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Nebraska
Public Service Commission

BEFORE THE NEBRASKA PUBLIC SERVICE COMMTSSION

In the Matter of the Nebraska Public) Application No. NUSF-117
Service Commission on its own motion,)
to consider implementing a program to)
incentivize new fiber construction for)
E-rate eligible entities.)

COMMENTS OF THE 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 December 10, 2019 (the “Order”). In the following discussion, each of the Commission’s inquiries presented in the *Order* is set forth and is then followed by RIC’s comments in response thereto.

Initially, however, RIC proposes a framework for the establishment of a supplemental NUSF E-Rate Library Program (the “NUSF Supplemental E-Rate Program”) that RIC respectfully submits is consistent the federal Communications Act of 1934, as amended (the “Act”), the Nebraska Telecommunications Universal Service Fund Act (the “NUSF Act”) and existing Commission policies related to the operation of current NUSF programs. Pursuant to this framework, the Commission is positioned to establish the NUSF Supplemental E-Rate Program based on demonstrable need and reasonable accountability measures, and to do so with

¹ Arlington Telephone Company, Blair Telephone Company, Clarks Telecommunications Co., 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.

sufficient oversight to ensure that support provided from the NUSF Supplemental E-Rate Program is properly used by recipients.

RIC understands that in this proceeding the Commission is focused on the Section 54.505 "E-Rate Special construction" contribution requirements of the federal Universal Service Fund ("USF") rules issued by the Federal Communications Commission ("FCC"). These rules provide, in part, for the following:

- (f) *Additional discounts for State matching funds for special construction.* Federal universal service discounts shall be based on the price of a service prior to the application of any state-provided support for schools or libraries. When a governmental entity described below provides funding for special construction charges for networks that meet the long-term connectivity targets for the schools and libraries universal service support program, the Administrator shall match the governmental entity's contribution as provided for below:
 - (1) *All E-rate applicants.* When a State government provides funding for special construction charges for a broadband connection to a school or library the Administrator shall match the State's contribution on a one-dollar-to-one-dollar basis up to an additional 10 percent discount, provided however that the total support from federal universal service and the State may not exceed 100 percent.
 - (2) *Tribal schools.* When a State government, Tribal government, or federal agency provides funding for special construction charges for a broadband connection to a school operated by the Bureau of Indian Education or by a Tribal government, the Administrator shall match the governmental entity's contribution on a one-dollar-to-one-dollar basis up to an additional 10 percent discount, provided however that the total support from federal universal service and the governmental entity may not exceed 100 percent.
 - (3) *Tribal libraries.* When a State government, Tribal government, or federal agency provides funding for special construction charges for a broadband connection to a library operated by Tribal governments, the Administrator shall match the governmental entity's contribution on a one-dollar-to-one-dollar basis up to an additional 10 percent discount, provided however that the total

support from federal universal service and the governmental entity may not exceed 100 percent.²

II. OVERVIEW AND GUIDING PRINCIPLES

As a general concept, the RIC member companies support efforts to meet the demonstrated unserved broadband needs of libraries in the State. The issue before the Commission does not appear to be the advisability of establishing the NUSF Supplemental E-Rate Program. Rather, the issue is whether, and if so how, additional funding for broadband deployments to libraries can be accomplished in a fiscally responsible manner and within budgetary constraints of the NUSF in light of other NUSF programs already in existence. In this regard, RIC understands that the FCC is confronting similar issues regarding the appropriate use of the FCC's E-Rate funding, specifically in instances where broadband facilities currently exist.³ Therefore, RIC respectfully submits that the Commission should carefully review the FCC's consideration of issues relating to the proper use of federal E-Rate Program funding, and to utilize that experience in any NUSF Supplemental E-Rate Program that the Commission determines to be appropriately implemented.⁴

² 47 C.F.R. § 54.505(f).

³ See *FCC Public Notice, Wireline Competition Bureau Seeks Comment on Texas Carriers' Petition to Prohibit Use Of E-Rate Funds to Build Fiber Networks in Areas Where Fiber Networks Already Exist*, RM-11841; CC Docket No. 02-6; WC Docket No. 13-184, released May 30, 2019; see also *In the Matter of Petition for Rulemaking to Amend and Modernize Part 54 of the Commission's Rules to Prevent Waste in the Universal Service Fund E-Rate Program, Petition for Rulemaking of Central Texas Telephone Cooperative, Inc. et al.*, RM-11841; CC Docket No. 02-6; WC Docket No. 13-184 (filed May 22, 2019), <https://www.fcc.gov/ecfs/filing/10522043215849>.

⁴ See e.g. *Letter dated March 7, 2019 from FCC Commissioner O'Rielly to Ms. Radha Sekar, CEO of Universal Service Administrative Company* (wherein the Commissioner explains that, during his tenure at the FCC, he has "repeatedly voiced concerns over the use [of USF] dollars to overbuild existing networks, particularly when those networks subject to overbuilding were themselves built with [USF] support. In addition to wasting ratepayer money, USF-supported

With these concepts in mind, the following principles (and rationales for each) are provided by RIC for the purpose of facilitating a constructive dialogue regarding the development of the NUSF Supplemental E-Rate Program to assist with deployment of broadband to Nebraska libraries.

Principle 1: As is the case for the other NUSF programs, the NUSF Supplemental E-Rate Program must have reasonable and enforceable eligibility and accountability standards.

Rationale: In the discharge of the Commission's delegated duties pursuant to the NUSF Act, establishment of rules and standards for NUSF Supplemental E-Rate Program eligibility and accountability for use of Program funding must be addressed. Each existing NUSF program has its own administrative standards. RIC is not aware of any public policy or legal reason not to establish eligibility and accountability standards for the NUSF Supplemental E-Rate Program. Further, the Program should be established as a separate NUSF program, with a separate budget.

Principle 2: NUSF Supplemental E-Rate Program funding should be based on demonstrated need.

Rationale: Distribution of NUSF support to libraries through the NUSF Supplemental E-Rate Program should be needs-based with a time schedule for use of the support for

overbuilding undermines the ability of existing network providers to bring service to unserved areas in their communities.”); *see also* *Statement of Commission Michael O’Rielly, Establishing the Digital Opportunity Data Collection*, WC Docket No. 19-195; *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, released August 1, 2019 (wherein Commissioner O’Rielly states that “one of the problems inherent to USF administration is insufficient coordination among the programs, which has resulted in easily preventable waste and gross inefficiencies. This is certainly evident in recent examples of E-Rate-funded overbuilding of existing fiber-based providers, including recipients of High Cost funding.”). Commissioner O’Rielly’s letter can be found at <https://www.fcc.gov/document/comm-orielly-letter-radha-sekar-ceo-usac>. Commissioner O’Rielly’s statement can be found at <https://ecfsapi.fcc.gov/file/080198686057/DOC-358832A3.pdf>.

deployment of broadband facilities. To help ensure that the Program will be successful, RIC respectfully submits that guidelines or rules governing provision of support should be transparent and enforceable in order to fulfill Program goals and objectives. As such, RIC recommends that any request for NUSF Supplemental E-Rate Program support should be subject to an application process that provides verifiable facts as to the level of broadband services that are currently available to an applying library, coupled with a challenge process that allows interested parties to present evidence as to the level of broadband service currently available to the library seeking the benefit of such funding.⁵

Principle 3: NUSF Supplemental E-Rate Program funding should be distributed to an entity over which the Commission has jurisdiction.

Rationale: In order to provide for additional accountability, the Commission should have jurisdiction over the recipient of NUSF Supplemental E-Rate Program funding. Absent that jurisdiction, the Commission's will lack oversight of use of Program funding. The Commission should restrict its provision of NUSF Supplemental E-Rate Program support to Nebraska Eligible Telecommunications Carriers ("NETCs") that will be accountable to the Commission to make use of Program funding for the purposes specified by the Commission.

Principle 4: Reasonable conditions should be placed on any library that seeks to have an NETC request NUSF Supplemental E-Rate Program funding for that specific library's broadband needs. Such reasonable conditions should include the following:

⁵ In a letter to Sen. Curt Friesen, Chair of the Nebraska Legislature's Transportation and Telecommunications Committee, dated January 12, 2020, Eric Carstenson, President of the Nebraska Telecommunications Association, provided updated information regarding the number of Nebraska communities that are currently provided with broadband service at speed of 25/3 Mbps or higher. The information in his letter indicates that based upon recently completed research and contrary to information provided to the Nebraska Rural Broadband Task Force, "there is extensive broadband available in Nebraska." RIC notes that on January 14, 2020, Senators Friesen and Bostelman introduced LB 992, and that Section 8 of such Bill would require the Commission to establish the Nebraska E-Rate Special Construction Matching Fund Program.

1. **Any library's NUSF Supplemental E-Rate Program funding request must demonstrate that the library will seek FCC funding under the E-Rate schools and libraries program administered by USAC and that the library understands that distribution of NUSF Supplemental E-Rate Program funding will be contingent upon approval of federal E-Rate funding.**
2. **Any library's NUSF Supplemental E-Rate Program funding request must demonstrate that the request does not seek funding for redundant fiber facilities to the library's location.**

Rationale: The Commission is aware that the NUSF Supplemental E-Rate Program, if implemented, is required by the terms of the NUSF Act to be supplemental to federal E-Rate funding.⁶ Thus, before any Program funding is distributed, the recipient should have applied for federal E-Rate funding since it is only after the request for federal E-Rate funding is made that any NUSF support distributed could be "supplemental." In addition, the specific directive of Section 86-317 of the NUSF Act for supplemental funding means, as a practical matter, that any NUSF Supplemental E-Rate Program funding may not be used when broadband has already been deployed to the library in question.

Principle 5: The NUSF Supplemental E-Rate Program need not be in lock step with the FCC's program provided the guidelines of 47 U.S.C. § 254(f) are met.

Rationale: 47 U.S.C. §254(f) rejects the concept that the Commission, in developing the NUSF Supplemental E-Rate Program, must be in lock step with the E-Rate program established by the FCC. Provided that the statutory directives are in fact followed, the Commission, pursuant to Section 254(f), is authorized to

adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt

⁶ See *Neb. Rev. Stat.* § 86-317 (NUSF support "supplements federal universal service support mechanisms.")

additional mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.⁷

To be sure, the Federal Act's requirements do not provide the Commission with unfettered discretion as to how to implement NUSF Supplemental E-Rate Program. However, RIC respectfully submits that the Federal Act's requirements provide ample discretion for the Commission to fashion its Program so as to provide for "additional definitions and standards" that would be applicable a to a "specific, predictable, and sufficient" NUSF Supplemental E-Rate Program.⁸ Moreover, because the Commission has already established NUSF contribution reform in a manner that does not burden the federal programs,⁹ RIC is confident that the same can be accomplished here.

Finally, RIC understands that the "devil is in the details" regarding the proper scope and rules applicable to the NUSF Supplemental E-Rate Program. Consistent with the Commission's approach addressing Rule 202 Reverse Auctions,¹⁰ RIC suggests that public input be obtained regarding any proposed rules relating to the NUSF Supplemental E-Rate Program. In this way and subject to RIC's principles outlined above, all interested parties and stakeholders can

⁷ 47 U.S.C. § 254(f).

⁸ *Id.*

⁹ *See, e.g., In the Matter of the Nebraska Public Service Commission, on its own motion, to determine a rate design and address implementation issues with a connections-based contribution mechanism*, Application No. NUSF-111/PI-211, Order (Aug. 7, 2018).

¹⁰ *See, e.g., In the Matter of the Commission, on its own motion, seeking to establish Title 291, Chapter 16, to adopt Reverse Auction and Wireless Registry rules and regulations in accordance with the Nebraska Legislative Bill 994 [2018]*, Rule and Regulation No. 202, Order Opening Docket, Releasing Proposed Rules, Seeking Comment, and Setting Hearing, (Mar. 12, 2019).

participate in order to ensure that the NUSF Supplemental E-Rate Program achieves the purposes for which it is established and does so based on demonstrated need and accountability.

III. RESPONSES TO COMMISSION QUESTIONS

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.*

As a general proposition, Section 86-317 of the NUSF Act provides that “[t]he purpose of the Nebraska Telecommunications Universal Service Fund Act is to *authorize the commission to establish a funding mechanism which supplements federal universal service support mechanisms . . .*” (emphasis added) Thus, the Nebraska Legislature has expressly delegated to the Commission the authority to establish state universal funding that is supplemental to federal universal service support mechanisms. Moreover, with respect to the matters raised in the *Order*, the Legislature specifically acknowledged that NUSF funds could be used to support libraries.¹¹ Such acknowledgement, in turn, is supported by the objectives of the NUSF Act in that “. . . *libraries . . .* should have access to advanced telecommunications services as described in the Telecommunications Act of 1996.”¹²

In combination with the directives of Section 86-324(1) of the NUSF Act, RIC submits that, taken as a whole, the foregoing provisions of the NUSF Act support the reasonable conclusion that the Commission has been delegated authority from the Legislature to supplement the federal E-Rate Special Construction matching fund program through the provision of NUSF

¹¹ *Neb. Rev. Stat. § 86-323(5).*

¹² *Neb. Rev. Stat. § 86-323(6) (emphasis added).*

support for the deployment, maintenance and upgrading of facilities to provide broadband services to libraries in this State.

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?*

Section 86-323(5) of the NUSF Act provides:

Funds for the support of high-cost service areas will be available only to the designated eligible telecommunications companies providing service to such areas. Funds for the support of low-income customers, schools, libraries, and providers of health care to rural areas will be available to any entity providing telecommunications services, maintenance, and upgrading of facilities.¹³

For the reasons stated in Principle 3 in Section II above, RIC respectfully submits that, as applied to the establishment of the NUSF Supplemental E-Rate Program funding, only NETCs are eligible to receive distributions from this other NUSF programs. RIC notes that this requirement is entirely consistent with the Commission's NUSF rules.

The Commission's NUSF rules require, in part, that "[o]nly a telecommunications company explicitly designated as an NETC by the Commission for the expressly stated purpose of receiving funding from the NUSF by Commission order shall be eligible to receive NUSF funding."¹⁴ Moreover, once designated as an NETC, the Commission's NUSF Rules also

¹³ In *Neb. Rev. Stat.* § 86-324(1) the Legislature repeats the directive that: "Only eligible telecommunications companies designated by the commission shall be eligible to receive support to serve high-cost areas from the fund."

¹⁴ *Neb. Admin. R. & Regs.*, tit. 291, ch. 10, § 004.01A. The Commission defines a Nebraska Eligible Telecommunications Carrier or NETC as "[a] telecommunications company specifically designated by Commission order to receive support from the Nebraska Universal Service Fund consistent with the Federal Act and Nebraska statutes." *Id.* § 001.01R. Further, the Commission defines the Nebraska Universal Service Fund or NUSF as "[t]he Nebraska Telecommunications Universal Service Fund as described in Sections 86-316 through 86-329 of the NUSF Act and administered in accordance with the Commission rules and regulations and Commission orders." *Id.* § 001.01S.

provide that NETC is then eligible to participate in the various NUSF programs that have been implemented by the Commission.¹⁵ Because NETCs are held to be accountable for their use of NUSF funds,¹⁶ the Commission's own rules, and consistency within the overall NUSF programs, the conclusion that NETCs should be the only entities eligible for NUSF Supplemental E-Rate Program funding is amply supported. As such, a carrier's eligibility for NUSF Supplemental E-Rate Program funding should be based upon such carrier's certification as an NETC.¹⁷

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?*

RIC has outlined above in Section II five (5) overall principles that should be used to establish and thereafter govern the NUSF Supplemental E-Rate Program disbursements.

¹⁵ See e.g., Neb. Admin. R. & Regs., tit. 291, ch. 10, § 004.03F2 providing that NUSF support for the Telehealth Program will be disbursed to NETCs providing service to the hospital; *Id.* § 004.04A providing that telecommunications companies designated as ETCs are eligible for NTAP support; *Id.* § 004.06 providing that NUSF wireless program support will be made to NETCs; and *Id.* § 006.05A providing that NETCs designated by the Commission to receive NUSF support are required to offer Lifeline and Link-Up services.

¹⁶ See e.g., 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."); see also *Neb. Rev. Stat.* 86-324(1) and Commission Telecommunications Rules, Title 291, Chapter 5, Section 009.

¹⁷ RIC recognizes that this eligibility requirement is different than that established for the FCC. See, 47 U.S.C. § 254(h)(1)(B). However, as discussed in Section II regarding Principle 5, Section 254(f) of the Act provides the Commission the authority to adopt additional standards and conditions, let alone rest its decision on the need for increased accountability for the use and disbursement of state NUSF resources. One such condition might be that if a bidder that responds to a request for bids is not an NETC at the time of bid submission and is the successful bidder, NETC status must be obtained from the Commission prior to the bidder's receipt of NUSF Supplemental E-Rate Program funding. See discussion in response to Commission Inquiry 4 below.

Likewise as stated in Section II above, these requirements should be proposed by the Commission as rules so that interested parties are provided with an opportunity to review and comment and otherwise provide insight into the overall framework the Commission proposes to implement so as to ensure that funds are properly spent.

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?*

In order for libraries to use the NUSF Supplemental E-Rate Program to obtain the additional federal E-Rate discounts available for State matching funds for special construction, the Commission will need to coordinate the implementation of the NUSF Supplement E-Rate Program with the timelines set forth by the Universal Service Administrative Company (“USAC”) for the federal E-Rate program. RIC provides a general overview of this process based on its consultants’ experience with the federal E-Rate Program.

As a general matter, under the federal E-Rate program, libraries can begin to request bids for services, via FCC Form 470¹⁸ for a specific funding year in July of the previous year. The libraries must allow at least 28 days to receive competitive bids. After the closing of the bid window, the library must select a service provider based on the request for proposal selection criteria.

Once a service provider is selected, federal E-Rate funds are applied for via FCC Form 471.¹⁹ The application window for FCC Form 471 typically opens on a designated date in

¹⁸ See also 47 C.F.R. § 54.503(c). While 47 U.S.C. § 254(f) as discussed herein provides a degree of flexibility to the Commission in fashioning the NUSF Supplemental E-Rate Program, the Commission in moving forward with its NUSF E-Rate Supplemental Program should address the competitive bidding process that the FCC rules require to initiate federal E-Rate Program funding. See, e.g., 47 C.F.R. § 54.503(a). See also n. 17 above.

¹⁹ See also 47 C.F.R. § 54.504.

January and closes on a designated date in March. The amount of the State funds available for special construction is submitted on the Form 471 application to determine the level of the federal E-Rate discounts that can be requested. Thus, applicants need to obtain State funding approval prior to making their federal applications.

Based on the above processes, RIC anticipates that the Commission would likely need to establish its funding approval process in the fourth quarter preceding the funding year. This timing, in turn, should allow libraries the ability to complete their respective USAC paperwork in a timely fashion.

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

Please refer to Section II above.

IV. CONCLUSION

As stated above, the Rural Independent Companies appreciate the opportunity to provide these Comments in response to the *Order* and look forward to continuing participation in this docket. RIC will look forward to reviewing other party comments filed in this proceeding and, based on the contentions raised by, augment its proposal should that be appropriate.

Dated: January 17, 2020.

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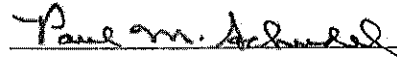
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of January 2020, an electronic copy and one paper copy of the foregoing pleading were delivered to:

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