

In the Matter of the Nebraska Public) Application No. NUSF-108
Service Commission, on its own Motion, to) Progression Order No. 6
make adjustments to its high-cost)
distribution mechanism and make) **COMMENTS**
revisions to its reporting requirement.)
)

INTRODUCTION

The Nebraska Rural Broadband Association (“NRBA”),¹ by and through its attorneys of record, submits these *Comments* (“Comments”) in response to an *Order Seeking Comments* (“Order”) entered by the Public Service Commission (“Commission”) on April 21, 2021. The Commission raised a number of specific questions related to several more general issues. The NRBA will address its Comments to the larger issues raised and will offer specific recommendations to address those larger issues.

Several issues presented in the Commission’s Order were raised at the request of the Rural Independent Companies (“RIC”). It is unfortunate that the RIC group has asked the Commission to reconsider several major policy decisions it recently made. Those decisions were, and remain, important to broadband reform the Commission has undertaken. Reversing major policy decisions should happen rarely. Reopening such decisions should be done only after a showing of substantial new evidence justifying the action. Such judicial prudence is necessary to ensuring stable and predictable support, as called for under Nebraska law.²

In recent years, the Commission has made important reforms to the systems of high-cost support administered in accordance with the Nebraska Telecommunications Universal

¹ For purposes of this proceeding, the NRBA is made up of the following carriers: Cambridge Telephone Company; Diller Telephone Company; Glenwood Telecommunications, Inc.; Hemingford Cooperative Telephone Co.; Mainstay Communications; and Stanton Telecom, Inc.

² NEB. REV. STAT. § 86-323(5).

Service Fund Act. Until the Commission overhauled its distribution methods, Nebraska Telecommunications Universal Service Fund (“NUSF”) support was used by some carriers to ambitiously deploy fiber infrastructure in rural Nebraska and less successfully by other carriers, creating digital divides fracturing across the state. After recognizing the need to bridge these divides, the Commission laboriously investigated the methods of distributing support for all carriers, making distinctions between carrier-types largely to ensure that state support and support under the federal Universal Service Fund (“FUSF”) complemented one another, as required by law. The primary aims of the Commission’s reform efforts were creating improved systems of incentives and accountability.

The Commission began its reform by first reexamining support mechanisms for price cap carriers on October 5, 2014.³ Two years later, the Commission commenced a proceeding to reform the support mechanisms for rate-of-return carriers.⁴ That proceeding was docketed NUSF-108 and is the same proceeding in which the Commission is now continuing its investigation. On November 19, 2018, the Commission established support methodologies primarily for Legacy carriers.⁵ About a year later, the Commission finalized methodologies for ACAM carriers.⁶ For the most part, the Commission completed its major overhaul of the NUSF support system, modifying its methods of ensuring accountability based on earnings on February 23 of this year.⁷

The Commission has made substantial improvements in its systems of incentives for deployment of broadband infrastructure and accountability for use of ratepayer funds. The Commission’s important reform work took longer than six years. Progression Order 6 raises

³ NUSF-99, *Order Opening Docket, Seeking Comment and Setting Hearing* (Oct. 15, 2014).

⁴ NUSF-108, *Order Opening Docket and Seeking Comment* (Sept. 27, 2016).

⁵ NUSF-108, Progression Order No. 3, *Findings and Conclusions* (Nov. 19, 2018).

⁶ NUSF-108, Progression Order No. 4, *Order* (Oct. 29, 2019).

⁷ NUSF-108, Progression Order No. 5, *Order* (Feb. 23, 2021).

several good issues that still need to be addressed, but the RIC group's request for the Commission to reopen and undo three critical policy decisions is nothing but an attempt to put off addressing the public need that will be served by the Commission's reform.

The beneficiaries of the delay would be several members of the RIC group, and price cap carriers, which until the adoption of the 202 rules essentially had monopoly-control of large rural territories that remain underserved at best. It is regrettable that these companies are again raising issues that have been resolved. It does nothing but divide an industry that should be working together to connect Nebraskans as quickly as feasible.

Given adoption of those rules and enactment of new law, the doors of those territories have been opened to competition, which the Commission will oversee. Senator Friesen's LB 994 unlocked those doors in 2018, but final approval of Commission rules and regulations was necessary before the doors could be opened. The rules and regulations became effective May 12, 2021. The public does not want those doors closed again. As was heard during debate on the floor of the Legislature earlier this year, the public wants the doors opened wider. And it wants more accountability.

The Commission should reject RIC's requests to reexamine decisions fundamental to ensuring accountability for use of NUSF support. That said, various components the Commission's systems should be fine-tuned and updated, and this proceeding affords an opportunity to do so expeditiously.

The Commission, in its Order, raised questions on a number of such issues. The NRBA believes that several questions demand prompt resolution, which the present proceeding affords, and thanks the Commission for opening it.

COMMENTS

Over-Earning Distribution

Since the early days of the NUSF-108 reform, the RIC group has challenged the Commission's measures for overseeing of earnings accountability.⁸ It persists in its challenge, and the Commission's first general inquiry is whether to allow over-earnings to be ignored so that over-earning carriers may receive more Broadband Deployment Support ("BDS"). This request, like all of the RIC's requests for reconsideration of important Commission reform, is nothing but an obstruction into the Commission's productive work of ensuring broadband deployment as swiftly and efficiently as possible. In the past thirty days, the Governor's Broadband Bridge Act became law, the Commission's 202 rules for redirecting withheld NUSF support were approved by the Governor, and LB338 was enacted. All of those actions will result in intense work on the part of the Commission.

This is no time to second-guess reform that was carefully crafted through more than six years of meticulous deliberation by the Commission. The reconstructed system has created workable incentives and accountability for the large majority of Nebraska rate-of-return carriers. It should not be modified to primarily benefit a small group of carriers whose NUSF EARN Form filings show them to be the highest-earning and slowest to deploy broadband infrastructure.

Calculation and Use of Broadband Deployment Support

The RIC group has also asked the Commission to reconsider its 2019 decision in Progression Order No. 4 with regard to support for capped ACAM locations. The RIC has presented no basis for such reconsideration. Unwarranted reexamination of questions critical to NUSF reform would be a waste of limited government resources.

⁸ NUSF-108, Progression Order No. 3, *Comments of the Rural Independent Companies in Response to Order Seeking Comment*, p. 5 (Mar. 5, 2018).

For example, the awkward characterization of issues in the only full paragraph of the Commission's Order on page 3 rings of someone pleading the government to come in and rescue him and him only. The inquiry has then scent of special legislation, and should not be further explored.

That said, the Commission in its Order also posits questions relating to the details of support for capped locations that bear fine-tuning. For carriers with exchanges that remain significantly unserved or underserved, the Commission should specifically allocate BDS on an exchange-by-exchange basis, as it now does for price cap carriers. This will ensure that allocated support is promptly used for deployment or redirected to a carrier capable of expeditious deployment. With the Commission's 202 Program now active, the Commission should be able to avoid a repeat of what happened when BDS was allocated to price cap carriers under NUSF-99, which sat un-utilized for years.

Adjustments to Allocations for Ongoing Support

Aggressive speed standards have now been established both for using taxpayer and ratepayer funds on new infrastructure and determining where infrastructure may be overbuilt using government support.⁹ The 2021 Legislature, however, did not advance legislation specifically addressing support now going to carriers on essentially a year-by-year basis to help cover the cost of operations and maintenance of rural infrastructure. This support is commonly referred to as "Ongoing Support."

The Commission has asked several questions relating to Ongoing Support that merit consideration. Fundamentally, the Commission asks whether Ongoing Support is needed. The question is an important policy matter that really has never been specifically considered by the Commission. The answer is not complicated.

⁹ See LB388 (taxpayer) and LB338 (ratepayer).

Ongoing Support is necessary when the costs of operating and maintaining infrastructure that is needed to meet the standards of state law exceed what would allow limited rate of return from customer revenues for affordable services.

In other words, if a carrier charging rates deemed affordable by the Commission cannot earn a reasonable rate of return (10.25% for 2021),¹⁰ then Ongoing Support is allowed. Otherwise, no private carrier would provide service in areas where it cannot make a business case for the continuing to do so.

As carriers deploy broadband infrastructure in truly rural areas, regardless of the source of deployment support, Ongoing Support will be necessary. In rural areas where BDS support has been allocated for new infrastructure, for example, once that infrastructure has been constructed, and service is being provided and tested, then the BDS should be converted to Ongoing Support critical to the continued operation and maintenance of the network.

The Commission noted in its Order that during the first years of NUSF-108 reform allocations the relative percentage of support allocated to Ongoing Support and BDS have not changed.¹¹ The Commission made this observation, noting that its original intention was for BDS to transition to Ongoing Support once deployment was complete. The Commission asked a number of questions related to the transition of support.¹² The NRBA agrees that the general issue of transition from BDS to Ongoing Support needs to be addressed more clearly by the Commission, and looks forward to providing further comments on the matter.

¹⁰ NUSF-108, Progression Order No. 5, *Order*, p. 13 (Feb. 23, 2021).

¹¹ *Order*, at p. 4.

¹² *Order*, at pp. 4-5.

Of course, there must be limitations on Ongoing Support. First, it must only go to quality infrastructure. The Governor under the Broadband Bridge Act made clear the important policy principle of using taxpayer funds only for infrastructure capable of providing broadband at high speed. With enactment of LB338, the principle has also been prescribed for ratepayer funds used for BDS. It has not yet been applied to Ongoing Support.¹³

Second, Ongoing Support must be subject, as it is now, to the Commission's budget controls. Sustainable support is obviously dependent on the established budget. The Commission's budget control mechanism may need reexamination at some point, but appears based on sound working principles.

Third, Ongoing Support must reflect support the carrier is receiving under federal programs. Federal and state funding must be complementary. Funding must not be duplicative.

Finally, Ongoing Support must remain subject to restrictions on earnings, as established by the Commission in previous proceedings.¹⁴

Transferability of Support to Affiliated Providers

The RIC group also recommends the Commission reconsider its decision not to permit transferability of NUSF distributions among affiliated ETCs. Absent a strong public policy showing, the Commission should not reopen an order it issued three months ago.¹⁵ Such policy reasons have not been articulated and do not exist. The Commission has more

¹³ The issue of speed standards applicable to Ongoing Support will be explored in more depth below.

¹⁴ See NUSF-108, Progression Order No. 5, *Order* (Feb. 23, 2021).

¹⁵ NUSF-108, Progression Order No. 5, *Order* (Feb. 23, 2021).

immediate business to attend to. If carriers wish to consolidate their study areas, there is a process at the FCC that allows them to do so.¹⁶

Speed Requirements

Under LB338, effective January 1, 2022, new broadband infrastructure must be scalable to 100/100 to qualify for BDS in the NUSF program.¹⁷ This standard is consistent with the standard in the Broadband Bridge Act and preliminary guidelines recently released by the Department of Treasury for administration of American Rescue Plan funds directed toward broadband infrastructure.¹⁸

Additionally, consistent with the Broadband Bridge Act, LB338 protects existing infrastructure against subsidized overbuilding if the existing plant is capable of 100/20 speeds.¹⁹ The Department of Treasury took a similar approach.²⁰

No order of the Commission, rule and regulation, or law establishes a speed standard specifically for Ongoing Support. In the past, for guidance when it came to defining broadband speeds, the Commission relied at least in part on statutes that established and directed the Rural Broadband Task Force. In establishing the Task Force, the Legislature declared that residents of the state should have access to broadband at 25/3 speeds. Obviously, that provision of law was designed to be the compass guiding the Task Force's work, and it was helpful for the Commission temporarily, but the standard has been rendered obsolete as general policy proposition in the wake of enactment of both LB338 and LB388 this past legislative session.

¹⁶ Request for Clarification filed by the National Exchange Carrier Association, Inc., 11 FCC Red 8156 (rel. July 16, 1996).

¹⁷ LB338, sec. 4 (2021).

¹⁸ Coronavirus State and Local Fiscal Recovery Fund, 31 C.F.R. 26786, 26804 (May 17, 2021).

¹⁹ See LB338, sec. 6(4) (2021).

²⁰ Coronavirus State and Local Fiscal Recovery Fund, 31 C.F.R. 26786, 26804 (May 17, 2021).

Thus, the Commission should find guidance for the speed standard it applies to Ongoing Support within the context of more recently enacted law. The Legislature considered addressing the Ongoing Support issue, but did not include it in advanced legislation.²¹ Essentially, the Legislature showed deference to the Commission. It deferred to the Commission treatment of Ongoing Support. It did so wisely.

As stated above, Ongoing Support is critical to the continued operations and maintenance of broadband infrastructure in large areas of rural Nebraska. Current infusions of deployment support are certainly welcomed, but those funds will be used to build high-speed networks that will not run themselves.

“Quality” broadband infrastructure, as the Governor has called for under the Broadband Bridge Act, is capable of fostering international commerce – for giving a smart entrepreneur in the Sandhills the same fighting chance as her competitor in Silicon Valley. Quality infrastructure will create unique opportunities for diversification of rural economies in a day when people in larger urban areas of the country and state are looking for more social distance.

High-tech infrastructure that spans rivers and oceans is expensive. It is not built overnight, but many rural carriers across the state have ambitiously deployed fiber to the most remote farms and ranches of the state. It can be done, and has been. The Commission should allow some period to allow competition to drive more rapid deployment before adjusting the speed standards for Ongoing Support. The NRBA encourages the Commission to consider this specific issue and will comment further.

²¹ See LB398, AM339 (2021).

State Broadband Cost Model – Broadband Mapping Data

The Commission should not expend time or resources conducting an exhaustive study of the SBCM at this time, but would be well served to follow the FCC's consideration of its Digital Opportunity Data Collection mechanism.

When considering data and mapping issues, the Commission should concentrate its resources on areas subject to applications under the Broadband Bridge Program and transitions under the 202 Program. Costs associated with such testing might be part of the funding or transition plan.

Affordability of Service Offerings

The Commission's final inquiry concerns the proper exercise of its authority over supported broadband services. Federal and state law require affordability of supported services. The NUSF Act speaks clearly to the importance of ensuring that NUSF funds are used to make sure that broadband services "are available at rates that are reasonably comparable to rates charged for similar services in urban areas."²² The Commission clearly has authority to consider such questions, but should exercise care in doing so and avoid setting prescriptive rates. Actions under the 202 Program and Broadband Bridge Program will hopefully explore alternative means of ensuring affordability.

As a general matter, by raising this issue the Commission has raised the larger question of the duties of eligible telecommunications carriers receiving support. Those duties should be strictly enforced by the Commission. The Commission is right to ask such questions. Examination of ETC responsibilities in the age of competition is critical to ensuring accountability.

²² NEB. REV. STAT. § 86-323(3).

The NRBA believes issues of affordability may now be brought before the Commission without further policy changes. Alternatives to ensure affordability might be proposed under the Broadband Bridge Program and might be possible through 202 proceedings triggered by consumer petitions based on affordability. If reexamination of programs such as the Nebraska Telephone Assistance Programs in the day of Broadband is needed, the Commission should undertake it.

CONCLUSION

The NRBA looks forward to continuing to work with the Commission and other stakeholders to expeditiously resolve the issues raised by the Commission in this proceeding.

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NEBRASKA RURAL BROADBAND
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CERTIFICATE OF SERVICE

The undersigned certifies that an original of the above *Comments* of the Nebraska Rural Broadband Association were filed with the Public Service Commission on May 28, 2021, and a copy was served via electronic mail, on the following:

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