

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

<b>In the Matter of the Nebraska Public</b>	)	
<b>Service Commission, on its own motion,</b>	)	<b>Application No. C-5272</b>
<b>to implement the Nebraska Broadband</b>	)	
<b>Bridge Act.</b>	)	
	)	

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**INITIAL COMMENTS OF WINDSTREAM**

Windstream Nebraska, Inc. and its affiliates (collectively “Windstream”) hereby respectfully file these comments as permitted by the Order Opening Docket, Seeking Comment, and Setting Hearing (the “Order”) issued by the Nebraska Public Service Commission (“Commission”) on June 8, 2021, and state as follows:

**I. Introduction**

Windstream appreciates the opportunity to provide comments in this docket as the Commission begins implementation of the Broadband Bridge Program (“Program”) as created by LB388 (2021) (the Nebraska Broadband Bridget Act or “Act”). The Act is an important continuance of the Commission’s ongoing work to expand broadband access throughout Nebraska. Furthermore, Windstream is in strong support of the Program’s requirement that projects be scalable to 100/100 Mbps download/upload speeds and the Act’s furtherance of fiber-to-the-home infrastructure investments in the State of Nebraska.

**II. Response to the Commission’s Questions**

**A. Grant Priorities**

Windstream agrees that the priorities for grant distribution outlined in the Act are clear and provides more detailed comments regarding the priority evaluation process below.

## **B. Project Areas**

### **1. Geographic Area Identification**

Windstream supports requiring applicants to submit a polygon shapefile (.shp) identifying the proposed project area. Further, Windstream agrees it is appropriate for the Commission to assume all locations within the polygon will be served unless the applicant provides a point shapefile identifying specific locations of households that would be served. Windstream would support the Commission requiring an affirmative statement that it is the intent of the applicant to serve all locations within a polygon as part of the application.

### **2. Speed Data**

Assuming that company-wide information is acceptable, Windstream has no opposition to the proposed requirements in the Order regarding providing documentation to demonstrate an applicant has delivered the minimum speeds via the technology proposed in an application and that those speeds are advertised in other areas.

As to requiring applicants to identify the current broadband speeds provided in the project area, Windstream asks that the Commission provide more clarity on what information is sufficient to establish an area that is unserved or underserved. In particular, Windstream recommends that Form 477 data be sufficient to establish all of the households within a census block are unserved or underserved unless an application treats some households within a census block differently than others for purposes of the grant priority designations, at which point more granular data should be considered.

### **3. Non-Contiguous Geographical Areas**

Windstream supports the Commission's proposal to allow applicants to file grant applications for project areas that are not contiguous. Windstream agrees that it is likely that

applicants may need to work around areas that already have broadband services. Accordingly, Windstream anticipates that there are likely to be clusters of unserved or underserved households that are geographically clustered but not contiguous. Rather than asking applicants to explain why project areas may not be contiguous, Windstream recommends applicants be asked to explain why non-contiguous project areas are appropriate to include in a single application (as opposed to separate applications). For example, providing service to a number of clusters could require the installation of a single fiber hub whose installation cost would be required to be listed on every application if each cluster were submitted in a separate application, but whose installation cost would be “shared” amongst the clusters in practice. Windstream believes this strategy would reduce confusion in the review process caused by duplicate infrastructure costs across multiple applications and create better transparency for evaluators. It would also create a simpler process for granting applications in part, if necessary.

#### **4. Unserved and Underserved Areas**

In continuance of the response above, Windstream recommends the Commission accept applications that include project areas with a mixture of both unserved and underserved areas. However, Windstream disagrees that mixed project areas should automatically be relegated to the lower priority tier.

It seems likely that a project, particularly projects with a large geographic footprint, could include both unserved and underserved household areas, especially if areas are classified at the census block level. In most cases, unserved locations are in the least dense areas, while underserved locations are more likely to be closer to existing fiber infrastructure. Therefore, it requires less fiber to reach underserved locations versus unserved locations. But when underserved locations

are bordered by unserved locations, it is also more efficient to install fiber to both sets of locations rather than to exclude the underserved locations in order to achieve a higher priority.

Windstream argues carriers seeking grant funds should not be penalized for proposing projects with such efficiencies. Penalizing carriers might actually encourage the cherry-picking that the Commission seeks to avoid and inadvertently frustrate broadband expansion opportunities. Accordingly, rather than diminishing the priority of those applications outright, Windstream recommends the Commission establish a threshold for what portion of a project's infrastructure resources is required to serve locations in the higher priority tier to be considered in the higher tier of applications. Carriers submitting applications for project areas with a mixture of both unserved and underserved areas would be required to calculate the feet of fiber required to hit the incremental locations so that the Commission may evaluate what portion of a project's infrastructure resources are required to serve the higher priority tier and whether it meets the established threshold.

## **5. Overlapping Areas**

Windstream supports the proposed approach to overlapping areas expressed in the Order.

## **6. Digital Inclusion Plan**

Windstream asks the Commission to provide further clarity on how affordability will be determined in evaluating broadband service plans provided by an applicant. Although the Order provides sample indicators, the Order provides little guidance on how it will apply the indicators. In particular, Windstream is concerned about the scope of comparability. For example, comparing rates between non-competitive companies is unlikely to provide an accurate depiction of affordability for a given area. Likewise, comparing rates in competitive markets and less saturated

areas does not provide the full picture. The Commission should also consider defining what speeds constitute a “standard” broadband connection for purposes of digital inclusion plans.

Furthermore, Windstream argues carriers should not be prohibited from requiring a contract or pre-payment for rates implemented below the carrier’s normal rate scheme to expand access to those disadvantaged within a community. Providing services in a high-cost area at a rate that meets the Commission’s requirements will likely require the carrier to support services with its own capital; providing more certainty as to income from subscribers in the area enables carriers to be more aggressive in their pricing for disadvantaged consumers.

## **7. Matching Funds**

Windstream supports the continuation of the match percentage calculation and reimbursement procedures used in NUSF-77 and NUSF-92.

Windstream recommends the Commission consider federal universal service support and other governmental program support as a match for purposes of grants under the Act. Projects receiving federal support are already moved to a lower priority tier and should not be further penalized in the application process.

Windstream agrees with the Commission’s recommendation in the Order that state universal service support should not be considered a match unless further support for a project is required to meet the new scalability requirements passed as part of LB338. As a practical matter, it is unlikely existing fiber projects supported by state universal service funds would meet this requirement, but such support might be necessary to convert fixed wireless projects to fiber.

Finally, Windstream believes in-kind contributions should not be considered as part of the match. As the Commission implies in the Order, it is often difficult to quantify the value of in-kind

contributions fairly and consistently. This is true of tangible goods whose prices fluctuate and intangible contributions like right-of-way access.

## **8. Eligibility and Priority Determination**

Windstream supports the Commission using information collected through past grant programs and FCC Form 477 data as the default information for service and speeds provided within a project area. Because testing performed by consumers can be unreliable or show speeds below 100/20 Mbps because of their subscribed level of service, Windstream recommends any additional evidence accepted by the Commission to demonstrate some locations within a census block are unserved or underserved only be accepted from applicants who are the sole carrier claiming to provide service within the census block. Evidence could include the location's distance from fiber, advertised maximum speeds, or other relevant information.

## **9. Scoring Criteria**

Windstream supports the Commission's pursuit of a scoring/weighting process that is based on objective criteria. Windstream has provided more detailed comments below regarding the weights and scores assigned to the proposed criteria in Attachment B.

### **a) Financial Capability**

#### **(1) Financial Viability of the Applicant**

Windstream believes audited financial statements, independent audit results, and federal tax returns are sufficient to determine the financial health of a carrier. Windstream also encourages the Commission to accept other evidence of financial viability if provided by an applicant. Windstream does not support consideration of past bankruptcy proceedings of an applicant or carrier partner by the Commission. The current financial status of an applicant or carrier partner

has a greater bearing on financial viability, and the Commission should not disqualify applications supported by companies in solid financial health.

Windstream supports project financial plan requirements that are akin to those required in NUSF high-cost programs and encourages the Commission to maintain consistent requirements across all broadband expansion programs as much as possible. Advancement of broadband expansion is best served by low administrative costs where possible, and continuity amongst support programs eases the burden on both carriers and the Commission staff.

## **(2) Financial Viability Over Time**

Again, Windstream supports requirements related to project viability to the extent other similar requirements are already implemented for other programs administered by the Commission.

### **b) Technical Capability**

Windstream believes the Commission's proposal to require information from applicants regarding prior experience providing broadband, either in Nebraska or other states, is reasonable. Windstream requests Field 15 on the Application and Application Form Field Descriptions in Attachment A and the Reference Sheet – Scoring Criteria included in Attachment B to the Order be modified to reflect that offering 100/100 Mbps (or greater) outside of Nebraska is also sufficient to demonstrate technical capability and be awarded the corresponding points on the Scoring and Weighting Sheet.

Windstream opposes requiring any attestations regarding the security of equipment that is broader than the Federal Communication Commission's equipment and authorization rules as they exist at the time an application is submitted.

**c) Legal Capability**

Windstream agrees that contact information for a legal representative should be required of applicants. As to relevant factors, the Commission's primary focus should be whether the applicant can legally provide broadband service in Nebraska, and Windstream opposes consideration of other regulatory compliance as a measure of legal capability. To the extent the Commission continues to pursue considering past regulatory compliance regarding late-filed reports or remittances, Windstream requests the Commission apply a limited look-back period for regulatory compliance, particularly given the Commission's waiver policies. Pending dockets or litigation should not be considered because they could be resolved in favor of the applicant, and penalizing the applicant is premature. Finally, although the ability of the applicant to quickly navigate local zoning and permitting is desired by both the Commission and the applicant, Windstream is unsure how the Commission can fairly and objectively determine that capability, and therefore Windstream opposes attempting to measure that ability as a factor in the grant process.

**d) Eligible Telecommunications Carrier Status**

Windstream supports the Commission requiring all applicants to have or obtain eligible telecommunications carrier ("ETC") status to qualify as a grant recipient. Such a requirement ensures all applicants and service providers bear the same responsibilities and oversight.

**e) Rates**

In line with prior comments regarding rates in the digital inclusion plan, Windstream renews its concern about the scope of comparability between carrier rates and requests the Commission provide further clarity on what constitutes a comparable rate outside the project area. Windstream does not oppose requiring the same or similar rates for the project area as those offered



throughout an exchange or local market area for the same level of service. However, expanding comparisons to a larger geographic area or company-wide seems to be beyond the intent of the Act. Furthermore, wading too far into price-setting could frustrate both carriers' business development and broadband expansion, which is the stated purpose of the Act. To the extent an applicant's rates are the same or similar rates for the project area as those offered throughout an exchange or local market area for the same level of service, Windstream suggests the applicant's rates be considered to have met any affordability benchmark.

Windstream has also been an active participant in the FCC's Emergency Broadband Benefit and is advocating for the implementation of a similar long-term program. If such a program is implemented, Windstream would support the Commission considering carrier participation in the program to satisfy an affordability benchmark.

In addition, Windstream reinstates its proposal that contracts requiring a consumer to maintain service for a certain term or requiring pre-payment be allowed for low-cost plans whose rates are below the applicant's normal cost offerings. Windstream does not set data caps, apply overage charges, or require annual contracts (in favor of month-to-month plans) and does not object to the Commission disqualifying plans who do when the plans' rates are at or above the applicant's normal cost offerings.

**f) Minimum Broadband Speeds**

Windstream strongly supports the 100/100 Mbps minimum broadband speed requirement in the Act and agrees with the Commission's interpretation that consumers within a project area should be able to connect to a service capable of 100/100 Mbps within the normal time frame of a service request once a project is complete.

Windstream believes an attestation from the carrier that the service is scalable to reach speeds of 100/100 Mbps is sufficient for all projects. Applications showing deliverable speeds beyond 100/100 Mbps should have those speeds supported by speed test documentation from similar deployments using the proposed technology. If available speeds are affected by a household's location or factors outside of a carrier's control (e.g., weather), then applicants offering speed tests to support claims of enhanced speed offerings should also demonstrate that the speed test results came from deployments with like locations and outside factors.

Windstream believes speed tests required by the Act after project completion will dissuade carriers from proposing projects with uncertain outcomes and ensure repayment of grant funds if there are service deficiencies.

**g) Project Match**

Windstream does not oppose the approach taken to matching fund sources and weights given to the percent of eligible project costs requested as it goes to weighing the project match requirement in the Act in isolation. However, the Commission has also sought comment on what weights the Commission should apply to each factor, and Windstream is concerned that the project match is given disproportionate weight in the scoring system. As proposed in the Order, the project match accounts for up to 30 of the potential 91 points available within the scoring system. Although Windstream sees the value in encouraging project matches higher than 50% of project costs, the Commission should be wary of inadvertently eliminating project applications by assigning too much value to the project match. Some broadband expansion programs have failed to spend their allocated budgets because the match is too low to make business sense for a project area. Windstream suggests the project match points are disproportionate with other application

elements and that the total points assigned to project matches should be similar to other project components.

For example, the Order proposes to include the number of households in a project area as a factor additional to the minimum considerations outlined in the Act. Windstream believes this is an important factor and supports including it in the scoring system. After all, the purpose of the Act is to “facilitate and fund the development of broadband networks in unserved and underserved areas.” The points assigned to the number of households served, however, only amount to a maximum of six points of a potential 91 points. Furthermore, the proposed scoring system does not account for the amount of funds requested from the Program by any given application. Windstream has always strived to be a good steward of public dollars, which includes pursuing projects that are a good value by providing services to the most people at the lowest cost. Windstream posits that a high project match score is not necessarily akin to a good value and recommends the Commission explore whether there is a more balanced approach to evaluating a project’s reach for the dollars. For purposes of the scoring system, that may require deducting points for some factors to achieve more proportional point allocations and to account for applications whose project parameters vary widely.

### **C. Challenge Process**

As an initial matter, Windstream request clarification from the Commission regarding one piece of proposed information required from challenging carriers who already provide service in the project area. The Order asks challenging carriers to provide “[e]vidence that the required service levels are being met at the customer premises.” Windstream interprets this to mean that the challenging carrier must demonstrate that the customer is receiving the minimum broadband speeds for which they subscribe. If that interpretation is correct, Windstream has no objection to

the information required of a challenging carrier as proposed in the Order or the requirement that a challenge is attested to under penalty of perjury.

As to challenge responses, the Commission should be wary of accepting subjective or informal information as evidence undercutting the credibility of information submitted by a challenging carrier without also affording the challenging carrier an opportunity to respond in kind. Furthermore, speed tests captured from consumers should be considered relevant only to the extent that they are conducted with reliable methodology and are used in comparison to the speeds the consumer is subscribing to, rather than the speeds available within a project area. If the Commission is willing to accept consumer-captured speed test data, comments from local/community members, or other subjective/informal information from an applicant in response to a challenge, Windstream recommends the Commission establish a formalized process for managing the submission and response to such information. That process would likely be best managed by Commission staff in conjunction with both the applicant and the challenger to ensure the Commissioners receive all relevant information in a timely and efficient manner.

Finally, Windstream supports allowing portions of a challenged application to be withdrawn and does not believe carriers should be prohibited from withdrawing additional portions beyond the challenged area(s) if required to ensure project efficiency. A progression order setting reasonable deadlines for submission of an amended application and responses should be entered by the Commission based on the anticipated scope of the required changes. Except for the carrier(s) who challenged the original application, other carriers should be prohibited from challenging an amended application.

#### **D. Distribution of Support**

Windstream takes no position on the distribution schedule proposed in the Order other than to note that multiple distributions increase the administrative burden on Commission staff. As explained more fully below, there will likely need to be some gap between project completion and post-award testing to allow carriers to accumulate subscribers. Accordingly, Windstream believes the full grant award could be distributed upon project completion. The Commission may find that this approach also provides some assurance that the carrier has the financial ability to complete and maintain the project's infrastructure.

#### **E. Post-Award Testing**

Section 4(3)(b) of the Act states, in part, that "speed tests shall be conducted for one week using a random sample of locations of consumers who subscribe to the network completed as a result of the grant." Conversely, the Order proposes to determine the number of testing locations be based on the households in the application's project area. Drop facilities and in-home equipment are typically not installed at a location until the resident subscribes to the service. Depending on how proximate the speed tests are conducted in relation to project completion, it is possible that the requisite number of subscribers is not present for the carrier to meet the proposed speed test threshold. This disconnect could be remedied either by establishing a gap between project completion and testing, or by establishing a portion of subscriber locations for initial testing and a requirement for a second round of testing if the number of tested locations in the first round is less than the established number of project-wide test locations proposed in the Order.

Section 4(3)(b) of the Act implies that speed tests should be used by the Commission to determine whether the completed project meets the 100/100 Mbps scalability requirement. Windstream recommends the Commission implement contingency requirements similar to those

adopted by the FCC to account for factors that may leave a carrier with fewer testing locations than required. For example, the FCC permits carriers to request a replacement location if the subscriber at a location selected for testing refuses to participate, drops service, or subscribes to a slower speed tier than the one being tested. Carriers may also request a replacement location if the subscriber at a location selected for testing does not use the service for a month or more but continues to subscribe, or if the subscriber accepted but does not use or stopped using the modem provided for testing. Locations should also be able to be replaced if non-carrier equipment is used by the customer that hinders or affects speed test results. And finally, carriers that serve 50 or fewer subscribers in a state and particular service tier and cannot find five active subscribers for the required testing are subject to verification that more subscribers are not available.

Alternatively, if there is a sufficient number of total subscribers but an insufficient number subscribing to at least 100/100 Mbps service, Windstream proposes that carriers be required to provide at least 100/100 Mbps service to all testing locations for the duration of any testing period.

Similarly, Windstream proposes the FCC's "80/80" rule implemented for Connect America Fund Phase II ("CAF2") is a good model for establishing a threshold for passing testing results. The 80/80 rule establishes that carriers have meet the speed requirements for a project if 80% of the measurements are at least 80% of the required speed. That allows a small window for carriers to mitigate factors beyond their control that can impact testing and Windstream believes it is a reasonable standard.

Windstream further requests the Commission grant carriers additional time to develop and propose testing solutions if carriers are required to perform testing at the 500 Mbps and 1 Gbps levels. Currently, the CAF2 testing platform is limited to speeds up to 300 Mbps. Many carriers,

including Windstream, will be required to develop testing that supports 1 Gbps under the Rural Digital Opportunity Fund; that testing capacity will likely not be available in time for the Program.

#### **F. Post-Award Repayment**

Windstream has no opposition to the proposed notice and hearing procedure proposed in the Order for repayment.

#### **III. Summary**

For the reasons stated above, Windstream recommends some modifications to the proposed Program implementation and scoring provisions included in the Order. Windstream appreciates the opportunity to provide comments in this matter and looks forward to further discussion regarding Program implementation with the Commission and other carriers.

Respectfully submitted this 29th day of June, 2021.

WINDSTREAM NEBRASKA, INC.,

s/ Mary Jacobson

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#### **Certificate of Service**

The undersigned hereby certifies that on this 29th day of June, 2021, one (1) electronic copy of the foregoing Initial Comments of Windstream was delivered to the Nebraska Public Service Commission at [psc.broadband@nebraska.gov](mailto:psc.broadband@nebraska.gov).

s/ Mary Jacobson

Mary Jacobson