

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public)
Service Commission, on its Own Motion,) Application No. C-5368
to Administer the Nebraska Broadband)
Bridge Program in the 2022 Program)
Year.)
)

COMMENTS OF COX NEBRASKA TELCOM, LLC

Cox Nebraska Telcom, LLC hereby submits these comments in response to the Commission’s February 1, 2022 Order seeking comment on issues relating to implementation of the Nebraska Broadband Bridge Program (“NBBP”) authorized by the Nebraska Broadband Bridge Act.¹

Cox supports the goal of the Nebraska Broadband Bridge Act (the “Act”) to ensure all residents, businesses, and institutions in the state have access to high quality broadband internet access service and the economic opportunities it brings. Cox also supports the Act’s goal of maximizing investment in broadband infrastructure to bring service to unserved and underserved areas in Nebraska while avoiding overbuilding. Cox appreciates the Commission’s efforts to improve the administration of the NBBP and thanks the Commission for the opportunity to comment on further improvements and implementation in Year Two of the program. To that end, Cox makes the following recommendations:

¹ See *In re Nebraska Public Service Commission, on its Own Motion, to Administer the Nebraska Broadband Bridge Program in the 2022 Program Year*, Order Opening Docket and Seeking Comment and Notice of Hearing, Application No. C-5368 (Neb. Pub. Serv. Comm’n Feb. 1, 2022) (“*February 1 Order*”); Nebraska Broadband Bridge Act, Neb. Rev. Stat. §§ 86-1301 to 86-1310.

I. The Commission Should Revise its Treatment of Usage Limits and Contract Terms by NBBP Participants.

The NBBP will benefit from a wide array of providers competing for support, leading to more competitive applications and better outcomes for unserved and underserved communities. To achieve the goal of attracting a wide applicant pool, Cox recommends the Commission consider changes to program requirements that deter participation by otherwise-qualified and capable providers, particularly where the Commission’s policy objectives can be met with a more flexible program design.

One such opportunity is the Commission’s proposal to disallow applicants from imposing any kind of data usage caps on any broadband plans offered in NBBP areas, or from requiring customers to sign up for contracts with defined terms and early termination fees (“ETFs”).² While Cox understands the objective of ensuring that consumers benefiting from the NBBP do not face artificial and unnecessary limitations on their broadband usage and have the option of switching to other plans at a later date, the inflexibility and indefinite duration of these prohibitions are likely to have a substantial deterrent effect on participation by broadband providers.

It can be impractical for providers with large unsubsidized operations (whether elsewhere in Nebraska, or in other parts of the county) to enforce different rules and policies unique to a small number of subsidized subscribers. Doing so can add increased software licensing expenses (to add new capabilities to back-end systems), staffing and training costs, and can introduce higher risks of human error and customer frustration in administering and complying with complex policies.

This added complexity may be manageable when many customers are impacted (for instance, with larger government support programs, such as the FCC’s Rural Digital Opportunity

² *February 1 Order* at 7 and Attachment B.

Fund (“RDOF”)), and unavoidable when policy changes are required by law (*e.g.*, compliance requirements that differ across state borders). However, when taking on these costs and challenges is optional, and the number of potentially impacted customers is modest, broadband providers may decide that it is more practical to forgo opportunities rather than introduce additional complexity into their operations. For broadband providers that include usage limits and/or defined contract terms with ETFs in their customer offerings today, the costs and complexity of creating a unique class of customers in NBBP areas may exceed the benefits of participating in the program.

The Commission could make the program much more accessible to participation by private broadband providers by considering these policies as scoring criteria rather than conditions on participation. If the Commission favors unlimited data plans with no contract terms, it can assign additional priority to applicants that offer them. Adopting this framework will help the NBBP attract a wider pool of applicants, which will ultimately lead to more competitive pricing and benefit consumers.

Specifically, the Commission could take two steps: (1) award five (5) extra points to providers that offer plans with unlimited data and no contract terms or ETFs, and (2) confine post-award obligations to an obligation to serve, and set a specific term for that obligation of 15 years. The Commission should also clarify that these extra points are available to applicants who offer one or more plans with unlimited data and no ETFs, rather than to applicants who commit *not* to offer *any* plans with those features. Ensuring that customers have the *option* of purchasing unlimited data plans without ETFs will fully satisfy the Commission’s objectives while adding flexibility that will make the program more attractive to applicants.

Moreover, structuring the scoring criterion based on what providers make available, as opposed to what they do *not* make available, will provide participating broadband providers with

greater flexibility to meet customer needs. For instance, plans with usage limits may offer benefits to particularly low-volume users by enabling providers to pass along cost savings to those users, and plans with contract terms and ETFs may offer benefits to subscribers with predictable, long-term service needs by enabling providers to pass along to those subscribers the cost savings from increased predictability.

II. The Commission Should Continue to Prevent Overbuilding Using NBBP Funding, and Structure Application Requirements to Advance this Objective More Efficiently.

The Commission's *February 1 Order* noted that it "has historically been opposed to using public funds to overbuild existing networks," and seeks input on how it should approach this issue going forward.³ Cox concurs with the Commission's historic approach of ensuring that public funds be used only to support network construction in areas that lack adequate broadband access today. Funds for the NBBP are limited. Moreover, areas that have broadband service today are often already attractive areas for investment due to their proven ability to sustain broadband providers offering service with private capital. If NBBP recipients are authorized to use NBBP funds to overbuild existing service areas, there is a substantial risk that applicants will de-prioritize applications in hard-to-reach and expensive-to-serve areas that lack broadband service today, and instead focus their applications on projects that overbuild more economic areas instead (either in whole or in part). This would inevitably divert funding away from the neediest areas, undermining the objectives of the NBBP.

Cox understands that some areas may be impractical to reach with last-mile networks without deploying facilities through areas where service is already available. Where this situation arises, however, transit facilities (if supported by public funding) can be limited to

³ *February 1 Order* at 7.

transit purposes only (*i.e.*, not as last-mile facilities serving end-user customers), or the applicant provider can fund the transit facilities using its own private capital and utilize public funding only for the facilities serving end-user customers in unserved areas. There is no need for the NBBP to authorize the use of public funds to support last-mile networks in already-served areas, even when those already-served areas are located between an awardee's existing network and an unserved project area.

Cox also recommends that the Commission enhance the efficiency of the evaluation process—in particular, the assessment of whether an application is for an eligible area—by requiring applicants to accompany their applications with broadband deployment data from the FCC showing the available fixed broadband options (if any) already reported in the relevant census blocks. The Commission could require applicants to either (1) submit an affidavit as part of the original application stating that a review of the most recent FCC Form 477 filings does not show the availability of qualifying broadband service in the proposed service area, or (2) identify all reported providers already offering service in the proposed project area, and provide detailed documentation demonstrating why the reported presence of those existing providers would not lead to overbuilding. Specifically, if the FCC's Form 477 broadband deployment data (or, once available, Broadband DATA Act data) indicates that other fixed providers already offer qualifying broadband service in the same area(s) that the applicant proposes to serve, the applicant should bear the burden of accompanying its application with a demonstration that those areas are not, in fact, being reliably delivered as reported by the incumbent provider(s).

Requiring applicants to lead with this information up front will improve the administration of the challenge process by immediately identifying applications that are likely to involve overbuilding concerns and trigger the challenge process. It would also help streamline

the challenge process by relieving existing broadband providers of the need to review every published application to compare the proposed service area to the providers' own footprints, and deter applicants from submitting unmeritorious applications that would otherwise unnecessarily consume the Commission's time and resources. Including these steps as part of the application should significantly curtail the number of challenges filed by existing service providers.

III. The Commission Should Clarify and Review Speed Testing Requirements During the Challenge Process.

Cox also recommends certain refinements to the proposed challenge process. Telecommunications providers frequently find themselves on both sides of the challenge process—as existing providers, they have an interest in ensuring that public funds are not spent on wasteful overbuilding. As applicants to public broadband programs, they have an interest in ensuring that areas served by incumbents with unreliable or inconsistent broadband speeds are not “walled off” from eligible applicants who could substantially improve the available offerings.

To that end, Cox has no objection to the Commission's proposal that existing providers challenging applications submit shapefiles of their service areas overlapping an application's proposed project area. Cox also has no objection to requiring providers that submit challenges to applications to verify their challenges with speed test data. While many existing providers reliably and consistently deliver the speeds they report and advertise to consumers, that is not uniformly the case. Some market participants make claims about high-speed data offerings that their network architectures cannot consistently deliver, and providers who wish to exclude project areas from public funding should be required to demonstrate that they offer qualifying service. That said, Cox recommends the Commission make certain revisions to the challenge approach set forth in the *February 1 Order* to ensure that the process is productive and useful.

At the outset, Cox requests that the Commission clarify its statement that providers must submit speed test data “for each serviceable location in the challenged area.”⁴ Based on the subsequent table setting forth the Commission’s proposed speed test requirements, the Commission’s intent appears to be that a provider’s submission of the specified sampling of speed test data consistent with the proposed table will be deemed to comprise information “for each serviceable location,” even though speed tests are not conducted for each location individually. Cox respectfully asks the Commission to clarify that it does not expect home-by-home speed tests as part of a challenge.

More substantively, Cox is concerned that the proposed number of speed test locations is not realistic, and would represent a substantial burden to responding providers, particularly those who may be responding to multiple applications at once.⁵ As a general matter, broadband providers have access to aggregated speed test data generated from testing at dedicated testing locations, such as SamKnows, as well as internal metrics from monitoring their own network equipment. However, providers do not typically have the ability to remotely generate speed test data to specific customer locations—testing the speed at a *specific* customer’s location may require deploying a field technician to manually test the download and upload speeds at the demarcation point immediately outside a customer’s home, which (in turn) may require making arrangements for access to the customer’s property. The Commission’s proposed requirement that a provider challenging an application may need to perform as many as fifty such tests for a single challenge could quickly become unworkable—particularly if a provider must respond to numerous applications at once in a compressed time frame. This could require providers to pull fully-

⁴ *February 1 Order* at 4.

⁵ Specifically, the Commission proposes 10 test locations for 50 or fewer locations in challenge, 10% of total number of locations for 51-500 locations in challenge, and 50 test locations for over 500 locations in challenge. *February 1 Order* at 5.

deployed field technicians away from regular job duties to accommodate testing needs, resulting in operational disruption, harming consumers.

For that reason, Cox urges the Commission to reevaluate the speed test requirements. To the extent that manual, on-site testing is required, Cox recommends that the number of required tests be lowered to no more than 5% of locations for each category in the Commission's chart on page 5 of the *February 1 Order* (with the "over 500" category capped at 25 tests), to make this requirement more realistic. Cox also recommends that responding providers be able to satisfy this requirement using other reliable data. This could include aggregated speed test data from SamKnows testing sites (which may not be specific to the project area, but demonstrate a provider's ability to consistently deliver its advertised speeds) as well as commercially available speed data collected by third parties (such as Ookla). Although third-party data can generally not be targeted to specific households, it can demonstrate the measured speeds (from user-initiated speed tests) delivered by specific providers within particular counties or zip codes, which can be a reliable proxy for project areas situated within those zip codes, particularly when combined with a reasonable sampling of speed testing data. The Commission should, of course, judge and assign proper weight to any data provided, but should not limit the kind of data challenging participants may provide.

Absent these changes, Cox is concerned that the Commission may not receive the benefit of the challenge process it created, as some incumbent providers may forgo meritorious challenges rather than incur the burden and disruption of deploying their field technicians to perform dozens (if not hundreds) of speed tests in compressed timeframes. The NBBP would be ill-served by rules that cause existing providers to forego or limit their participation in the challenge process, as it

would deprive the program of valuable data and potentially lead to public funds being diverted into overbuilding instead of investing in the areas that need funding the most.

CONCLUSION

Cox thanks the Commission for the opportunity to file these Comments and respectfully asks it to adopt the changes that are suggested above

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Certificate of Service

The undersigned hereby certifies that on this 1st day of March, 2022, the Comments of Cox Nebraska Telcom, LLC in Application C-5368 were delivered via electronic mail to the following:

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