speed Test Protocols for implementation.

---

<sup>4</sup> See Comments of Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink (collectively "CenturyLink") at 1; Comments of Nebraska Public Power District ("NPPD") at 2; Comments of Windstream Nebraska, Inc. ("Windstream") at 1-2; Comments of Rural Telecommunications Coalition of Nebraska ("RTCN") at 2; and RIC Comments at 2-3. The remaining two commenters, Cox Nebraska Telcom, LLC ("Cox") and Nebraska Rural Broadband Association ("NRBA") do not oppose the Commission's adoption of the PMM as the general framework for testing in Nebraska. These two commenters simply did not address the issue in their filed comments.

As noted, NRBA made no reference to the PMM in its filed comments. Rather, four times in its filed comments NRBA stated that it would not comment on "technical questions" in its comments, but rather "reserves comment" thereon. RIC objects to this approach by NRBA. The *NUSF-133 Order* at page 6 specifically directs that "interested parties provide comments responsive to the issues raised above on or before April 15, 2022" and allows *reply comments* to be filed on or before May 4, 2022. The purpose of reply comments is well understood, and it is to respond to positions taken by other interested parties in their filed comments. Any attempt by NRBA to use the May 4 reply comments other than for the foregoing purpose should be disallowed as an untimely attempt to file comments. (*See, e.g.*, Application No. C-5368, Order Denying Motions for Late-Filed Comments (Mar. 8, 2022).) No commenting party other than NRBA seeks to employ the "reserves comment" tactic. The role of reply comments is exactly what the name means, namely, to reply to comments filed by other interested parties in this proceeding *rather than to submit initial comments* responsive to the NUSF-133 Order.

<sup>5</sup> Regarding acceptable end points for testing, daily testing period and test intervals, commenters expressed consensus that the parameters of the PMM (which are incorporated into RIC's Proposed Speed Testing Protocols) should be adopted with regard to these subjects. See CenturyLink Comments at 3-4; Windstream Comments at 3-4; RTCN Comments at 4; and RIC Comments at 5 and Exhibit A.

## Disagreement Regarding Scope of Statutory Speed Testing Requirements

Significant disagreement exists among commenters regarding the scope and interpretation of the testing requirements set forth in *Neb. Rev. Stat.* § 86-324.02. NRBA proposes that all recipients of NUSF ongoing support must perform speed testing to verify speeds of 100/100 Mbps in order to qualify to continue to receive such ongoing support.<sup>6</sup> In contrast, the Commission stated its interpretation of the statutory language of Section 86-324.02 regarding testing “to mean that providers that have completed capital improvement projects and are now eligible for ongoing support through the high-cost mechanism must conduct the speed tests and submit the results to the Commission using a random sample of locations.”<sup>7</sup> RIC, Windstream and CenturyLink generally support this interpretation by the Commission.<sup>8</sup>

RIC reiterates its interpretation set forth in RIC’s Comments that Section 86-324.02 must be interpreted in conjunction with the provisions of Section 86-324.01.<sup>9</sup> Set forth below is further legal analysis supporting this position that is based upon the principles of statutory construction derived from Nebraska Supreme Court caselaw.

As stated in RIC’s Comments, Sections 4 and 5 of LB 338 passed by the 2021 Legislature, are interrelated provisions that have been codified as sections 86-324.01 and 86-324.02 of the Nebraska statutes and amend the Nebraska Telecommunications Universal Service Fund Act.<sup>10</sup> While Section 86-324.02 requires speed testing of locations for which broadband services are provided by recipients of

---

<sup>6</sup> NRBA Comments at 4. RTCN appears to share this position. *See*, RTCN Comments at 3-4.

<sup>7</sup> *NUSF-133 Order* at 2-3.

<sup>8</sup> RIC Comments at 2; Windstream Comments at 2; and CenturyLink Comments at 3.

<sup>9</sup> RIC Comments at 1-2.

<sup>10</sup> *Neb. Rev. Stat.* §§ 86-316 to 86-329.

ongoing NUSF support, Section 86-324.02 provides no effective date to establish applicable speed requirements and provides no broadband speed requirements for testing purposes. These details are only found in Section 86-324.01 which specifies that “beginning on January 1, 2022” NUSF support for construction of broadband infrastructure must be used for projects “scalable to one hundred megabits per second or greater for downloading and one hundred megabits per second or greater for uploading.”

The Nebraska Supreme Court has established the following principles of statutory construction that are applicable to the interpretation of Sections 86-324.01 and 86-324.02:

We determine a statute’s meaning based on its text, context, and structure. In construing a statute, a court [in this case the Commission] must determine and give effect to the purpose and intent of the Legislature *as ascertained from the entire language of the statute* considered in its plain, ordinary, and popular sense. A court must attempt to *give effect to all parts of a statute . . . Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.*<sup>11</sup>

The context of the testing provisions of Section 86-324.02 is the Legislature’s stated requirement that *beginning January 1, 2022* all new broadband infrastructure projects funded by the NUSF shall provide service scalable to 100/100 Mbps. “When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, *understood in context.*”<sup>12</sup>

Not only is context to be considered in the interpretation of a statutory enactment, but further, “when interpreting a statute, well-established principles of statutory interpretation require a court [in this case the Commission] *to take account of context and of other statutes pertaining to the same subject.*”<sup>13</sup>

Section 86-1101 bears the title “Broadband telecommunications service; legislative intent.” Regarding

---

<sup>11</sup> *Ash Grove Cement Company v. Nebraska Department of Revenue*, 306 Neb. 947, 955 (2020) (emphasis added).

<sup>12</sup> *State of Nebraska v. Wines*, 308 Neb. 468, 474 (2021) (emphasis added). *See also, Parks v. Hy-Vee, Inc.*, 307 Neb. 927, 944 (2020) (emphasis added).

<sup>13</sup> *State v. A.D.*, 305 Neb. 154, 161 (2020) (emphasis added). *See also, State v. Jedlicka*, 305 Neb. 52, 59 (2020).

broadband speeds, this section provides, in pertinent part: “It is further the intent of the Legislature that the residents of this state should have access to broadband telecommunications service at a minimum download speed of twenty-five megabits per second and a minimum upload speed of three megabits per second.” Interpreting the testing requirements of Section 86-324.02 in isolation and without the context of the speed requirements established by Section 86-324.01 and the effective date of such speed requirements would create conflicting minimum legislative broadband speed requirements in light of the above stated minimum speed requirements of Section 86-1101 juxtaposed to the minimum speed requirements of Section 86-324.01.

Further, if the Legislature had intended to modify or replace the 25/3 Mbps minimum speed requirements of Section 86-1101, it could have readily included provisions to do so in LB 338 which was passed in 2021. It did not do so. Additionally, a further opportunity was available to the Legislature to amend the speed requirements of Section 86-1101 in connection with the passage of LB 1144 which was unanimously approved by the Legislature on April 13, 2022, and which contains wide-ranging provisions relating to provision of broadband services in this State. Again, the Legislature did not do so.

A further well-established principle of statutory construction is that the intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.<sup>14</sup> NRBA’s assertion that the Commission should require that carriers verify 100/100 Mbps to qualify for ongoing NUSF support is without legal basis except with regard to post January 1, 2022 testing requirements for broadband infrastructure construction projects that receive NUSF funding.

The Commission implemented Section 86-324.01 through its January 25, 2022 Order Authorizing Payments from the NUSF High Cost Program for 2022, wherein the Commission directed

---

<sup>14</sup> See e.g., *Ash Grove Cement Company v. Nebraska Department of Revenue*, 306 Neb. 947, 974 (2020); and *Sellers v. Reefer Systems, Inc.*, 305 Neb. 868 (2020).

that for 2022 “[a]ll areas built to through the use of NUSF, including capped locations, are required to construct networks capable of a minimum of at least 100 megabits per second up and down pursuant to Neb. Rev. Stat. 86-324.01.”<sup>15</sup> However, once locations are built out to provide broadband service (at speeds of 25/3 Mbps through December 31, 2021 and at speeds scalable to 100/100 Mbps commencing January 1, 2022), ongoing NUSF support is provided if broadband at minimum speeds of 25/3 Mbps is available at a location.<sup>16</sup>

In summary, beginning January 1, 2022, (1) the Commission shall ensure that NUSF for construction of new broadband infrastructure is used for projects that will provide broadband service scalable to 100/100 Mbps (implemented by the Commission through its January 25, 2022 Order Authorizing Payments); (2) the Commission shall establish speed test procedures to confirm that the infrastructure constructed by recipients of NUSF after January 1, 2022 provides the required speed capabilities; (3) the Commission shall require speed tests to be conducted for one week using a random sample of locations at which consumers subscribe for broadband services provided through infrastructure for which ongoing support is received; and (4) the Commission shall receive the results of such speed tests for its review and evaluation.

RIC has prepared the Proposed Speed Testing Protocols attached to its filed Comments as Exhibit A for the Commission’s consideration and reiterates its request that these Speed Testing Protocols be approved and adopted by the Commission to accomplish the foregoing points.

### **Comments Regarding the Appropriate Use of Consumer Testing**

Interested parties included considerable discussion of the appropriateness of consumer testing in their filed comments. The consensus position of commenters was to disfavor the use of consumer tests

---

<sup>15</sup> *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*, Application No. NUSF-108, Order Authorizing Payments at 2 (Jan. 25, 2022).

<sup>16</sup> *See, id.*, Progression Order No. 6 at 21-22 (Oct. 19, 2021).

for the purpose of determining whether infrastructure projects will support broadband services scalable 100/100 Mbps.<sup>17</sup> Section 86-324.02 specifies that the *recipient of NUSF support* “shall conduct the speed tests and submit the results to the commission.” The Legislature did not provide that consumer testing should be used to validate speed capabilities of NUSF-supported infrastructure. However, as RIC stated in its Comments, “[t]his does not mean that consumer-initiated testing is necessarily bad or should be discouraged.”<sup>18</sup>

RIC is hopeful that the testing program that the Commission ultimately approves will maximize the use of remote testing and thereby minimize the administrative costs and diversion of providers’ technical personnel to perform testing at the subscriber’s premises.<sup>19</sup> RIC expects that many consumers would prefer that provider personnel would not travel to the consumer’s residence to perform testing.

### **Conclusion**

RIC notes that the *NUSF-133 Order* states that a hearing concerning the issues presented in this docket “may be scheduled” after the Commission considers filed comments and reply comments. RIC respectfully submits that the nature and complexity of the issues presented in this proceeding warrant the Commission’s scheduling and conducting of a hearing. RIC appreciates the ongoing opportunity to participate in this proceeding.

---

<sup>17</sup> See, CenturyLink Comments at 5-7; Cox Comments at 3; Windstream Comments at 4-6; RTCN Comments at 5; and RIC Comments at 7.

<sup>18</sup> RIC Comments at 7.

<sup>19</sup> Remote testing is also supported by CenturyLink and Windstream. See, CenturyLink Comments at 8 and Windstream Comments at 6.

Dated: May 4, 2022.

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")

By: Paul M. Schudel

Paul M. Schudel, NE Bar No. 13723

[pschudel@woodsaitken.com](mailto:pschudel@woodsaitken.com)

WOODS & AITKEN LLP

301 South 13th Street, Suite 500

Lincoln, Nebraska 68508

Telephone (402) 437-8500

Facsimile (402) 437-8558

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of May 2022, an electronic copy and one paper copy of the foregoing pleading were delivered to the Nebraska Public Service Commission at [psc.broadband@nebraska.gov](mailto:psc.broadband@nebraska.gov) and to interested parties via email service.

Paul M. Schudel  
Paul M. Schudel