

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska)	Application No. C-5272
Public Service Commission, on its)	
Own Motion, to implement the)	COMMENTS OF THE RURAL
Nebraska Broadband Bridge)	TELECOMMUNICATIONS
Act.)	COALITION OF NEBRASKA
)	
)	

INTRODUCTION

The Rural Telecommunications Coalition of Nebraska (“RTCN”)¹, by and through its undersigned counsel of record, submits these Comments (“Comments”) in response to the *Order Opening Docket, Seeking Comment, and Setting Hearing* (the “*Order*”) entered by the Nebraska Public Service Commission (the “Commission”) on June 8, 2021 in the above-captioned matter. RTCN appreciates the opportunity to provide input on the administration of the Broadband Bridge Program and thanks the Commission for their efforts to expeditiously resolve the issues raised in the *Order*.

The *Order* addresses a variety of items concerning the Broadband Bridge Program, and posits a number of inquiries. For both brevity and clarity, these Comments do not contain responses to each question posed by the Commission. Rather, RTCN has chosen to address its main concerns in these Comments. We reserve the right to add further comments or testimony to issues unaddressed in these Comments, as such opportunity may arise.

¹ For purposes of this proceeding, the RTCN consists of the following carriers: Arapahoe Telephone Company d/b/a ATC Communications; Benkelman Telephone Company, Inc., Cozad Telephone Company, Hartman Telephone Exchanges, Inc., Plainview Telephone Company, Southeast Nebraska Communications, Inc., Pierce Telephone Company, and Wauneta Telephone Company.

COMMENTS

A. THE COMMISSION MUST CONSIDER, AND TO THE EXTENT POSSIBLE ADDRESS, CURRENT INDUSTRY DYNAMICS RELATING TO THE AVAILABILITY OF LABOR AND MATERIALS

As the *Order* correctly notes, the Nebraska Legislature provided “significant guidance to the Commission and structure to” the Broadband Bridge Program; however, the Legislature wisely reserved for the Commission determination of many of the finer “components” to the process envisioned in LB388.² Successfully implementing the Broadband Bridge Program requires the Commission to consider the current industry dynamics related to infrastructure construction. Where it can, the Commission must ensure that the Legislature’s policy can be successfully implemented in the face of current reality.

Current reality for construction of broadband facilities in Nebraska is this: a carrier placing a material order for fiber can expect to receive the product in no less than 50 weeks, and a carrier seeking a contract with a contractor for fiber installation can expect the work to be performed no sooner than the third quarter of 2022. As the American economy reopens after the COVID-19 pandemic, many industries face significant challenges in procuring both materials and labor. These shortages, and their impacts, are well-documented and the telecommunications industry has not been immune. While these “pipeline” disruptions are not expected to be permanent, there is no clear answer on when they will abate.

These difficulties drive the concern of RTCN members as it relates to two items suggested by the Commission in the *Order*: (1) the evidence required of a challenger to a proposed project; and (2) the timing of grant awards to be made and when LB388’s eighteen (18) month “clock” begins to run. Each are addressed separately below.

² *Order* at 3.

1. Evidence Required for Challenge by a Proximate Provider

LB388 permits challenges to be filed by three separate categories of providers: (1) a carrier already providing service in the proposed project area; (2) a carrier presently constructing broadband infrastructure in the proposed project area; and (3) a carrier that provides broadband service in or proximate to the proposed project area, where the carrier commits to complete construction and provide service “no later than eighteen months after the date grant awards are made under the program.”³

With respect to the first two categories of challengers (those who have built and those who are building in a proposed project area), RTCN takes no issue with the suggested showing which the Commission proposes be made for a successful challenge to an application. With respect to the third category of challenger (a proximate carrier who commits to completion of a broadband network in the proposed project area within 18 months), the *Order* suggests that such a challenger must “provide progress reports every three months demonstrating progress toward construction.”⁴ RTCN takes no issue with this reporting requirement, but suggests that the Commission provide more specificity as to what it will consider “progress toward construction” and urges the Commission to further define this term with an eye toward the above-described labor and material shortages. Will a firm order for material without a definite delivery date constitute sufficient “progress”? Is a construction contract without definitive commencement and completion timelines to be deemed sufficient “progress”?

The plain language of LB388 carries a sufficient penalty to disincentivize challengers from submitting disingenuous challenges – a ban on challenging *any* grants for the following two

³ LB388, *Slip Law Copy*, Section 7(2).

⁴ *Order* at page 15.

years unless the challenger’s failure to complete the broadband network is “beyond the provider’s control.”⁵ In light of this penalty, we suggest that the Commission’s viewpoint on “progress toward construction” be broadly defined.

2. Clarification on “ the date the grant is awarded”

The Legislature provided for significant penalties in the event an applicant fails to timely complete a project.⁶ The specter of these penalties is part of the risk potential applicants must weigh prior to applying under the Broadband Bridge Program. Considered along with the significant labor and material supply issues described above, RTCN believes this will be a key decision-making point for many providers in Nebraska.

The text of LB388 requires that providers “agree to complete the project within eighteen months after the date the grant is awarded.”⁷ The imposition of penalties, likewise, springs from the provider’s failure to complete the project within a specified period of time “after the date the grant is awarded.”⁸ While LB388 requires the Commission to act on a timeline that provides for the submission of applications before October 1, 2021 for the current fiscal year, the Legislature was silent as to any specific date upon which grants must be “awarded.” Likewise, the *Order* contains little indication of when the Commission intends to “award” grants under the program.

Because the date upon which grants are “awarded” is consequential, RTCN suggests that the Commission clearly state the date upon which it intends to take such action. Further, if the Commission deems it consistent with the language of LB388, RTCN suggests that the

⁵ LB388, *Slip Law Copy*, Section 7(5).

⁶ An applicant must repay ten percent per month of the grant if no extension is given from the eighteen month period, and twenty percent per month if a six month extension is granted.

⁷ LB388, *Slip Law Copy*, Section 4(2)(a)

⁸ *Id.*

Commission develop some flexibility for applicants regarding the “date of award.” For example, the Commission may consider permitting applicants to specify on the application a “Proposed Date of Award” – essentially a proposed date upon which the applicant can realistically commence construction.⁹ Developing some timing flexibility for applicants would alleviate a potential scenario where a grant is “awarded” on January 1, 2022 for a proposed project that may not be able to commence until the second or third quarter of 2022 due to labor and material shortages. RTCN believes that providing applicants with as much certainty as to the construction timelines they must meet will produce a more robust response from Nebraska providers.

II. FINANCIAL, LEGAL, AND TECHNICAL CAPABILITY OF THE APPLICANT

LB388 requires the Commission to evaluate the “financial, technical, and legal capability” of applicants to “deploy and operate broadband Internet service” as part of the overall application scoring system.¹⁰ As a foundational issue, and as the *Order* suggests at page 8, RTCN firmly agrees that the scoring / weighting process should be “based upon objective criteria that can be assigned certain values and is transparent to the public.”

1. Demonstration of Applicant’s Financial Viability

The *Order* suggests, on one hand, that the Commission proposes to require audited financial statements, other independent audit results, and the applicant’s last filed tax return as indicia of the applicant’s financial viability.¹¹ The Commission also suggests that current Eligible Telecommunications Carriers (ETCs) would “by default” be deemed financially viable by virtue

⁹ The Legislature directed the Commission to “approve grant funding for all qualified applicants within the limits of available appropriations...each fiscal year.” LB388, *Slip Copy Law*, Section 8(1). Therefore, any “Proposed Date of Award” would likely need to fall before the close of the 2021-22 Fiscal Year – or June 30, 2022.

¹⁰ LB388, *Slip Law Copy*, Section 6(2)(a).

¹¹ *Order* at page 8.

of such status.¹² As the Commission’s “Reference Sheet – Scoring Criteria” notes, ETCs in Nebraska already submit financial statements and other tax return information “that demonstrate overall financial viability” on an annual basis. RTCN’s interpretation of these various suggestions is that current Nebraska ETCs would be scored as a “Yes” on the “Financial Viability of the Applicant” criteria without the need to submit further financial information as part of their application. This is a logical result because, as the Commission recognizes, ETCs are already required to annually submit such information.

2. Demonstration of Project’s Financial Viability

The Commission also proposes that applicants provide “an explanation of how costs and revenue will result in financial viability of the project over time.”¹³ It appears that the Commission intends to score this criteria on a sliding scale of 1 to 5, with more points awarded for “a business plan that provides details about how the proposed network will be maintained.”¹⁴ First, we observe that the “financial viability of the project over time” is *not* a scoring criteria provided by the Legislature in LB388. Second, we question how the Commission will objectively determine which projects are more or less “financially viable” than others. The *Order* provides no suggested criteria by which the Commission will determine whether a proposed project’s “financial viability” is worthy of 1 point, 3 points, or 5 points of scoring. Further, the RTCN is aware of no established, reliable, and objective method of grading projects in such a manner.

¹² *Id.*

¹³ *Order* at 9.

¹⁴ *Order* at Reference Sheet – Scoring Criteria.

Moreover, other requirements and safeguards in the Broadband Bridge Program should satisfy the Commission that any proposed project is “financially viable” from a revenue generation and future maintenance standpoint. Particularly in light of the requirement that applicants provide at least a 50% match of project costs, the Commission should assume that applicants have carefully vetted each proposal from a revenue and cost standpoint. Doing otherwise would place the applicant at risk of losing the substantial investment it must make to complete the project. For those reasons, the RTCN believes that the Commission’s proposal to evaluate a project’s “Financial Viability Over Time” is unnecessary and should not be carried forward in any final set of rules.

III. MATCHING FUND SOURCES

LB388 requires the Commission to weigh and score applications based upon:

Whether the applicant has committed to fund more than fifty percent of the total development costs of the project from sources other than grants under the program, with higher scores for higher amounts of matching funds.¹⁵

In the *Order*, the Commission proposes to implement this directive by scoring the percent of matching funds committed. The Commission also proposes to score “the nature of the match” by favoring certain types of matching fund sources over others. For the reasons explained below, the RTCN urges the Commission to reconsider its suggested scoring of matching fund sources.

First, we observe that the Commission’s proposal to score matching fund sources differently is inconsistent with the Legislature’s intent as expressed in the plain language of LB388. The Legislature chose to use a specific term to describe the nature of applicant matching funds required – **“from sources other than grants under the program.”** This broad Legislative choice of wording is important, and strongly implies that the Legislature did not

¹⁵ LB338, *Slip Law Copy*, Section 6(f).

intend for the Commission to create preferences between matching fund sources. Had the Legislature intended otherwise, it certainly could have distinguished between private capital and federal or state broadband funds in describing the required applicant match. The Legislature chose not to do so, and the Commission should recognize and honor that choice.

If a project application includes matching funds from multiple sources, the Commission has proposed to “consider the application under the lower point assignment.”¹⁶ RTCN anticipates that this proposal will produce illogical results inconsistent with the goals of the Broadband Bridge Program, and urges the Commission not to adopt this proposal. To illustrate, we outline two hypothetical proposals below for the same project that are identical in all respects except for the amount and source of matching funds:

<u>Project 1</u>	<u>Matching Fund Source</u>	<u>Project 2</u>
20%	Broadband Bridge Program	40%
35%	Federal Broadband Funds	0%
15%	NUSF High Cost BDS	0%
30%	Applicant Funds	60%

In the above scenario, both applications would score *equally* under the Commission’s proposed matching fund scoring criteria. Project 1 would score 0 points under the Match Source criteria because it utilizes 15% NUSF High Cost BDS funds (using the lowest point assignment, High Cost matching funds awarded 0 points), and 20 points under the Match Amount criteria (30% or less match requested). Project 2 would score 10 points under the Match Source criteria (10 points for applicant funds only) and 10 points under the Match Amount criteria (36 to 40% match).

The above hypothetical illustrates a scenario where the Commission would utilize *twice as much* Broadband Bridge Program funding to accomplish the same result due to its preference

¹⁶ Order at 12.

for one matching fund source over another. While the *Order* itself notes the Commission’s desire to “maximize the benefits” of the Broadband Bridge Program¹⁷, the Commission’s counterintuitive proposal to prefer one source of matching funds over another works against that purpose. The end sought to be achieved by the Legislature through LB388 is “the development of broadband networks in unserved and underserved areas” in Nebraska to the greatest extent possible with the financial resources provided.¹⁸ By setting up a system of preferring one means to that end over another, the Commission frustrates the purposes of the legislation.

The Commission also solicits input on whether and how the matching fund criteria should be weighed differently than the Commission’s proposal. For the reasons explained above, RTCN believes that the “Matching Fund Source” criteria should be discarded. Such an action would be consistent with the plain language and Legislative intent of LB388, and would better position the Commission to do the greatest good with the resources at hand. The sole focus of the matching fund criteria should be the relative burden each proposed project places on the resources available – that is, the “Matching Fund Amount” criteria.

RTCN suggests reconfiguring the scoring “bands” under the “Matching Fund Amount” criteria in a manner that will incentivize applicants to request the lowest possible amount from the program, in order to maximize the benefits of the program. If an applicant scores the same by requesting a 36% match or a 40% match, no incentive exists to request the lower amount. The 36% match request should score incrementally higher than the 40% request. To remedy this, RTCN suggests that the Commission assign a total of 30 possible points to the Matching

¹⁷ *Order* at 13

¹⁸ LB388, *Slip Law Copy*, Sec. 3(1).

Fund Amount, awarding 0 points for a 50% match request, 1 point for a 49% match request, and so forth through a full 30 points for a 20% or less match request.

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**RURAL TELECOMMUNICATIONS
COALITION OF NEBRASKA**

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