

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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

COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES

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 and Three River Telco (the "Rural Independent Companies")

By: Paul M. Schudel, NE Bar No. 13723
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
WOODS & AITKEN LLP
5335 Wisconsin Ave., N.W., Suite 950
Washington, D.C. 20015
Telephone (202) 944-9502
Facsimile (202) 944-9501

Date: May 28, 2021

TABLE OF CONTENTS

I. INTRODUCTION..... 2

II. EXECUTIVE SUMMARY OF COMMENTS..... 3

**III. RESPONSES TO SPECIFIC COMMISSION REQUESTS
FOR COMMENTS 7**

A. Calculation and Use of BDS Support..... 10

B. Overearnings Redistribution 18

IV. REMAINING ISSUES CONTAINED IN *PO 6 ORDER* 22

V. CONCLUSION 23

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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

COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES

I. INTRODUCTION

The Nebraska Rural Independent Companies (“RIC”)¹ submit these Comments in response to the Order Opening Docket and Seeking Comment entered by the Nebraska Public Service Commission (the “Commission”) on April 27, 2021 (the “*PO 6 Order*”). RIC appreciates the opportunity to provide these Comments and looks forward to continuing participation in this docket and other pending dockets regarding the Nebraska Universal Service Fund (“NUSF”).² In the following Comments, RIC has reversed the order of Issues A and B set forth in the *PO 6 Order* to present a more logical discussion regarding RIC’s Broadband Deployment Support (“BDS”) Proposal for model-based capped locations (and has done so for the reasons stated in the introduction to Section III below). Regarding Issues C through G of the

¹ 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., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company and Three River Telco, each of which is a Rate of Return Nebraska Eligible Telecommunications Carrier (“ROR NETCs”). As referenced in these comments, the terms “carrier” or “carriers” are used interchangeably with NETCs.

² Unless otherwise indicated, RIC uses the term “NUSF” in these Comments to refer to the NUSF High Cost Program and the term “EARN Form” to refer to the reporting form used by the Commission to ascertain NUSF eligibility by ROR NETCs since NUSF is only available to such NETCs. *See, e.g.*, 47 U.S.C. § 214(e); *Neb. Rev. Stat.* § 86-324(1). Moreover, as referenced in these comments, the terms “NUSF” and “High Cost Program” are also used interchangeably.

PO 6 Order, RIC respectfully suggests that such issues are not central to the focus of the *PO 6 Order* and that any Commission consideration of such issues should not delay Commission action on the RIC BDS Proposal. In an effort to create a “road map” through the issues set forth in the *PO 6 Order* and the responses thereto presented in these Comments, RIC is providing the following Executive Summary.

II. EXECUTIVE SUMMARY OF COMMENTS

The Commission faces a critical public policy decision to conform its policies for the distribution of NUSF High Cost Program support with the Legislature’s declared intention that “the residents of this state should have access to broadband telecommunications service at a minimum download speed of twenty-five megabits per second and a minimum upload speed of three megabits per second.”³ The Commission has expressly recognized this statement of legislative intent in a recent order,⁴ as well as the necessity of and demand for broadband service

³ *Neb. Rev. Stat.* § 86-1101.

⁴ Earlier this month the Commission stated in the context of NUSF contribution framework issues that resolution of NUSF issues

should be focused on achieving legislative goals and Commission’s articulated policies supporting ubiquitous broadband service at minimum speeds of 25/3 Mbps for all Nebraska consumers. As we noted in our NUSF-111 proceeding, the Legislature has asked the Commission to ensure that broadband telecommunications service in rural areas of the state be comparable in download and upload speed and that state resources should be utilized to ensure that rural residents of the state should not be penalized simply because of their rural residence.

In the Matter of the Nebraska Public Service Commission, on its own motion, to consider revisions to the contribution methodology and determine a rate design for services currently subject to a revenues-based surcharge, Application No. NUSF-119/PI-233, Order at 28 (May 11, 2021) (footnotes omitted) (“*May 11th NUSF-119 Order*”).

during the pandemic.⁵ Nonetheless, the Commission's current policies for the distribution of NUSF High Cost Program support have singled out locations partially funded by federal Alternative Connect America Cost Model ("A-CAM") support (generally referred to as "capped locations") and have denied these locations, and therefore the consumers residing therein, the means for build out of 25/3 Mbps broadband services in the form of BDS and the benefits derived therefrom.

This situation has been and is creating "haves" and "have nots" among Nebraska consumers vis-à-vis the ability of A-CAM-electing ROR NETCs to fund additional 25/3 Mbps broadband buildout in many of the capped locations in their service areas. Furthermore, these policies have been and are resulting in discriminatory distribution of BDS by the Commission among A-CAM-electing ROR NETCs and both ROR NETCs that have elected to receive legacy federal USF support and price cap ("PC") NETCs.

In this docket the Commission has an opportunity to correct the foregoing situation and to adopt revised policies that permit the distribution of BDS to capped locations.⁶ These policy changes will increase the availability of funding for additional broadband buildout for Nebraska consumers who currently lack access to broadband service at minimum speeds of 25/3 Mbps and will advance the goals of the Legislature and the Commission to encourage ubiquitous access to

⁵ *See, id.* ("[T]he pandemic has highlighted the importance of having sufficient broadband capabilities throughout the state as students, parents, and other residents of the state have been expected to learn and work from home. In addition, the effects of the pandemic are no less significant for residential users than business users.")

⁶ Since December 19, 2017 when the Commission issued Progression Order No. 3 in Application No. NUSF-108, the Commission has been grappling with a series of issues relating to distribution of NUSF High Cost support to ROR NETCs. RIC both appreciates the Commission's continuing commitment to the adoption of appropriate reforms to current NUSF High Cost Program distribution policies and believes that the Commission's approval of the RIC BDS Proposal presented in these Comments is critical to the successful accomplishment of providing 25/3 Mbps broadband access to all Nebraska consumers.

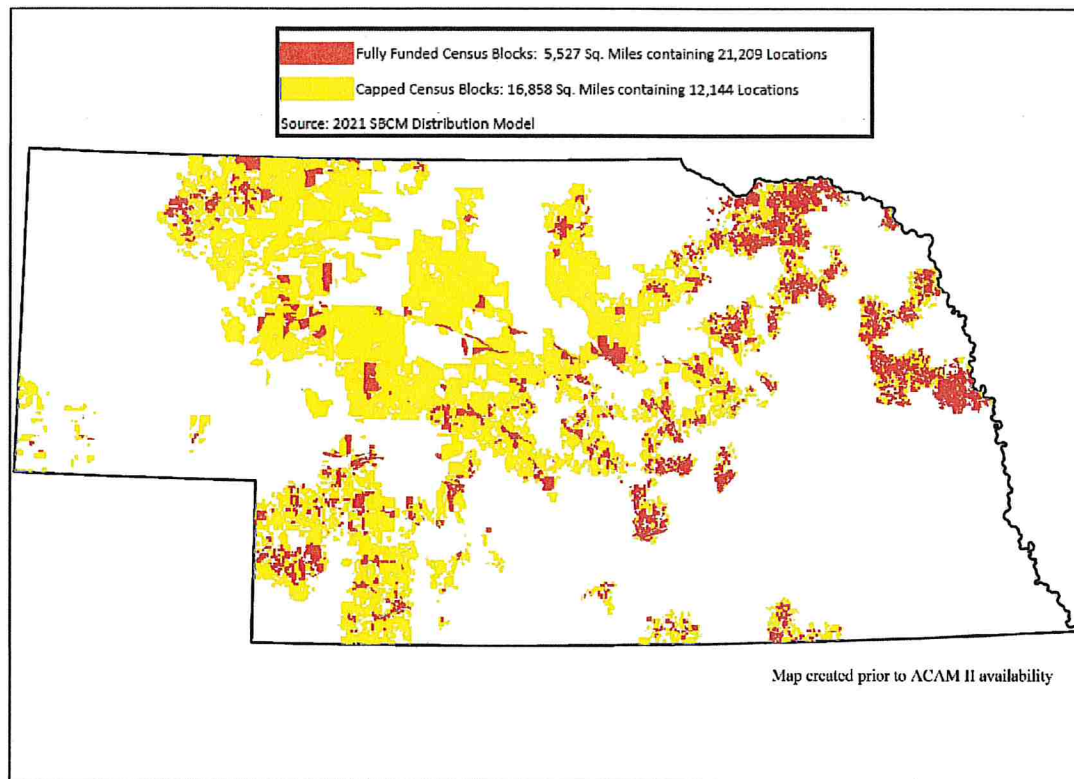
broadband service for all Nebraska residents. Adoption of the entirety of the RIC BDS Proposal described in Section III below advances the policy of encouraging additional 25/3 Mbps broadband deployment, builds upon the current NUSF High Cost Program's accountability measures, and eliminates discrimination among customers served by NETCs vis-à-vis BDS availability.

No rational basis exists to delay the adoption and implementation of the RIC BDS Proposal. While the *PO 6 Order* at page 3 attempts to paint a picture of past concerns associated with provision of BDS for capped locations, those concerns have been addressed by the Commission's continuing refinements to the NUSF High Cost Program. The combination of the broadband project application process, mandatory federal broadband speed testing and upcoming state speed testing authorized by LB 338, reporting of locations to the federal High Cost Universal Broadband ("HUBB") mechanism that are built out to 25/3 Mbps, the experience derived from the adoption and use of the State Broadband Cost Model ("SBCM"), and the Commission's oversight of ROR NETCs (all aspects of which RIC refers to as the "Accountability Framework") amply provide the necessary tools to support the conclusion that the public interest is served by the adoption of the RIC BDS Proposal in its entirety. Furthermore, any concern by the Commission regarding the necessity for approval of these BDS-eligibility changes is addressed by the magnitude of current underfunding of the SBCM-determined costs to build out capped locations, which is nearly \$83 million over the life of the A-CAM Program.⁷

Pictorially, the lack of BDS for capped locations is reflected in the data presented in the

⁷ The disaggregated data that supports this total underfunding of nearly \$83 million is provided in Confidential Exhibit A attached to these Comments. Further explanation of the information presented in this Exhibit is provided in Section III below.

following Nebraska map:



To place the information set forth in this map in perspective, the 16,858 square miles of Capped Census Blocks (highlighted in yellow) represent **21.8%** of the 77,824 total square mile area of the State of Nebraska, and these areas have a customer density of less than one customer per square mile. These areas are among the most rural areas of the State, and the customers residing in these areas are those to whom 25/3 Mbps broadband service must be provided consistent with the Legislature's and the Commission's universal service policies.

RIC proposes that the Commission make the findings outlined in Section III.A below that necessarily lead to the conclusion that BDS is to be made available to all capped locations. Based upon these findings, the provision of BDS to capped locations should be funded in one of several methods, one of which is the RIC Overearnings Proposal described in Section III.B

below to permit transfer of ROR NETCs' overearnings⁸ amounts to such carriers' BDS eligibility. Other means of funding BDS include the expansion of the BDS budget by transferring unused funds currently designated for PC Carriers or by use of a portion of the unallocated surplus balance in the NUSF. In order to implement these findings, RIC also supports the following actions by the Commission with regard to Issues C through G of the *PO 6 Order*:

1. Provision of BDS to capped locations should be implemented in 2022 in order to avoid any disruption to ROR NETCs' current 2021 budgets;
2. Provision of ongoing NUSF support to ROR NETCs should continue in order to implement applicable legislative policy;⁹ and
3. Continuation of the use of the SBCM for the Commission's implementation of the NUSF High Cost Program is appropriate and provides data necessary for resolution of the BDS-related eligibility and allocation issues raised in the *PO 6 Order*.

III. RESPONSES TO SPECIFIC COMMISSION REQUESTS FOR COMMENTS

As noted above, in these Comments RIC has re-ordered Issues A and B as presented in the *PO 6 Order*. Commission approval of a carrier's use of overearnings as additional BDS would only achieve the full benefit of additional broadband deployment if the Commission *first approves the provision of BDS for capped locations* regardless of a carrier's earnings status. Once this policy change is confirmed, all ROR NETCs' ability to use overearnings for BDS would become a rational extension of this policy change.

⁸ The term "overearnings" as used in these Comments refers to that amount of NUSF High Cost Program ongoing support that would have been received by a ROR NETC but is currently disallowed for such carrier based upon the earnings test calculated annually by use of the NUSF EARN form.

⁹ *Neb. Rev. Stat.* §§ 86-323(1) and 86-323(5) establish the objective that "quality telecommunications and information services should be available at just, reasonable, and affordable rates" and further, provide that "specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service".

Thus, to place the RIC responses to the *PO 6 Order* issues in context, RIC again notes that the RIC BDS Proposal consists of two (2) elements: (1) elimination of ineligibility of capped locations served by A-CAM-electing ROR NETCs to receive BDS; and (2) the RIC Overearnings Proposal (described in Section III.B below) to provide additional BDS funding through utilization of a ROR NETC's overearnings for broadband buildout where such overearnings exist. For the reasons stated herein, RIC respectfully submits the following proposed findings of fact that the Commission should adopt in connection with the RIC BDS Proposal:

- Federal A-CAM USF support is provided on the condition that the recipient attains buildout to locations according to certain broadband speed requirements.¹⁰
- Nebraska law requires that NUSF High Cost support be supplemental to federal USF.¹¹
- The Nebraska Legislature has stated its intent in *Neb. Rev. Stat.* § 86-1101 that all Nebraska consumers should have access to broadband service at minimum speeds of 25/3 Mbps.¹²

¹⁰ See, e.g., 47 C.F.R. § 54.308.

¹¹ See, *Neb. Rev. Stat.* §86-317. The NUSF Act's purpose is to "authorize the commission to establish a funding mechanism which *supplements* federal universal service support mechanisms and ensures that all Nebraskans, without regard to their location, have comparable accessibility to telecommunications services at affordable prices." (emphasis added).

¹² *Neb. Rev. Stat.* § 86-1101 provides:

It is the intent of the Legislature that broadband telecommunications service in rural areas of the state should be comparable in download and upload speed and price to urban areas in the state where possible and that state resources should be utilized to ensure that the rural residents of the state should not be penalized simply because of their rural residence. *It is further the intent of the Legislature that the residents of this state should have access to broadband telecommunications service at a minimum download speed of twenty-five megabits per second and a minimum upload speed of three megabits per second.* (emphasis added)

- Consistent with 47 U.S.C. § 254(f), the Commission has adopted an additional standard for NUSF eligibility by increasing federal A-CAM broadband speed requirements to 25/3 Mbps to capped locations as a condition to the provision of supplemental NUSF funding to an A-CAM-electing ROR NETC.¹³
- BDS is the NUSF High Cost Program support mechanism established to provide supplemental NUSF support for deployment of fiber-based networks by ROR NETCs for broadband buildout to 25/3 Mbps.¹⁴
- The SBCM has been adopted by and should continue to be used by the Commission to identify the investment amounts required for the deployment of 25/3 Mbps-capable networks.¹⁵
- Any concern that supplemental BDS support duplicates federal A-CAM support for capped locations that may have previously existed has now been eliminated based on the Commission's Accountability Framework.¹⁶

¹³ See, e.g., *PO 6 Order* at 5. Section 254(f) of the Communications Act of 1934, as amended, envisioned States establishing “additional definitions and standards to preserve and advance universal service” but “only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.” 47 U.S.C. § 254(f)

¹⁴ See, *In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements, Order Seeking Further Comment*, Application No. NUSF-108, Progression Order No. 3, Findings and Conclusions at 39-41 and 45-46 (Nov. 19, 2018) (“*NUSF-108 PO#3*”).

¹⁵ See, *NUSF-108 PO#3* at 35-36.

¹⁶ See, *In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements, Order Seeking Further Comment*, Application No. NUSF-108, Progression Order No. 4 at 4 (Feb. 5, 2019). Further, RIC recognizes that an argument has been made that federal A-CAM support associated with “reasonable request” locations provides funding for capped locations. However, such argument fails to acknowledge the fact that the amount of federal funding is insufficient to recover the model costs identified through the use of the SBCM. Moreover, a review of the SBCM modules demonstrates that the total investment required to deploy broadband to capped locations is not particularly dependent on the number of locations served and is subject to only minor variance on that basis. Rather, Nebraska A-CAM-electing ROR NETCs’ investments are primarily driven by overall network costs not by location-specific costs such as drops to the customer premises. Federal A-CAM support attributable to reasonable request locations is not sufficient to recover the SBCM-derived total unfunded costs of approximately \$83 million attributable to capped locations served by RIC members. Confidential Exhibit B provides data derived from the A-CAM that supports this conclusion.

- Providing BDS for capped locations will increase broadband deployment consistent with the policy of providing access by all consumers to broadband service at minimum speeds of 25/3 Mbps.¹⁷
- Thousands of consumers located in capped locations constituting nearly 22% of the square mile area of Nebraska do not currently have access to broadband service at 25/3 Mbps contrary to approved public policy.¹⁸
- Allowing BDS for capped locations provides for consistent treatment of all ROR NETCs and their customers in that PC NETCs and legacy ROR NETCs are receiving federal USF support as well as NUSF High Cost BDS support without regard to the level of federal support received on a per location or total basis.

With this foundation in mind, RIC proposes that the Commission resolves the questions associated with Issues A and B of the *PO 6 Order* as follows and that the Commission should adopt the entirety of the RIC BDS Proposal.

A. Calculation and Use of BDS Support

1. Whether the Commission “should adjust the calculation of BDS support available for capped locations?”

RIC Response: Yes. All capped locations should be eligible for BDS for the reasons stated above. Calculation of the amount of eligible BDS for any such capped location is readily determined through the use of the SBCM by permitting BDS support for only the percentage of investment that is not recovered after subtracting federal support per location and federal benchmark revenue (\$252.50) from the SBCM-determined location cost.¹⁹

¹⁷ See, e.g., n. 12 above.

¹⁸ See, Confidential Exhibit A attached hereto.

¹⁹ For example, if a capped location has SBCM investment of \$20,000 and SBCM cost of \$352.50, then the amount of NUSF BDS support available to build out that location is \$4,480 determined as follows:

$$\$200 \text{ A-CAM support} + \$52.50 \text{ Benchmark} = \$252.50$$

2. **Whether “changes to the support mechanism for capped locations should be made.”**

A. **Should “the Commission set aside a separate allocation for this support and name it something different?”**

RIC Response: RIC respectfully submits that the mechanics regarding the allocation of NUSF High Cost Program support to capped locations and the terminology associated with such support can readily be re-named if necessary, once the BDS policy change presented by RIC is established by the Commission. The “bottom line” is that the Commission should revise its current policies in order that BDS is provided to capped locations and that legislative and Commission policies supporting ubiquitous access by all Nebraska consumers to broadband at minimum speeds of 25/3 Mbps are realized.

B. **The “Commission seeks comment on whether increasing the amount of support for capped locations is warranted?”**

RIC Response: Yes, increasing BDS for capped locations is warranted. RIC construes this question to address the need for BDS to be explicitly available for capped locations. For all of the reasons stated herein, providing BDS to capped locations will not only advance broadband deployment but will do so in a manner that treats all ROR NETCs and their customers in a non-discriminatory manner.

As RIC has previously noted in the October 2020 hearing leading up to the *PO 6 Order*, federal legacy ROR carriers receive two types of federal high cost support, High Cost Loop Support and Connect America Fund Broadband Loop Support. Neither of these federal

$\$252.50 / \$352.50 = 77.6\%$ of costs are covered by FCC support and benchmark revenue

This leaves 22.4% (100% minus 77.6%) of the costs unrecovered.

Thus, 22.4% x \$20,000 of SBCM investment (or \$4,480) of supplemental state support (BDS) should be available for this location.

programs require legacy ROR carriers to build or target this federal support to specific geographic areas or census blocks within their study area boundaries. Consequently, all locations served by legacy ROR NETCs are beneficiaries of federal USF support and since a legacy ROR carrier's federal USF support does not cover all its costs, all census blocks served by legacy carriers are, by definition, "partially funded." Likewise, since 2015 it has been the policy of the Commission to provide a significant portion of NUSF High Cost Program support to PC carriers for locations already receiving federal CAF II support.²⁰

This inconsistency associated with provision of BDS to ROR NETC legacy carriers and provision of NUSF support to PC NETCs in CAF II locations juxtaposed with the current denial of BDS to A-CAM-electing ROR NETCs is discriminatory, and adversely impacts the availability of 25/3 Mbps broadband to consumers located in such A-CAM-electing ROR NETC areas. This set of facts alone, in RIC's view, supports BDS eligibility for capped locations to remedy this discrimination between NETCs.

i. "Does this place certain carriers at an advantage over others?"

RIC Response: No. Just the opposite. By treating all NETCs equally, both PC carriers and all ROR carriers, versus the current practice of denying A-CAM-electing ROR NETCs eligibility for BDS, the RIC BDS Proposal creates equal treatment among ROR NETCs. More importantly, this policy change will address the "haves and have nots" disparity between customers. By using the Commission-approved SBCM to determine BDS eligibility for capped locations, all costs of deploying broadband are addressed equitably among ROR NETCs and are otherwise treated in a transparent fashion when addressing NUSF support levels. Given funding

²⁰ *In the Matter of the Nebraska Public Service Commission, on its Own Motion, to Administer the Universal Service Fund High-Cost Program*, Application No. NUSF-99, Progression Order No. 1 at 7 (Sept. 1, 2015)

limitations in the NUSF budget and the extent of investment costs in capped locations for RIC A-CAM-electing companies that are unrecovered by federal support (again, nearly \$83 million), the provision of BDS support for these locations will provide the opportunity for incremental buildout of additional 25/3 Mbps broadband in capped locations until the Commission also reallocates the total NUSF High Cost budget between PC and ROR carriers following the resolution of Rural Digital Opportunities Fund issues by the Federal Communications Commission.

ii. “If so, how can the Commission address this concern?”

RIC Response: Please see response to III.A.2.B.i above. Commission adoption of the entirety of the RIC BDS Proposal will address the current discriminatory denial of BDS to A-CAM-electing ROR NETCs and does so in a manner consistent with legislative and Commission policies and the Commission’s Accountability Framework.

iii. “Should there be a separate accounting of the support used for capped locations? If so, what type of accounting is needed for transparency?”

RIC Response: Yes, subject to the clarification noted herein. RIC is concerned that the phrase “separate accounting” may be confusing the Uniform System of Account book entries with the Commission’s current practice for processing applications for NUSF support. This is particularly true since the book accounting associated with BDS is not an issue that is raised by the RIC BDS Proposal.

To avoid this potential confusion, therefore, RIC believes that the foregoing question is more relevant to applications for broadband build out projects for capped locations. In this regard, RIC anticipates that BDS allocations for capped locations would be earmarked in the NUSF project approval process for a specific year, and the support used would then be explained

in the following year's filings. No other change – including any element of the current Accountability Framework – would be required or necessary as the RIC BDS Proposal does not alter these Commission's requirements.

RIC respectfully submits that implementation of this aspect of the RIC BDS Proposal is administratively efficient and readily understood in that the process builds on the Commission's current project-based approval system. As such, RIC does not believe there is a need to "reinvent-the-wheel" particularly since the RIC BDS Proposal otherwise allows for tracking of BDS use for broadband deployment.

iv. "Should the Commission be concerned about carriers that are earning above the prescribed rate of return receiving additional support for capped locations?"

RIC Response: No. While more discussion of this aspect of the RIC BDS Proposal is provided in response to the questions raised in Section III.B, *infra*, the entirety of the RIC BDS Proposal is consistent with the purposes of the NUSF in the first instance – to provide increased incentives for investment in broadband deployment.²¹ Providing BDS support will enhance the use of NUSF High Cost Program support for network deployment/investments because, under the RIC BDS Proposal for capped locations, BDS (1) would be used for additional broadband build out;

²¹ See, e.g., *In the Matter of the Nebraska Public Service Commission, on its Own Motion, to Administer the Universal Service Fund High-Cost Program*, Application No. NUSF-99, Progression Order No. 1 at 6 (Sept. 1, 2015) ("Historically, the NUSF-EARN Form has been a tool used by the Commission to ensure carriers were making investments in their network and to ensure NUSF support provided was being used in Nebraska."); see also *In the Matter of the Nebraska Public Service Commission, on its own Motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements*, Application No. NUSF-108, Order Opening Docket and Seeking Comment at 2 (Sept. 27, 2016) and Order Seeking Further Comment and Releasing Proposed 2017 Distribution Calculations at 3 (Dec. 20, 2016).

and (2) would otherwise allow a method for tracking investment while encouraging new broadband deployment in the areas that the SBCM indicates are in need of such investment.

- v. **“Does the concern about consumers receiving timely broadband in those areas override the concern about a carrier earning more than the prescribed rate of return?”**

RIC Response: Yes. The potential for overearnings cannot be viewed in a vacuum in light of the broadband policies that the Legislature²² and the Commission have established, let alone consumer broadband demand in any given area coupled with the already recognized impact of the COVID-19 pandemic.²³ As such, RIC believes that broadband access has been shown to be a necessity. Thus, any concern regarding overearnings has been mitigated, in particular with respect to the RIC Overearnings Proposal that overearning be used only for broadband deployment.²⁴

- vi. **“Is there a higher threshold that the Commission should look at or should a carrier’s earnings be irrelevant?”**

RIC Response: Under the RIC BDS Proposal the answer to this question is “no.” While it may be appropriate for the Commission to gather data regarding and A-CAM-electing ROR NETC’s earnings through continued use of the EARN Form, as long as any overearnings are used solely for BDS and the deployment of broadband to unserved or underserved locations within the overearning carrier’s service area, the earnings level should not be relevant until all locations in

²² RIC notes that the Legislative directive is that *all* Nebraska consumers should have access to broadband at minimum speeds of 25/3 Mbps (*see Neb. Rev. Stat. § 86-1101(2) and n. 11, supra*) without any qualification as to carrier earnings (or such higher minimum speeds as may be approved by the Legislature).

²³ *See, May 11th NUSF-119 Order* at 28; *see also n. 5, supra.*

²⁴ *See also* Section III. B below.

the carrier's service area have access to broadband at statutorily required minimum speeds and there is a demonstration that further BDS is no longer required.

Because the unfunded total amount for capped locations served by A-CAM-electing RIC companies in Nebraska is nearly \$83 million, the continuing need for BDS in capped locations will remain for several years and could increase as broadband speed requirements increase. Thus, RIC respectfully submits that no further consideration of this aspect of the *PO 6 Order* is necessary. RIC is concerned that any additional focus on this issue may be used as an excuse to avoid prompt implementation of the entirety of the RIC BDS Proposal in 2022.

- vii. **“Should the Commission require a carrier to invest a certain percentage of federal support prior to approving additional support where a carrier’s earnings are above the prescribed rate of return?”**

RIC Response: No, any such issue should be raised and resolved on a fact-specific basis. If an NETC is not making sufficient progress toward its federal buildout and is not making proper use of supplemental BDS, the Commission can investigate any such issue during its annual 47 U.S.C. § Section 254(e) review.²⁵

- a. **“If so, what should that percentage be?”**

RIC Response: Not applicable. *See* Section III.A.2.B.vii.

- b. **“If not, why not?”**

RIC Response: Not applicable. *See* Section III.A.2.B.vii.

4. **“In the event that capped locations are eligible for support through, for example, the Broadband Bridge program, should NUSF support continue be directed to capped locations? Why or why not?”**

²⁵ *See*, 47 U.S.C. § 254(e) (“A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”).

RIC Response: As a general matter, any such issue should be resolved on a fact-specific basis. Only where it can be demonstrated that either NUSF High Cost Program support or support from any source, including the Broadband Bridge Act, is duplicative of federal support, then such NUSF or grant support would not otherwise meet the “sufficiency” requirement of 47 U.S.C. § 254 and Nebraska law²⁶ and should be disallowed.

5. “Should the Commission revise the rural definition to include additional areas that might be unserved or underserved?”

RIC Response: No. As noted in the *PO 6 Order*, “[t]o qualify as rural, a census block must have fewer than 20 households and less than 42 households per square mile. It also must not fall within a census block designated city or village.”²⁷ However, there has been no nexus demonstrated with respect to the RIC BDS Proposal and the need to alter this definition. Thus, RIC respectfully submits that no further consideration of this aspect of the *PO 6 Order* is necessary and prompt implementation in NUSF support year 2022 of the entirety of the RIC BDS Proposal should remain the Commission’s objective in response to the matters raised in the *PO 6 Order*.

6. “Should there be a cap on the amount that any individual location could receive in high cost support? If so, what should that cap be?”

RIC Response: As noted in the *PO 6 Order*, the Commission stated that it would be “prudent” to again ask whether a previously proposed (but not adopted) “\$15,000 per location cap” should

²⁶ See, 47 U.S.C. § 254(e) (“Any such support should be explicit and sufficient to achieve the purposes of this section.”); see also *Neb. Rev. Stat.* § 86-317 (Provides that the purpose of the NUSF Act is “to establish a funding mechanism which supplements federal universal service support mechanisms.”).

²⁷ See, *PO 6 Order* at 4.

now be adopted?²⁸ The answer to this question is “no” in that such a cap is contrary to the requirement of Section 86-323(3) of the Nebraska statutes which provides that “[c]onsumers in all regions of the state, including low-income consumers and those in rural and high-cost areas, should have access to telecommunications and information services . . .”²⁹ Thus, in order to be consistent with and to carry out the stated policies and purpose of the NUSF Act, the Commission should not establish a per customer location cap on NUSF High Cost Program support.

B. Overearnings Redistribution

1. The Commission seeks “comment on whether to adopt RIC’s proposal to transfer capped overearning amounts to the recipient’s NUSF BDS eligibility”?

RIC Response: As indicated above, RIC respectfully submits that addressing this issue requires the Commission to first find that BDS eligibility for capped locations is now approved for A-CAM-electing ROR NETCs.³⁰ RIC notes that the RIC Overearnings Proposal³¹ would allow use of overearnings as additional BDS provided that:

1. Any such additional BDS allocation for a ROR NETC is subject to the budget limitation for ROR NETCs applicable to any given year.
2. Where the EARN Form shows that a ROR NETC over earned, that ROR NETC’s initial ongoing support as calculated by the Commission’s NUSF distribution

²⁸ See, *PO 6 Order* at 3 citing *In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements, Application No. NUSF-108, Order Seeking Further Comments and Setting Hearing* at 5 (June 19, 2018).

²⁹ *Neb. Rev. Stat.* § 86-323(3)

³⁰ See., e.g., Section II, *supra*.

³¹ The RIC Overearnings Proposal would allow the use by ROR NETCs of overearnings (as defined in note 8 above) as a part of BDS for 25/3 Mbps broadband build out to capped locations as well as to other unserved or underserved locations in the ROR NETCs’ service areas.

model:

- a. Would be separately identified and the amount of the additional BDS would be capped at that ROR NETC's SBCM-determined Base Total On-going Model Support Amount,³² and
- b. Using the same process applicable to other BDS locations, the additional BDS representing the overearnings of the ROR NETC must be used for projects within the ROR NETC's service area to provide access to fiber-based broadband at minimum speeds of 25/3 Mbps within a time frame³³ and in accordance with additional requirements identified by the Commission.

For the following reasons, RIC respectfully submits that this RIC Overearnings Proposal should be adopted. First, this aspect of the RIC BDS Proposal will provide incentives for increased consumer access to broadband at minimum speeds of 25/3 Mbps, a result consistent with the objectives of *Neb. Rev. Stat.* § 86-1101.

Second, this aspect of the RIC BDS Proposal brings consistency within the NUSF High Cost Program by requiring that a ROR NETC's overearnings be retained, and thus used for the specific purpose of providing broadband access to consumers located within the ROR NETC's service area where the SBCM indicates that BDS is required for a capped location.

Third, by retaining the overearnings for BDS use within the ROR NETC's service area, this aspect of the RIC Overearnings Proposal eliminates current redistribution of overearnings to ongoing NUSF support, a result consistent with the statutory requirement that NUSF support subject to any Commission-sponsored reverse auction must be used for the benefit of those

³² RIC recognizes that this aspect of the RIC Overearnings Proposal presumes that BDS is available for capped locations.

³³ RIC makes clear that ROR NETC broadband buildout timeframe requirements previously adopted by the Commission – two years with a possible third year based upon a demonstration of good cause – would apply. *See, NUSF-108 PO#3* at 43.

consumers for which such support was originally allocated.³⁴

Fourth, the RIC Overearnings Proposal would avoid any unintentional creation of “haves and have nots” among rural consumers as a result of the Commission’s NUSF High Cost Program policies. The RIC Overearnings Proposal provides for additional 25/3 Mbps broadband deployment for consumers who would otherwise not have broadband access.

Fifth, the RIC Overearnings Proposal strictly limits the use of overearnings for fiber-based 25/3 Mbps broadband deployment.

Sixth, any broadband deployment project for which overearnings are to be utilized must be completed within a time frame and in accordance with requirements as specified by the Commission under its current buildout requirements of up to two years with an option of a third year.³⁵

Finally, any overearnings will not be available to shareholders or owners of ROR NETCs, but rather will be used for the benefit of the end user customers.

RIC respectfully submits that the adoption of the RIC Overearning Proposal addresses the traditional ROR regulatory treatment of overearnings in a manner directly consistent with benefits to the consumer by providing additional available BDS for 25/3 Mbps buildout. By continuing the Commission’s Accountability Framework and advancing the Commission’s adherence to the Legislative policy that all Nebraskans should be provided with access to 25/3 Mbps broadband as well as the effects of the COVID-19 pandemic,³⁶ the public interest is served through the adoption of the RIC Overearnings Proposal.

³⁴ See, *Neb. Rev. Stat.* § 86-330.

³⁵ See, *NUSF-108 PO#3* at 40.

³⁶ See, *May 11th NUSF-119 Order* at 28.

2. **“The Commission further seeks comment on the timing of making such change if this proposal is adopted.”**

A. **“Is this a change the Commission should make during the current 2021 support year?”**

RIC Response: No. To avoid creating issues with current 2021 budgets that are being implemented by ROR NETCs, and to provide adequate lead time to implement the entirety of the RIC BDS Proposal, implementation of the RIC BDS Proposal should occur January 1, 2022 for NUSF support year 2022.

B. **“How much notice should the Commission provide to the carriers that will be seeing a decrease in NUSF support?”**

RIC Response: Assuming the Commission issues its order in this docket by November 1, 2021 (which RIC believes can be readily accomplished should the Commission address only those issues surrounding the adoption of the RIC BDS Proposal), ROR NETCs should be able to plan 2022 budgets on the basis of approved use of BDS for capped locations and the changes effected by the RIC Overearnings Proposal.

C. **“In the alternative, should the Commission consider making this change effective for the 2022 distribution year?”**

RIC Response: Yes, for reasons stated in Sections III.B.2.A and B.

3. **“In the event that a carrier does not have an area available for BDS support, how should that support be distributed?”**

RIC Response: RIC respectfully submits that any resolution of this issue should take into account the specific facts and circumstances that exist at the time the need for BDS is eliminated for A-CAM-electing ROR NETCs serving capped locations.

Absent such factual findings, RIC is concerned that it may be premature to revise SBCM recovery levels based on potential increases in broadband speed requirements, additional investments needed to achieve those speeds, changes in service areas, and even potential “force

majeure” events. To be sure, the broadband market and consumer demands remain dynamic and not static. Thus, altering methods for determining ROR NETCs’ SBCM recovery levels is imprudent unless and until such alterations can be based on known and reasonably anticipated facts and the effects of those facts on specific NETCs.

A. “Should the Commission “redistribute that amount to other carriers?”

RIC Response: No, for the reasons provided in Section III.B.3, above.

B. “Should the support be placed back into the overall mechanism for distribution?”

RIC Response: No, for the reasons provided in Section III.B.3, above.

IV. REMAINING ISSUES CONTAINED IN *PO 6 ORDER*

In the *PO 6 Order*, the Commission outlined five (5) additional issue areas that extend beyond the BDS-related focus of RIC’s advocacy in NUSF-108. This RIC BDS-related advocacy was the subject matter that the Commission indicated “it was willing to consider . . . in a separate proceeding”³⁷ and which was stated to be the focus of the *PO 6 Order*.

RIC respects the fact that the Commission may include issues for comment in this proceeding in the exercise of its reasonable discretion. However, introduction of the twenty-one (21) additional topics listed on pages 4 through 7 of the *PO 6 Order* appear to RIC to have the effect of either (1) delaying the proper treatment of the core issue of providing BDS for capped locations and the use of overearnings advocated by RIC or (2) in certain instances dismantling the existing ROR NETC NUSF disbursement program.

³⁷ See, *PO 6 Order* at 1. RIC notes that one such issue area – transferability of NUSF among affiliated NETCs (*see id* at 5) – was addressed in RIC’s February 18, 2020 in response to the Commission Progression Order No: 5 in NUSF-108. See *Comments of the Rural Independent Companies, Application No. NUSF 108, Progression Order No. 5*, filed February 18, 2020 at 13. At this time, RIC stands by those comments and will not present additional comments.

While RIC reserves its right to file reply comments on any and all issues raised in items C through G of the *PO 6 Order*, RIC strongly opposes any delay in the adoption of the RIC BDS Proposal in its entirety as presented in these Comments. To the extent that elements of Issues C through G in the *PO 6 Order* need be considered at this time, RIC has addressed those elements on page 7 above. In this regard, RIC opposes other modifications to the current NUSF disbursement program for ROR NETCs outlined in additional topic areas C through G of the *PO 6 Order* in the absence of specific demonstrations that the necessary facts triggering the inquiries exist and that a decision arising from those facts meets governing legal standards of review.

In summary, the necessary facts and sound legal basis required to resolve the breadth of Issues C through G can be addressed separately from the central focus of the *PO 6 Order*. Again, RIC respectfully submits that the focus of the *PO 6 Order* is the provision of BDS for capped locations in compliance with applicable legislative and Commission policies. For the reasons provided in these Comments, any delay in implementing the RIC BDS Proposal disserves the public interest and the rural consumers that each of the RIC member serves in SBCM-identified capped locations.

V. CONCLUSION

As stated above, the Rural Independent Companies appreciate the opportunity to provide these Comments in response to the *PO 6 Order* and look forward to continuing participation in this docket.

Dated: May 28, 2021

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 and Three River Telco (the "Rural Independent Companies")

By: Paul M. Schudel

Paul M. Schudel, NE Bar No. 13723
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
WOODS & AITKEN LLP
5335 Wisconsin Ave., N.W., Suite 950
Washington, D.C. 20015
Telephone (202) 944-9502
Facsimile (202) 944-9501

CONFIDENTIAL EXHIBIT A

[REDACTED]

CONFIDENTIAL EXHIBIT B

[REDACTED]

CERTIFICATE OF SERVICE


The undersigned hereby certifies that on this 28th day of May 2021, an electronic copy and one paper copy of the foregoing pleading were delivered to:

Nebraska Public Service Commission

Cullen.Robbins@nebraska.gov

Brandy.Zierott@nebraska.gov

Also, electronic copies of the foregoing pleading were electronically delivered to the other parties to this docket.



Paul M. Schudel