

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own motion, to consider implementing a program to incentivize new fiber construction for E-Rate eligible entities.

Application No. NUSF – 117

PROGRESSION ORDER NO. 1

ORDER OPENING DOCKET AND SEEKING COMMENT

Entered: December 10, 2019

COMMENTS OF QWEST CORPORATION d/b/a/ CENTURYLINK QC AND UNITED TELEPHONE COMPANY OF THE WEST d/b/a CENTURYLINK

Pursuant to Commission Order dated December 10, 2019 in the above-referenced docket, Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink (collectively, “CenturyLink”) hereby respectfully provide the following comments on the Commission’s consideration of implementing a program within the Nebraska Universal Service Fund to incentivize new fiber construction for E-Rate eligible schools and libraries.

INTRODUCTION

The Federal Communications Commission’s (hereinafter “FCC”) rules and requirements governing the E-Rate program are both unique and complex. As recognized by the Commission, E-Rate contains a state matching component for special construction projects whereby the program will match up to an additional 10% (or 90% total) for one-time, upfront costs of deployment for new or upgraded fiber to eligible school and library locations. These special construction charges are limited to construction of network facilities, design and engineering, and project management.¹ Charges for network equipment, such as modulating electronics and

¹ *In the Matter of the Nebraska Public Service Commission, On Its Own Motion, To Consider Implementing A Program to Incentivize New Fiber Construction For E-Rate Eligible Entities, NUSF-117, Order Opening Docket and Seeking Comment at 2 (Dec. 10, 2019). See also, FY 2017 ESL, 31 FCC Rcd at 9775.*

other equipment necessary to make service functional, are not considered special construction charges. Further, E-Rate special construction funds do not cover the on-going monthly recurring charges of broadband service or ongoing costs associated with internal networks needed to utilize the new construction.

To be eligible for federal special construction funds, state programs must adhere to FCC rules and regulations. To make full use of federal funds, any state match component for E-Rate special construction projects should be limited to 10% of total construction with the remaining 90% of construction costs being covered by the E-Rate program. Furthermore, any recipient of E-Rate special construction funds from the FCC must abide by significant FCC-mandated guidelines, including reporting obligations, construction timelines, speed/network requirements and more. As such, the requirements, criteria and other aspects of the program are already defined by the FCC; additional state specific rules or requirements may not be necessary. Indeed, state specific regulations which are inconsistent with FCC rules may serve to disqualify and/or discourage participation.

The following comments offered by CenturyLink focus on leveraging existing federal regulations and, where necessary, state-specific regulations that may be warranted:

- 1. Does the Commission have authority to implement a program to supplement the federal E -Rate Special Construction matching fund program? Specifically, the Commission seeks comment on whether Neb. Rev. Stat. § 86-323 provides the Commission with the authority to create this program for libraries and schools. Why or why not? Please explain.***

While Neb. Rev. Stat. § 86-323 sets forth the public policy of the State to preserve and advance universal service based on the principles contained therein, it does not authorize the Commission to take any action to implement the policy. More specifically, although Section 86-323 expressly recognizes the need for schools and libraries to have access to advanced

telecommunications services, the statute does not provide the mechanism to (a) raise funds or (b) distribute funds to schools or libraries, regardless of participation in the FCC's E-Rate program. Consequently, Section 86-323, by itself, does not authorize the Commission to implement a program to supplement the federal E-Rate special construction program.

The Commission's authority to raise funds and implement specific programs must be found in enabling statutes.² Indeed, the Nebraska legislature has recognized this limitation by its introduction of Legislative Bill ("LB") 992, which is currently pending. Section 8 of LB 992 creates the "Nebraska E-Rate Special Construction Matching Fund Program" and allows the program to "receive funding from the Nebraska Telecommunications Universal Service Fund to provide incentives for fiber optic cable to be constructed to benefit public libraries." Given the pending legislation and out of an abundance of caution, the Commission may want to consider delaying implementation of an E-Rate Special construction program until it knows what will become of LB 992.

Nevertheless, should the Commission wish to proceed with an E-Rate special construction program prior to the legislature acting on LB 992 and assuming that a special enabling statute similar to LB 992 is unnecessary, the Commission must consider Neb. Rev. Stat. § 86-324, which is the enabling statute that creates the Nebraska Telecommunications Universal Service Fund. The Fund was created to make telecommunications services available consistent with the policies set forth in § 86-323, one such policy being access to advanced telecommunications services by schools and libraries.³ In addition to creating the Fund, Section

² *Cty. Cork v. Neb. Liquor Control Comm'n*, 250 Neb. 456, 459-60, 550 N.W.2d 913, 916 (1996) (holding that "an administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which they are to administer").

³ Neb. Rev. Stat. § 86-324(6).

86-324 both outlines the Commission’s authority to administer the Fund⁴ and limits the Commission’s authority to award NUSF funds to “eligible telecommunications companies.”⁵ Given this statutory limitation, whether the Commission has authority to use the Fund to provide the state match for federal E-Rate special construction projects depends on the structure of the proposed program. That is, any state match for federal E-Rate special construction projects must be directed toward eligible telecommunications companies rather than directly to a school or library.

Finally, in addition to compliance with state statutes, to receive the state match component, use of NUSF for federal E-Rate special construction projects must be consistent with FCC rules and regulations governing the program. To the extent FCC E-Rate rules allow the state match payment to be made directly to a telecommunications carrier, as opposed to the school or library, use of NUSF funds for federal E-Rate special construction projects may be consistent with both state and federal mandates.

2. *If so, how should the Commission determine a carrier's eligibility for the program? Should the Commission create a mechanism to designate eligible telecommunications carriers specifically for this purpose?*

Eligibility to participate in any state match program for E-Rate special construction projects should be based on existing eligible telecommunications carrier (“ETC”) requirements and existing eligibility criteria implemented by the FCC for participation in the E-Rate special construction program. To that end, the Commission should mirror federal eligibility guidelines. Establishing state specific eligibility criteria or additional ETC designations is unwarranted given the extensive federal E-Rate requirements and framework, especially when the state-match

⁴ Neb. Rev. Stat. § 86-324(2).

⁵ Neb. Rev. Stat. § 86-324(1).

portion of the overall initiative is limited to 10%. Further, any state-specific eligibility criteria may serve to deter participation by not only schools and libraries but also needed partners in the carrier and construction communities.

3. ***If implemented, what should the filing requirements be for the program? What criteria should the Commission consider relevant? Should the program operate similar to the Commission's Telehealth program where the Commission provides an overall budget for the program? Should the Commission provide reimbursement to the eligible carriers at a specific level for each site? How should funding for each site be determined? Should the Commission utilize a grant process?***

CenturyLink urges strong caution in establishing Nebraska-specific requirements and criteria for the reasons set forth above. Certain requirements are necessary and appropriate to ensure limited state resources are spent prudently and federal deadlines for E-Rate filings can be met. However, if Nebraska implements a federal E-Rate special construction matching fund program, the Nebraska program must remain consistent with the federal initiative and cover only those costs covered by the federal program. Predetermining specific reimbursement levels for each site may conflict with the structure of the federal E-Rate special construction program and potentially disqualify participants from receiving the additional funding, or at least the full amount of the additional funding, from the FCC.

Establishing an overall budget for the initiative is one component of a state-match program that would not run afoul of FCC guidelines if properly structured. The overall size of the budget and source of funding is ultimately a policy decision. Most states that have implemented an E-Rate Special Construction state-match program have established an annual budget as state funds are generally limited. In many states, the allocation is limited to a few years and comes from the state general fund as part of the legislative appropriations process. Without knowing the need of schools and libraries for special construction fiber projects, CenturyLink is unable to make a specific recommendation regarding the overall size of the state-

match. Further, the Commission must take into consideration the ability of the recipient school or library to utilize the special construction once it is completed. The FCC E-Rate special construction matching fund is a one-time funding mechanism for broadband infrastructure and does not cover the on-going monthly charges of the underlying services. If a school or library cannot demonstrate an ability to fund the ongoing costs, the use of NUSF to fund the federal E-Rate special construction matching program may not be in the best interest of ratepayers.

Any filing requirements and/or filing criteria established by the Commission should mirror federal guidelines where possible. Establishing state-specific application filing deadlines and prioritizing the various applications to best match public interests with limited resources will likely be required to meet the FCC filing deadlines outlined in Question 4. Some states have adopted a first-come, first-serve approach to ensure timely application filings so that the state officials can award funding to meet the federal application filing deadlines. If other approaches are taken, the Commission will need to develop some sort of scoring criteria as well as a review process. Given the fact that the state-match portion is limited to only 10%, the first-come, first-serve approach may work well, and the Commission can always adopt another approach if issues arise.

4. If implemented, what should the timeline be? What dates does the Commission need to factor in for library participation in the federal E-Rate program?

If the Commission implements an E-Rate special construction program, it must coordinate the application and participation deadlines with the federal program. The program year for federal E-Rate funding is July 1 through June 30. For the program year beginning July 1, 2020, the last day for competitive bids is February 26 with an application deadline of

March 25.⁶ Given these impending deadlines, the earliest a Nebraska E-Rate special construction program could be implemented is for the 2021 program year. Deadlines to participate in a state match program must take into account these federal deadlines.

5. *What other factors should the Commission take into consideration?*

Overbuilding and wasteful and duplicative spending of ratepayer funds are of utmost concern to the FCC and must be taken into account by the Commission. This is particularly true when schools and libraries already have a fiber-based internet connection from existing providers.⁷ As explained by Commissioner O’Rielly:

I have repeatedly voiced concerns over the use of Universal Service Fund dollars to overbuild existing networks, particularly when those networks subject to overbuilding were themselves built with Universal Service Fund support. In addition to wasting ratepayer money, USF-supported overbuilding undermines the ability of existing network providers to bring service to unserved areas in their communities.⁸

Given the potential for abuse and waste, the Commission must be particularly cognizant of these issues and craft state specific rules which prohibit NUSF funds from being used towards special construction projects for schools and libraries where existing providers are capable of providing service.

⁶ See <https://www.usac.org/e-rate/resources/upcoming-dates/>.

⁷ Letter from Michael O’Rielly, FCC Commissioner, to Jacqui Clay, Superintendent of Cochise County Schools (Aug. 26, 2019), available at <https://docs.fcc.gov/public/attachments/DOC-359287A1.pdf>.

⁸ Letter from Michael O’Rielly, FCC Commissioner, to Radha Sekar, CEO of Universal Service Administrative Co. (Mar. 7, 2019), available at <https://docs.fcc.gov/public/attachments/DOC-356472A1.pdf>.

In conclusion, CenturyLink thanks the Commission for the opportunity to provide comments in this docket and looks forward to a continuing and productive dialog on the provision of NUSF for the E-Rate Special Construction match program.

Dated this 17th day of January, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of January, 2020, an original of the Comments of CenturyLink in foregoing matter were hand-delivered to the Nebraska Public Service Commission, 300 The Atrium, 1200 N Street, Lincoln, NE 68508 and a copy of the same was emailed to the following:

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