

MAR 01 2022

Received &amp; Scanned

## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public                    )  
 Service Commission, on its own motion,            )  
 to administer the Nebraska Broadband            )  
 Bridge Program in the 2022 program year.        )

Application No. C-5368

**COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES**

The Nebraska Rural Independent Companies (“RIC”)<sup>1</sup> 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 February 1, 2022.<sup>2</sup> 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 2022 program year of the Nebraska Broadband Bridge Program (“NBBP”).<sup>3</sup> In the below Comments, RIC will first set forth the topic on which comments are requested in the *C-5368 Order* followed by RIC’s responsive comments.

---

<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 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) (the “*C-5368 Order*”).

<sup>3</sup> In addition to these Comments in response to the *C-5368 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) (the “*RIC C-5272 Comments*”) which are incorporated herein by reference.

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

### **1. Program Overview.**

Response: RIC believes that the dates set forth in Attachment A to the *C-5368 Order* are appropriate. RIC further 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) Financial Capability.**

Response: The Commission proposes to require applicants to provide cash flow projections for a minimum of five (5) years, including cash flows “for at least 3 years beyond the date the project reflects positive cash flow.” The Commission also proposes that projections showing negative cash flow for the last year of the projection will not be accepted.

RIC's initial observation regarding the “Financial Capability” scoring/weighting criteria is that the requirements established in the *C-5272 Order* to demonstrate that the applicant satisfies this criterion are sufficient and need not be changed.<sup>4</sup> These criteria properly focus on the *financial capability of the applicant to deploy and operate a broadband network* and to provide the broadband service outlined in the application as directed by the Legislature, including submission of a business plan that provides details regarding the applicant's ability to maintain the network constructed through use of grant funding. Specifically, the Legislature

---

<sup>4</sup> *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 Issuing 2021-2022 Grant Application Schedule and Application Materials, pp. 8-9 and Attachment B, Nebraska Broadband Program Guide (“NBBP Guide”), p. 10 (Aug. 10, 2021) (the “*C-5272 Order*”).

directed that in connection with the Commission's evaluation and ranking of NBBP applications, the Commission's "weighted scoring system shall consider, at a minimum: (a) The financial . . . capability of the applicant to deploy and operate broadband Internet service."<sup>5</sup>

As proposed in the *C-5368 Order*, the Commission would redirect the focus of the scoring criteria away from the applicant's financial capability and maintenance of the network as directed by Neb. Rev. Stat. § 86-1306(2)(a) and toward the financial viability of the project. Use of a review standard based upon the financial viability of a project, which the Commission proposes to measure based upon positive cash flow projections, is in conflict with several other policy considerations addressed in the *C-5368 Order*.

For example, match source and match funding can yield up to forty (40) points in scoring an NBBP application. Use of the applicant's funds or outside funds (i.e., debt financing) and increasing the percentage match will both have the effect of reducing cash flow from the project. Moreover, the Commission proposes to create new sources for points by encouraging applicants to provide service discounts or low-income assistance programs (up to ten (10) points) and free Wi-Fi hotspots (up to six (6) points). Again, implementation of these policy considerations will reduce cash flow from an NBBP project. Finally, since unserved areas of Nebraska receive the highest prioritization for funding,<sup>6</sup> those areas can reasonably be expected to be the highest cost, lowest density areas of the State. Thus, the level of positive cash flow, if any, from these highest priority projects will likely be low.

RIC respectfully submits that the foregoing elements of the NBBP, all of which have high value in achieving success by the NBBP in contributing to the establishment of ubiquitous

---

<sup>5</sup> *Neb. Rev. Stat.* § 86-1306(2)(a).

<sup>6</sup> *See*, NBBP Guide, p. 9.

broadband availability in Nebraska, weigh against implementation of a “financial capability” scoring criteria that focuses on positive cash flow projections and thus, the financial viability of an NBBP project rather than the financial capability of the applicant. As such, RIC recommends that the Commission should not implement the “Financial Capability” proposal presented on page 3 of the *C-5368 Order*.

**(b) Technical Capability.**

Response: RIC supports the Commission’s proposal that applicants identify the expected useful life of facilities proposed to be built in connection with an NBBP project. Further, RIC believes that it is reasonable for the Commission to consider an applicant’s past performance of Commission-funded projects in connection with the Commission’s scoring of an applicant’s technical capability (up to twenty (20) points).<sup>7</sup>

It is not clear, however, from the Commission’s discussion of this subject in the *C-5368 Order*<sup>8</sup> as to how the number of points that may be deducted for past poor performance by an applicant will be determined. If this proposal is adopted, RIC encourages the Commission to provide objective guidelines regarding the extent of any point deductions based upon past performance. Such objective guidelines would provide consistent results which might otherwise not occur if reliance is solely on subjective judgments of the evaluator of an application.

**(c) Legal Capability.**

Response: RIC supports the Commission’s proposed scoring modifications relating to legal capability as set forth in the *C-5368 Order*.<sup>9</sup> However, consistent with RIC’s position in

---

<sup>7</sup> See, *id.*, p. 10.

<sup>8</sup> See, *C-5368 Order*, p. 3.

<sup>9</sup> *Id.*, pp. 3-4.

the preceding paragraph, RIC encourages the Commission to provide objective guidance regarding the extent of any point deductions based upon complaints filed against an applicant during the preceding five (5) years.

### **3. Tiebreaker.**

Response: The Commission proposes that if two or more applications are scored with the same number of points, the application requesting the lower amount of NBBP funding should be granted. This method of tiebreaking seems ill advised particularly based upon the past difficulties experienced by the Commission as well as the Nebraska Department of Economic Development in awarding grant support for broadband buildout to the full extent of funding allocations.<sup>10</sup> If one of the Commission's goals relative to the NBBP is to distribute the full \$20 million legislative allocation for 2022, resolving a tie in application scoring based upon the application seeking the lowest amount of NBBP funding may prove counterproductive.

RIC suggests an alternative tiebreaker methodology that is similar to the Commission's suggestion. RIC proposes that any tie in the overall scoring of applications should be resolved in favor of the application that proposes the higher percentage of match funding. This approach would be consistent with the Commission's process relative to determining a tiebreaker in the wireless fund grant context.<sup>11</sup> For example, in the circumstance in which Application A and

---

<sup>10</sup> Even after the Commission issued its Order Issuing Additional Grant Award in Application No. C-5272 on February 1, \$574,660.91 of the Legislature's \$20 million 2021 NBBP program year allocation is unspent. Similarly, of the \$40 million of CARES Act support assigned to the Nebraska Department of Economic Development for funding of broadband build out projects, only \$29,528,620 was awarded.

<sup>11</sup> See *In the Matter of the Nebraska Public Service Commission, on its Own Motion, to Administer the Nebraska Universal Service Fund Broadband Program*, NUSF-92, P.O. No. 6, Order Setting Application Deadline (Aug. 1, 2017), p. 1 (finding that in instances where applicants offer a match, the match and the degree of match offered would be used to break a tie when all else was equal).

Application B receive the same scoring, if Application A is based upon a 50% funding match and Application B is based upon a 60% funding match, Application B would be funded.

#### **4. Challenge Process.**

##### **(a) Geographic Area Identification and Speed Testing**

Response: The proposed adjustment to the current Challenge Process does not appear to take into account the current guideline that the challenger “provides or has begun construction to provide a broadband network in the proposed project area with access to the Internet at speeds equal to or greater than 100/20 Mbps.”<sup>12</sup> RIC believes that a legitimate basis for a challenge to an NBBP application can and should be based upon an existing provider’s construction plans or construction in process. RIC recommends that Section 3.2 of the Challenge Process set forth in the NBBP Guide be maintained.

With regard to speed testing, RIC refers the Commission to the discussion of speed tests set forth on page 9 of the *RIC C-5272 Comments*.

##### **(b) Challenges to Portions of Applications and Modification of Applications**

Response: The Commission proposes that if a challenge to a portion of a filed application is submitted, then the applicant must remove the challenged areas from its application and failing to do so “the application will be considered withdrawn.”<sup>13</sup> This approach seems to create a presumption of accuracy of the challenge that may be unwarranted. The automatic requirement that the applicant must file a modified application and the associated obligation to create all of the revised information relating thereto will create a substantial burden on applicants.

---

<sup>12</sup> See, NBBP Guide, p. 8.

<sup>13</sup> See, *id.*

To avoid the foregoing concerns and burden, RIC suggests that the Commission should re-emphasize the importance and necessity of an applicant and challenger to engage in good faith discussions to resolve any challenge following the filing of a Notice of Intent to Challenge.<sup>14</sup> In this regard, RIC submits that, to advance the efficient administration of the NBBP, the Commission may want to establish a mediation process to assist the applicant and challenger to reach a resolution of their differences. This process may minimize the need for a Commission determination of the credibility of challenges.

If these efforts to reach a mediated solution fail, it may be necessary to proceed with the modified challenge process and application modification requirements as set forth in pages 5 and 6 of the *C-5368 Order*.

#### **5. Speed Testing.**

Response: RIC supports the concept of speed tests and believes the Commission should use the Nebraska Broadband Bridge Act's (the "Act") requirement:

Speed test means a measurement of download and upload speeds for access to broadband Internet service between a specific customer location and a specific remote service location that meets the specifications of the commission.<sup>15</sup>

In implementing this requirement, RIC suggests that the Commission should allow an applicant to rely on existing methods/vendors it uses to meet federal speed requirements, thus avoiding the additional administrative burden and costs of utilizing a new form of speed measurement.

#### **6. Remaining Grant Funding; Additional Federal Funds.**

---

<sup>14</sup> *See, id.*

<sup>15</sup> *Neb. Rev. Stat.* § 86-1302(10).

Response: RIC recommends that if any NBBP funding is not awarded during an assigned program year, then the remaining funds should be carried over to the next program year for award.

In the event that federal funding becomes available for use in the NBBP, such funding should be administered in accordance with any applicable federal guidelines and applicable Nebraska statutes and relevant Commission orders. Absent guidelines to the contrary, such federal funds should be utilized for broadband buildout funding in the next NBBP grant cycle.

#### **7. Revisions to Applications.**

Response: RIC supports continuation of the process for application supplementation or modification employed for the 2021 NBBP program year, without modifications.

#### **8. Overbuilding of Existing Networks.**

Response: As a general principle, RIC's position is that public funds should not be used to overbuild existing networks (as "overbuilding" is defined in the *C-5368 Order*).<sup>16</sup> At the same time, RIC recognizes that this principle may not be applicable in all instances. For example, when applying the Act's purpose to facilitate and fund the development of broadband networks in unserved and underserved areas,<sup>17</sup> together with the Legislature's further directives regarding first and second priority project areas for distribution of NBBP grants (subject to certain stated conditions),<sup>18</sup> some degree of overbuilding may be necessary if the existing network is not

---

<sup>16</sup> See, *C-5368 Order*, p.7, fn. 6.

<sup>17</sup> *Neb. Rev. Stat.* § 86-1303.

<sup>18</sup> *Neb. Rev. Stat.* § 86-1305(1) and (2). Unserved area "means a geographical area of the state which lacks broadband Internet service providing access to the Internet at speeds of at least twenty-five megabits per second for downloading and three megabits per second for uploading."



capable of providing 100/100 Mbps standard specified in the Act.<sup>19</sup> In these instances, RIC recognizes that it may be necessary for some level of overbuilding to occur. Nonetheless, as a policy matter, public funding should not be used to overbuild existing networks.

## **9. Data Plans and Usage Caps.**

Response: RIC supports the Commission’s statements in the *C-5368 Order* prohibiting “any kind of usage cap, including ‘throttling.’”<sup>20</sup>

Regarding the Commission’s proposal to also disallow “plans using a per-usage or ‘pay as you go’ model”, RIC respectfully requests that the proposal to disallow usage-based broadband pricing plans be modified so as to allow an applicant for NBBP grants to propose a usage-based pricing plan. However, the Commission would retain the discretion to take such a usage-based proposal into account in determining the number of points to be awarded relative to the “rate comparability” factor of the Scoring Guidelines.<sup>21</sup> Consistent with this recommendation, RIC also proposes that Section 4.2.4(b) of the NBBP Guide would be clarified

---

<sup>19</sup> *Neb. Rev. Stat.* § 86-1304(1)(a).

<sup>20</sup> *C-5368 Order*, p. 7.

<sup>21</sup> The primary reason for this request is that one of RIC’s member companies, Northeast Nebraska Telephone Company (“NNTC”), has since June 2019 provided broadband service within its service area pursuant to a usage-based plan (*see* <https://nntc.net/internet/> for details) with a residential base rate of \$19.95/month, a business base rate of \$27.50/month and a usage rate of \$0.14/GB of data. By way of example, in January 2022 81% of NNTC’s broadband service customers received billings of less than \$80.50 (the Commission’s published median rate for NBBP providers plus 15%). NNTC believes that its broadband service usage-based rate structure in fact provides a substantial number of its broadband customers with lower data usage needs with a discounted rate to NBBP providers’ median rate. This is consistent with and supports the policy considerations discussed by the Commission in Item 10 of the *C-5368 Order*. NNTC’s broadband service offering is based upon speeds of 100/100 Mbps or higher.

to specifically provide that usage-based pricing plans are allowed and would be considered by the Commission in connection with the awarding of points for the “rate comparability” factor.

**10. Digital Inclusion Plans; Additional Points Available.**

Response: The Commission proposes to modify its 2021 NBBP scoring methodology to provide up to ten (10) additional points to applications that provide for discounts or low-income assistance, and up to six (6) additional points for provision of public Wi-fi hotspots. RIC proposes that if an applicant is in compliance with applicable federal and state low-income assistance programs, then the applicant should automatically receive the full ten (10) points relating to Digital Inclusion Plans. As worded, the Commission’s proposal contemplates additional points would be available to a provider that offers a low-income or discounted service option apart from Lifeline, Emergency Broadband Benefit, and the Affordable Connectivity Program (the “Existing Discount Programs”). To encourage participation in the Existing Discount Programs, RIC recommends that points be offered to providers that voluntarily participate in the Existing Discount Programs as a baseline. In addition, the Commission should clarify that participation in the Existing Discount Programs would be required in order to receive the additional points for additional digital inclusion measures. Otherwise, the result of the Commission’s scoring process could give an advantage to carriers choosing not to participate in the Existing Discount Programs.

With regard to establishing Wi-fi hot spots within an area proposed to be served by a particular NBBP project, in rural high-cost unserved areas in the State, it is highly unlikely that buildings or businesses other than farms or ranches will exist in the project area. It appears to RIC that the proposal that public Wi-fi hot spots be the source of up to six (6) additional points will unfairly advantage applications that involve in-town locations suitable for creation of such

Wi-fi hotspots. As such, RIC recommends that this modification to scoring of NBBP applications be abandoned by the Commission.

## **11. Rates.**

Response: RIC's understanding of the Commission's proposal regarding broadband rates is that the median rate reported on the Commission's website (\$70.00) plus up to 15% increase (\$80.50) would only be applicable in the event that the applicant is not currently offering 100/100 Mbps service elsewhere in Nebraska. RIC recommends that the Commission's finding in the *C-5272 Order* that required applicants to submit information demonstrating that rates proposed in connection with an NBBP project are comparable to rates offered by the applicant elsewhere in Nebraska should continue to be followed without the modification.<sup>22</sup> This approach would be consistent with the statutory requirement that the Commission's "weighted scoring system shall consider, at a minimum: . . . (c) The ability of an applicant to offer rates in the project area that are comparable to the rates offered by the applicant outside the project area."<sup>23</sup>

Assuming that the above-described understanding of the Commission's proposal is correct, RIC supports the Commission's proposal that proposed rates in an NBBP project area should be no higher than fifteen percent (15%) greater than the median rate offered by other NBBP providers.

## **12. Match Source.**

### **(a) In-Kind labor costs.**

---

<sup>22</sup> See, *C-5272 Order*, pp. 11-12, subject, however, to allowance of usage-based broadband service plans as discussed in footnote 21 above.

<sup>23</sup> *Neb. Rev. Stat.* § 86-1306(2)(c).

Response: RIC respectfully submits that in-kind labor contributed to an NBBP project should be permitted as a source for match funding, subject to the requirement that the applicant bears the burden of demonstrating the value assigned to such in-kind contribution. If an applicant seeks to have construction labor costs associated with the deployment of plant as an in-kind contribution, that applicant could rely on prior invoices for similar construction activities as a reasonable proxy of the value of the in-kind contribution being proposed.

Provided that the demonstration requirement is rigorously applied in the review process, the flexibility for in-kind contributions and avoidance of gaming should result in the proper leveraging of existing capabilities of applicants to supply labor to complete NBBP projects and thus advance the Act's objective of deploying additional broadband service.

**(b) State and Federal support.**

Response: The Commission's proposal 1) to require an applicant to identify all sources of state and federal broadband funding currently received by applicant, and 2) to require an applicant to identify those portions of Nebraska that are meant to be served by such funding is not appropriate and should not be required. The amounts of Nebraska Universal Service Fund ("NUSF") support and federal universal service fund ("FUSF") support provided to recipient carriers is public information available via the Commission's website and USAC's website. Applicants should not be required to provide this publicly available information to the Commission in connection with an NBBP application.

Earmarking of amounts received from FUSF and NUSF disbursements that would, in turn, be used as matching funds for an NBBP application is not readily achievable based on current accounting for investment decisions and budgeting. As a general matter, both FUSF and NUSF support relating to a broadband project is bundled into the overall available capital budget

for broadband deployment. Thus, these support amounts would not be earmarked for any particular project as the Commission's proposal seems to suggest. Such earmarking is not required by the FCC and thus would be a new accounting requirement imposed by the Commission. Operating expense support that a carrier receives is also bundled with the overall expenses of a company and is not earmarked for specific projects. As a result, RIC recommends that an applicant be provided flexibility to demonstrate the level and appropriate use of FUSF or NUSF support as matching funds.

For the Broadband Deployment Support ("BDS") portion of NUSF High Cost Program support, RIC submits that current reporting requirements are sufficient. Specifically, companies are required to notify the Commission of the project areas/locations in which BDS support will be utilized. This BDS project notification already provides information necessary to identify portions of Nebraska to be served by such BDS funding.

### **13. Public-Private Partnerships.**

Response: The concept of a "public-private partnership" is not defined in the Act. The only reference to this term in the Act is as follows: "An application from a political subdivision or an Indian tribe shall be made as part of a public-private partnership with a provider."<sup>24</sup>

RIC recommends that the Commission should continue its current practice of not awarding additional points to an NBBP application that includes a "public-private partnership" (whatever that term means). This consideration is not a part of the Legislature's designated weighted scoring system to evaluate and rank NBBP applications.<sup>25</sup>

### **14. Invoices and Reimbursement.**

---

<sup>24</sup> *Neb. Rev. Stat.* § 86-1304(1)(b).

<sup>25</sup> *See, Neb. Rev. Stat.* § 86-1306.

Response: RIC submits that the time frame within which a successful applicant may submit invoices to support project expenses should be enlarged from the suggested 90-day timeframe to 180 days. This expansion of the window for submission of supporting invoices or other information will allow sufficient time for an applicant to identify, assemble and report cost information, particularly in-kind contributions to NBBP project costs.


## **II. CONCLUSION**

As stated above, the Rural Independent Companies appreciate the opportunity to provide these Comments in response to the *C-5368 Order*. RIC looks forward to participation in the hearing in this proceeding.

*[Remainder of this page intentionally left blank.]*

Dated: March 1, 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, 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

Thomas J. Moorman

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

WOODS & AITKEN LLP

5335 Wisconsin Ave., N.W., Suite 950

Washington, D.C. 20015

Telephone (202) 944-9502

Facsimile (202) 944-9501

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 1st day of March 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).



Paul M. Schudel