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**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

In the Matter of the Nebraska	)	Application No. CPF-2
Public Service Commission, on	)	
its own motion, to administer	)	
the second round of federal	)	
Capital Projects Funds for	)	
broadband development in	)	
Nebraska.	)	

**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 entered by the Nebraska Public Service Commission (the “Commission”) on August 15, 2023.<sup>2</sup> RIC appreciates the opportunity to provide these Comments. In the below Comments, RIC will first set forth the topic or question in response to which comments are requested in the *CPF-2 Order* followed by RIC’s responsive comments.

**RIC’S RESPONSES TO THE COMMISSION’S REQUESTS FOR COMMENTS**

**A. Per Project Location Funding Cap**

*The Commission seeks comment on whether it should set a per location funding cap for projects in CPF-2. If a cap is established, where should the Commission set the cap? Should this per location cap affect the total CPF grant funds sought for middle mile and transport costs? Should the Commission consider the cost per fiber route mile in addition to number of locations? If a*

<sup>1</sup> Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis 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, 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 second round of federal Capital Projects Funds for broadband development in Nebraska, Application No. CPF-2, Order Opening Docket and Seeking Comment (Aug.15, 2023) (the “CPF-2 Order”).*

*hard cap is not established should the Commission consider cost per location in its scoring criteria? If so, how heavily should this factor be considered?*

**Response:** Given that locations that remain eligible for CPF-2 grant funding are likely to be in some of the highest cost areas of the State, RIC cautions against setting a blanket per location funding cap.<sup>3</sup> Instituting a per location funding cap in the highest cost areas of the State may prove counterproductive if carriers are unable to establish a viable business case to deploy broadband as a result of a per location cap. In such cases, very high cost locations may continue to be without access to the broadband service at speeds required by the CPF-2 program.

The Commission has indicated that in the initial CPF-1 grant cycle, there were some projects that included middle mile and transport costs and such costs were reflected in the cost per location calculation.<sup>4</sup> The inclusion of middle mile costs in the per location cap may be avoidable if projects are configured on the basis of contiguous areas, a concept that is addressed in the NUSF-131 record.<sup>5</sup> While inclusion of middle mile costs in some CPF projects may be appropriate or even unavoidable, RIC concurs with the Commission that the main objective in the administration of CPF projects is intended to focus on projects that will achieve last-mile connections.<sup>6</sup>

If a CPF-2 project involves non-contiguous areas that require middle mile network facilities to connect locations, costs will increase. In light of the Commission's concern that per

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<sup>3</sup> On May 26, 2023, LB 683 was approved by the Governor which removed the restriction that CPF grants awarded in Congressional District 3 be within cities of the second class and villages.

<sup>4</sup> *CPF-2 Order* at 2.

<sup>5</sup> See *In the Matter of the Nebraska Public Service Commission, on its own Motion, to establish reverse auction procedures and requirements*, Application No. NUSF-131, Progression Order No. 1 (Mar. 14, 2023).

<sup>6</sup> *CPF-2 Order* at 2.

location costs are being driven up as a result of the inclusion of middle-mile and transport costs in last-mile applications, the Commission may wish to consider instituting a per location cap for middle mile and transport costs. The Commission could, for example, limit such costs to a percentage of the overall cost of the project.

RIC does not favor the Commission's establishment of a cost per location scoring criteria except as noted below. Rather, RIC supports the continued use of the Commission's scoring criteria that has been established and fine-tuned in connection with the Nebraska Broadband Bridge Act and CPF-1 grant programs.<sup>7</sup> However, RIC also advocates that it would be appropriate to give consideration to a CPF-2 applicant's cost per location if two or more projects are submitted by multiple applicants that receive the same project scores. Points should be awarded to the applicant proposing a lower cost per location and preference should be given to the application demonstrating a lower cost per location to build.<sup>8</sup>

## **B. Past Performance**

*The Commission seeks comment in relation to scoring modifications or exclusions for past performance in either the technical capability or the legal capability scoring metric. Should applicants be required to secure the approval of the appropriate city or county governing entity? Should the Commission modify its criteria related to past performance deductions? If so, please explain.*

*Are there any instances where the Commission should consider an applicant ineligible due to past performance issues? If so, what issues should the Commission consider as precluding a*

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<sup>7</sup> See *In the Matter of the Nebraska Public Service Commission, on its own motion, to administer the Nebraska Broadband Bridge Program in the 2023 program year*, Application No. C-5484, Order Issuing 2023 Grant Application Schedule and Application Materials, Attachments C and D (May 16, 2023) (the "2023 NBBP Order") and *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 at 7-8 (Jan. 10, 2023) (the "CPF-1 Order").

<sup>8</sup> See Nebraska Capital Projects Fund (CPF) Guide Program Year 2023 (the "2023 CPF Guide") at 19, Attachment D to the CPF-1 Order.

*grantee from consideration? In certain instances, the Commission has determined it may preclude a carrier from applying for or receiving consideration for grant awards if such carrier returned grant funding. However, these determinations are made after notice and hearing. Outside of this situation, what sort of due process should be given by the Commission prior to any decision to exclude an entity from grant eligibility?*

**Response:** The Commission presented a similar request for comments in Application No. NUSF-131 to which RIC responded. Thus, RIC respectfully refers the Commission to that response.<sup>9</sup> In summary, if a recipient of grant support from a program such as the Nebraska Broadband Bridge Program determines on the basis of changed circumstances that the grant recipient needs to return such support to the Commission, such recipient should not be precluded from participating in future grant programs. However, RIC also respectfully submits that certain factual circumstances may form the basis to disqualify an entity from eligibility to participate in future grant programs such as CPF-2. For example, if return of support by a recipient was required by the Commission based on some conduct by the recipient otherwise found by the Commission to be inconsistent with the public interest, then the entity should not be eligible to participate in grant programs absent a demonstration of changed circumstances.

Essentially, RIC is recommending Commission review of “past performance issues” on a case-by-case basis. As such, RIC believes that an entity should not be declared ineligible for participation in a grant program without receiving written notice of the bases on which ineligibility may be declared and a hearing is held at which relevant evidence may be presented to allow the Commission to reach a fully informed decision on the issue of eligibility.

Applicants for CPF-2 grants should not be required to secure approvals from city or county authorities to receive CPF-2 grants or to proceed to perform CPF-2 projects except to the

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<sup>9</sup> *Id.* at 6-7.

extent that such projects involve use of public rights of way or pole attachments for which local governmental permit approvals are required. The Commission is charged with the responsibility to administer CPF funding for broadband development in Nebraska.<sup>10</sup> Approval of CPF-2 grant funding by local political subdivisions is neither required by law nor is it appropriate.

However, RIC suggests that the Commission should continue the community outreach process used in the CPF-1 program requiring applicants to notify the applicable county and city authorities of the project application.<sup>11</sup> If a local community provides negative support for a project, such objections should only result in a possible reduction of points and should not disqualify the project solely based on such objection. This treatment of negative support is consistent with the practice followed in connection with CPF-1 applications.<sup>12</sup>

### C. Copper-Based Broadband Service

*In such cases [in which minimum speeds have been satisfied through copper-based Digital Subscriber Line technology], should there be a commitment from the challenging provider to upgrade its network to fiber? If so, what timeline for completing such a project should be applied? Should the Commission treat these areas as "underserved"? In the alternative, should the Commission require more robust speed testing at locations which are further away from the central office or an existing fiber line running through a community? Should the Commission require speed testing at particular points in the perimeter of a town or village? Should the Commission increase the number of speed tests required by the challenger? In the alternative, or in addition to, considering any modifications in the speed test requirements, should the Commission solicit more community feedback to hear from residents? If so, how can this exchange occur in the abbreviated timeframe for determining challenges/awards?*

**Response:** The Commission expresses concern that while some locations in a challenged area may have speed test data to satisfy the minimum speed requirements, it may not have the data necessary to make a determination that all serviceable locations within a challenged area are

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<sup>10</sup> See *Neb. Rev. Stat.* §§ 81-12,245 and 86-1301 – 1312.

<sup>11</sup> See *CPF-1 Order* at 7-8.

<sup>12</sup> See *2023 CPF Guide* at 16, item 3.c.

served with the minimum 100/20 Mbps speed threshold. In its Order Issuing Challenge Determination and Reclassification of Applications, the Commission noted that some Type I challenges were denied due to a lack of complete information evidencing that the minimum speeds were available throughout the challenged service area.<sup>13</sup>

Given that the Commission believes in some cases it lacks the speed test data necessary to make a reliable determination as to the existence of the minimum speeds throughout the challenged area, RIC recommends the Commission modify the required information to be submitted for a challenge. Such modification would require speed test data to be collected at a minimum number of locations determined by the Commission at or close to the perimeter of the challenged area. If the speed test data collected at these locations does not meet the minimum speed standard, the Commission should require the challenger to commit to upgrade its facilities to meet the minimum standard within 18 months. If the challenger does not commit to upgrading its facilities within that timeframe, the Commission should deny the challenge and approve the application that was challenged.

#### D. Project Areas

*Should the Commission impose restrictions to prohibit these activities [carving out certain locations from project areas]? For contiguous projects should we require the submission of all serviceable locations within the project area whether unserved, underserved, or served? Why or why not? In the case of fixed wireless service, while the locations and service area may be defined in a linear manner, should the Commission consider the potential propagation area when considering broadband serviceable locations within the project area? Similarly, should the Commission consider adjacent locations along a fiber route which may not have been identified in the applicant's project as being potentially served by the project? Should the Commission take these locations into account when determining the appropriate categorization of the project tier or the level of overlap between projects? Finally, should applicants be required to include only*

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<sup>13</sup> *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 CPF-1, Order Issuing Challenge Determination and Reclassification of Applications at 3 (May 16, 2023).*

*locations that are captured in the FCC's broadband serviceable location fabric? Why or why not?*

**Response:** It seems that the threshold issue that the Commission has not posed in connection with this item is: "What is the preferred size and scope of a CPF-2 project?" Intuitively, the remaining unserved, very high cost areas of Nebraska are isolated geographic areas with a limited number of contiguous customer locations. If the Commission preferences funding of contiguous project areas in order to avoid the added costs of middle mile facilities to connect an applicant's non-contiguous project areas, then there will be a larger number of separate projects, each consisting of a relatively small number of unserved locations. Conversely, if the Commission preferences larger projects with greater numbers of locations, it is likely that middle mile facilities will be required, and project costs will be higher.

RIC recommends that insofar as possible each CPF-2 project should consist of a contiguous geographic area. This preference should result in minimizing the costs to deploy broadband to unserved high cost locations. Further, all serviceable locations within a project area should be required to be served and carve outs should not be allowed. To allow carve outs would reduce the cost efficiency of serving already high cost areas and would further isolate any unserved carve out locations from receiving broadband service.

With regard to the Commission's questions whether "potential propagation area[s]" should be considered in regard to fixed wireless service applications or whether "adjacent locations along a fiber route" should be considered in regard to a fiber-based application, RIC responds as follows. For fixed wireless projects, RIC suggests that the Commission expand its analysis of propagation data that is already required to be submitted by fixed wireless grant

applicants to establish the number of ineligible locations in a proposed project's propagation area.<sup>14</sup>

Grant monies should not be used to overbuild existing broadband networks, regardless of technology. Because a fixed wireless project's propagation data, and not its designated project area, represents the actual scope of the area a fixed wireless project will serve, the Commission should analyze that propagation data to determine the number of ineligible locations included in a proposed fixed wireless project. The Commission should determine a threshold number of ineligible locations included in a fixed wireless project that would render that project application to be ineligible. This approach would appropriately balance the Commission's need to prevent grant funds from being spent on overbuilding with the reality that a fixed wireless network's project area is less precise than a fiber-based project.

Regarding Commission analysis of adjacent locations along a proposed project fiber route as being potentially served by the project, RIC believes this approach would be problematic. Because a fiber route serves specific locations, it would not be rational for the Commission to include in a fiber-based application those locations adjacent to the proposed project area for the purpose of either putting that application in a certain priority tier or scrutinizing a fiber application's eligibility for funding. The actual proposed project area should be analyzed by the Commission. If and when adjacent locations to a proposed project area will be provided with broadband deployment would be speculative in connection with the Commission's evaluation of a proposed project. Projects should be categorized by project tier

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<sup>14</sup> See *2023 CPF Guide* at 10, section 11.4.



based upon known information derived from submitted applications and not upon possible future events.

In response to the Commission's final question presented in this Section D, since CPF grant recipients are required by the U.S. Treasury to include the FCC fabric identification number of all locations included in an approved project area,<sup>15</sup> it would appear to follow that a recipient should only include broadband serviceable locations identified in the fabric map within the area of a project. Absent inclusion of a location on the fabric map, a fabric identification number would not be available, and Treasury's requirements could not be met.

#### E. Cybersecurity Practices

*The Commission seeks comment on whether to require applicants to provide assurances that they have taken steps to safeguard and strengthen their networks against cybersecurity attacks. The Commission seeks comment on whether to require applicants to certify that they have adopted cybersecurity plans, software, firewalls, or taken other steps to improve cybersecurity practices. If so, how should the Commission assign points within its scoring metric for this area? Should the Commission require an attestation that cybersecurity practices are in place, and if so, what should be included in the attestation?*

**Response:** RIC supports the Commission's suggestion that CPF-2 applicants should provide the Commission with certification that the applicant has taken steps to safeguard its networks against cybersecurity attacks. However, RIC also submits that in order for an applicant to be able to provide such certification in good faith, it will be necessary for the Commission to formulate and publish the "specifications" of any required cybersecurity plan in order that entities submitting certifications may do so on an informed, good faith basis. Given the importance of cybersecurity to the Commission and to the reliability and security of broadband networks, rather than

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<sup>15</sup> *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 Grant Awards and Results of Challenges at 8 (June 27, 2023).*

awarding points to applicants that submit certifications, RIC suggests that an applicant's completion of a cybersecurity certification should be treated as a condition precedent to eligibility to submit an application for CPF grant funding.

F. Other Modifications to the Scoring Criteria

*The Commission seeks comment from interested parties on other modifications to the scoring criteria. Are there other factors the Commission should consider? Is the Commission's requirement for community outreach sufficient? Should the Commission require approval of the impacted governmental entities (county, city, town, or village, for example) of their proposed project? Should the Commission require that grantees certify that projects funded through NBBP cover all costs to reach the customer premise, including drops to the residence or business for all serviceable locations?*

**Response:** The application scoring model that has evolved based upon experiences from two rounds of Nebraska Broadband Bridge Act grant applications and one round of Capital Project Fund applications is now, in RIC's opinion, a mature set of scoring considerations that should be maintained and should not be subject to additional material modifications in connection with CPF-2 project applications.<sup>16</sup>

The Commission should continue the *CPF-1 Order* community outreach requirement that obligates companies to notify cities and counties in which CPF-2 application locations are situated of the filing of the application with the Commission.<sup>17</sup> If a local governmental entity provides a negative response to the application, the Commission could determine to reduce points awarded in the scoring of such application. However, a negative response should not result in the rejection of the application. Further, as stated above, approval by local governmental authorities of a proposed project should not be required.<sup>18</sup>

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<sup>16</sup> See *CPF-1 Order*, Attachment C and *2023 NBBP Order*, Attachment C.

<sup>17</sup> See *CPF-1 Order*, Attachment D at 8.

<sup>18</sup> See *supra* at 4-5.

Finally, RIC believes that it is reasonable for the Commission to require that a project application includes all costs to provide broadband service to serviceable locations within the project area, including the cost of drops to the residences and businesses in such area. An applicant should expect to be required to certify that all costs to complete the project have been included in the application.

## CONCLUSION

As stated above, the Nebraska Rural Independent Companies appreciate the opportunity to provide these Comments in response to the *CPF-2 Order*. RIC looks forward to further participation in this proceeding.

Dated: September 15, 2023.

Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis 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, 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 15th day of September 2023, an electronic copy of the foregoing pleading was delivered to the Nebraska Public Service Commission at [psc.broadband@nebraska.gov](mailto:psc.broadband@nebraska.gov).

  
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Paul M. Schudel