

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

MAR 28 2023

Received

In the Matter of the Nebraska Public) Application No. C-5484
 Service Commission, on its own motion,)
 to administer the Nebraska Broadband)
 Bridge Program in the 2023 program year.)

COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES

The Nebraska Rural Independent Companies (“RIC”)¹ submit these Comments in response to the Order Opening Docket and Seeking Comment and Notice of Hearing entered by the Nebraska Public Service Commission (the “Commission”) on March 7, 2023.² RIC appreciates the opportunity to provide these Comments and looks forward to continuing its participation in this docket regarding the practices and procedures for administration of the 2023 program year of the Nebraska Broadband Bridge Program (“NBBP”).³ In the below Comments,

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 *In the Matter of the Nebraska Public Service Commission, on its own motion, to administer the Nebraska Broadband Bridge Act in the 2023 program year*, Application No. C-5484, Order Opening Docket and Seeking Comment and Notice of Hearing (Mar. 7, 2023) (the “C-5484 Order”).

³ In addition to these Comments in response to the *C-5484 Order*, RIC refers the Commission to its Comments filed in response to *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 (June 8, 2021) and its Comments filed in response to *In the Matter of the Nebraska Public Service Commission, on its own motion, to administer the Nebraska Broadband Bridge Act in the 2022 program year*, Application No. C-5368, Order Opening Docket and Seeking Comment and Notice of Hearing (Feb. 1, 2022) (“C-5368 Order”) which are incorporated herein by reference.

RIC will first set forth the topic on which comments are requested in the *C-5484 Order* followed by RIC's responsive comments.

I. RIC's Responses to the Commission's Requests for Comments

1. Procedural Schedule.

Response: While the Commission is correct that the July 1 falls on Saturday in 2023 and thus is not a business day on which 2023 applications may be filed with the Commission, in order to comply with the Legislature's directive that applications shall be submitted "on or before July 1 for each fiscal year,"⁴ RIC recommends that the due date for submission of 2023 NBBP program applications be moved to Friday, June 30, 2023.⁵

In addition, because item 2 of the *C-5484 Order* proposes application scoring deductions based upon community feedback that the Commission receives regarding filed applications, a cutoff date for the submission of community feedback should be included in the Schedule set forth in Attachment A to the *C-5484 Order*. No such date is currently provided.⁶ RIC recommends that the Commission establish September 1, 2023 as the cutoff date for submission of community feedback regarding 2023 NBBP program applications.

⁴ See, *Neb. Rev. Stat.* § 86-1304(1)(a).

⁵ RIC notes that LB 359 introduced before the current One Hundred Eighth Legislature, First Session, would amend Section 86-1304(1)(a) such that the Commission would be authorized to establish deadlines for applications for NBBP grants.

⁶ In *In the Matter of the Nebraska Public Service Commission, on its own motion, to administer federal Capital Projects Funds for broadband development in Nebraska*, Application No. CPF-1, Order Issuing 2023 Grant Application Schedule and Application Materials, p. 7 (Jan. 10, 2023) ("*CPF-1 Order*") the Commission set April 24, 2023 as the cut off for filing of community feedback relating to Capital Project Fund applications. Such date is 60 days following the due date for application filings. If the Commission allowed the same filing interval for community feedback regarding 2023 NBBP program applications, such date would be September 1, 2023.

With the exception of the foregoing schedule adjustments, RIC agrees that the dates set forth in Attachment A to the *C-5484 Order* are appropriate. RIC believes that it is reasonable for the Commission to hold applicants and challengers to strict compliance with the dates listed in Attachment A. However, for good cause shown, the Commission should grant waivers of the requirement for strict compliance with the dates shown in the schedule.

2. Adjustments to Scoring System.

(a) Community Outreach

Response: While it is reasonable to require applicants to engage in community outreach, the way that the *C-5484 Order* proposes to score this activity seems problematic. The *C-5484 Order* states that an application MAY receive a scoring deduction “depending on the nature of the feedback received.”⁷ No objective factors are established to determine the amount of scoring deductions that could result from such “negative feedback” or what will be regarded as “negative feedback” relevant to a 2023 NBBP program application.

What is the definition of “negative feedback”? Once community feedback is determined by the Commission to be “negative,” how does the Commission propose to determine the severity of such feedback in order to make a determination whether to assess “a score deduction of up to 10 points”?⁸ How will the Commission determine whether negative community feedback is objectively true and is sufficiently “negative” that deducting points from an applicant is warranted? Will the applicant against which the negative feedback is directed have an opportunity to respond to the negative feedback? And for that matter, will community feedback provided to the Commission be made available for review by applicants and the general public?

⁷ *C-5484 Order*, p. 3.

⁸ *Id.*

RIC believes that the foregoing questions are entirely legitimate and that the Commission should provide responses to these questions if the scoring of 2023 NBBP program applications could experience deductions based upon community feedback. However, regardless of whether the Commission responds to RIC's concerns, RIC believes that any process that weighs negative feedback for potential scoring deductions will be inherently subjective and therefore problematic. RIC would point out that there are objective point deductions in the program as proposed in the legal capability, technical capability, and rate comparability sections. The Commission has demonstrated that there are objective ways to deduct points from grant applications, and RIC strongly believes that objectivity is crucial here. Failure to address and resolve the issues highlighted here will create scoring and administrative issues that may undermine the scoring process, as well as create transparency issues for the Commission. The most transparent way to score applications is to eliminate subjective scoring deductions based upon negative community feedback, and instead to score applications on an objective basis.

(b) Scoring of Matching Funds

Response: The Commission's proposal regarding the methodology for scoring of matching funds regarding 2023 NBBP program applications is reasonable and appropriate for use in connection with 2023 NBBP program applications.⁹ RIC supports this proposal.

3. Challenge Process.

Response: The Commission's proposal to require separate filings of Type 1 and Type 2 challenges pertaining to a single project is reasonable and is supported by RIC.

⁹ *Id.*

4. Digital Inclusion Plans.

Response: In the *C-5484 Order* the Commission proposes to subject applicants for 2023 NBBP program grants to the same digital inclusion plan requirements as established in connection with Capital Projects Fund grant funding.¹⁰ RIC thus presumes that the Commission will score digital inclusion plan/low income offerings the same in the 2023 NBBP program as in the *CPF-1 Order* scoring model at 0 to 5 points.¹¹ RIC requests clarification by the Commission regarding its proposed scoring of digital inclusion plans in connection with 2023 NBBP program applications.

If the digital inclusion scoring requirements established for the Capital Project Fund program are adopted for the 2023 NBBP program, applicants will only be awarded points for creating their own specific low-income offering. RIC believes that requiring applicants to create and administer their own low-income offering is unduly burdensome for most, if not all, broadband providers in Nebraska. RIC proposes that if an applicant is in compliance with applicable federal and state low-income assistance programs, and submits a digital inclusion plan with its application, then the applicant should automatically receive the full five (5) points relating to Digital Inclusion Plans.

5. Fixed Wireless Providers.

Fixed wireless providers submitting applications for 2023 NBBP program grants should be required to comply with all aspects of the Nebraska Capital Projects Fund Program Guide and Grant Application form. These requirements include, but are not limited to, provision of the information required to be included in Attachment Letter K, K1 (tower locations), and K2

¹⁰ See, *CPF-1 Order*, pp. 13-14.

¹¹ *Id.*, Attachment C.

(propagation data).¹² RIC endorses the Commission’s proposal to formally adopt the requirements of the Capital Projects Funds applicable to fixed wireless providers to equally apply to the 2023 NBBP program year.¹³ Similarly, the Commission should require that fixed wireless providers provide with their tower coverage shapefiles the propagation maps and information necessary to reproduce the coverage area calculated in these maps, including descriptions of the software used as well as the methodology, inputs, and assumptions used.

The requirements of the CPF-NBBP Program Guide, Challenge Process, section 3.1 relating to Type 1 and Type 2 Challenges should also be made applicable to fixed wireless providers regarding the 2023 NBBP program year.

6. Rates.

Response: In connection with the Commission’s consideration of broadband service rates relating to the 2023 NBBP program, RIC submits that it is critical that the Commission is mindful of the scope of its broadband service rate-setting authority pursuant to the provisions of the Nebraska Broadband Bridge Act. *Neb. Rev. Stat.* § 86-1311 provides:

- (1) Nothing in the Nebraska Broadband Bridge Act shall be construed to authorize the commission to regulate Internet services as prohibited by subdivision (1)(d) of section 86-124.
- (2) The commission shall take reasonable steps to ensure that an applicant meets the obligations described in subsections (2) and (3) of section 86-1308. *The commission shall not deny an application based on prices or terms and conditions offered, or regulate any term of service. The commission's weighted scoring system under subdivision (2)(c) of section 86-1306 may take into consideration an applicant's terms and conditions of service.* (emphasis added)

¹² See, *CPF-1 Order*, p. 6, Attachment B, Grant Application Instructions; p. 4, Attachment D, 2023 CPF-NBBP Program Guide; section 2.2.2, Field 4 instruction; and section 2.2.3 instruction 5.f.

¹³ *C-5484 Order*, p. 4.

By the foregoing terms of Section 86-1311, the Legislature confirmed a critical distinction regarding the limitations of the Commission’s authority on the one hand to regulate prices or terms and conditions for providers’ offering of broadband services by stating that the Commission “shall not deny an application based on prices or terms and conditions offered, or regulate any term of service.”¹⁴ On the other hand, the Commission “may take into consideration an applicant's terms and conditions of service” in the scoring of NBBP program grant applications.

Based upon the foregoing delineation of the Commission’s authority regarding regulation of terms and conditions of broadband services, including the rates therefor, the discussion of “Rates” in the *C-5484 Order* must be understood to be limited to the Commission’s scoring of rates set forth in an applicant’s 2023 NBBP program grant application.

Subject to the foregoing, RIC supports the Commission’s continued use in the 2023 NBBP program of the first element of the “Scoring Criteria” regarding “Rate Comparability” as set forth in the *CPF-1 Order*.¹⁵ This Criteria requires an applicant to state in its 2023 NBBP program grant application that it will offer 100/100 Mbps broadband service in the project area at rates that are comparable to those offered in other areas that the applicant serves in Nebraska as a condition to the award of 5 points in scoring of an application.

¹⁴ However, pursuant to *Neb. Rev. Stat.* § 86-1308(2)(a) the Legislature established as conditions for an applicant’s acceptance of an NBBP program grant that (1) the applicant must offer broadband service to the project area for 15 years after receipt of grant funding, and (2) the applicant must commit to maintaining minimum speeds of 100/100 Mbps.

¹⁵ See, *CPF-1 Order*, Attachment C, Section E “Rate Comparability” and CPF Guide Program Year 2023, p. 16.

However, RIC opposes continued use of the second element of the “Scoring Criteria” regarding “Rate Comparability” as set forth in the *CPF-1 Order*.¹⁶ As proposed, this element would require an applicant for a 2023 NBBP program grant to price 100/100 Mbps broadband service at or below \$65/month as a condition to an award of 5 points.¹⁷ This proposed minimum broadband rate is extremely inconsistent with benchmark rate information released on December 16, 2022 by the Federal Communications Commission (“FCC”) announcing the results of the 2023 Urban Rate Survey for voice and broadband services. The FCC’s 2023 benchmark for 100/20 Mbps unlimited capacity allowance broadband service is *\$105.03 per month*.¹⁸ (The FCC’s table of 2023 broadband service benchmarks does not include 100/100 Mbps service.) It should be noted that the foregoing benchmark rate is for *United States urban areas*, excluding Alaska.

The Commission’s proposed price comparability benchmark proposed for 100/100 MBPS broadband service that would be required in the 2023 NBBP program is *48% less than the FCC’s 2023 urban benchmark for 100/20 Mbps broadband service*. The deviation in these benchmark prices is not only significant, but further, this deviation seriously undermines the advisability of continued use of the Commission’s proposed minimum pricing benchmark for the award of points for this element of the Rate Comparability criteria for scoring of 2023 NBBP

¹⁶ *Id.*

¹⁷ For the 2022 NBBP program year, the minimum rate necessary for award of points for Rate Comparability was \$80.50 per month. *See, C-5368 Order*, p. 15. In the *CPF-1 Order* the Commission lowered this minimum rate to \$65/month. *See, CPF-1 Order*, p. 15.

¹⁸ *See, Wireline Competition Bureau and Office of Economics and Analytics Announce Results of 2023 Urban Rate Survey for Fixed Voice and Broadband Services, et al.*, WC Docket No. 10-90, Public Notice, DA 22-1338, p. 3 (2022).

program grant applications. RIC respectfully requests that the Commission discontinue use of this element in the scoring of 2023 and future NBBP program grant applications.

7. **Penalties.**

In the instance that an applicant has been granted 2023 NBBP program funds and such applicant later makes the determination that it is unable to proceed with the approved project and thus needs to return the grant funds to the Commission, the applicant should prepare and file a motion with the Commission seeking leave to return the program funds. The motion should set forth a complete explanation of the circumstances that necessitate the return of 2023 NBBP program funds. No “automatic” civil penalty or disqualification from receiving future grant awards should be imposed as a result of an applicant’s filing of a motion requesting approval to return funds. Rather, the Commission should make a reasoned determination on a case-by-case basis, in consideration of the facts presented, as to whether any penalty should be imposed under the circumstances.

However, if an applicant that has been granted 2023 NBBP program funds proceeds with construction of the funded project, but does not complete the project within 18 months following the grant award (or the Commission’s approval of a timely filed 6-month extension request), then the applicant should be subject to the penalties provided in Section 86-1304(b).

II. CONCLUSION

As stated above, the Rural Independent Companies appreciate the opportunity to provide these Comments in response to the *C-5484 Order*. RIC looks forward to participation in the hearing in this proceeding.

Dated: March 28, 2023.

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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of March 2023, an electronic copy and one paper copy of the foregoing pleading were delivered to the Nebraska Public Service Commission at psc.broadband@nebraska.gov.

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