

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

In the Matter of the Commission, on its ) Rule and Regulation No. 202  
own motion, seeking to establish Title 291, )  
Chapter 16, to adopt Reverse Auction and )  
Wireless Registry rules and regulations in )  
accordance with Nebraska Legislative Bill )  
994 [2018]. )  
)

**COMMENTS RECEIVED**

APR 18 2019

Nebraska  
Public Service Commission

**Introduction**

The Rural Telecommunications Coalition of Nebraska (“RTCN”)<sup>1</sup>, by and through its attorneys of record, submits these comments (“Comments”) in response to the Order Opening Docket, Releasing Proposed Rules, Seeking Comment and Setting Hearing (“Order”), entered by the Public Service Commission (“Commission”) in the proceeding docketed Rule and Regulation No. 202 on March 12, 2019.

Recognizing the importance of broadband services to the residents of Nebraska, the Legislature passed LB 994 during the 2018 session.<sup>2</sup> The new law specifically defined broadband to mean internet service capable of “a minimum download speed of twenty-five megabits per second and a minimum upload speed of three megabits per second.”<sup>3</sup> In addition to establishing the Rural Broadband Task Force, LB 994 authorized the Commission to establish processes by which the Commission could withhold support from the Nebraska Telecommunications Universal Service Fund (“NUSF”) to any telecommunications company that is not satisfactorily serving its customers in areas served by the telecommunications

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<sup>1</sup> For purposes of this proceeding, the RTCN is made up of the following carriers: Arapahoe Telephone Company d/b/a ATC Communications, Benkelman Telephone Company, Inc., Cambridge Telephone Company, Cozad Telephone Company, Diller Telephone Company, Glenwood Network Services, Inc., The Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hemingford Cooperative Telephone Co., Mainstay Communications, Pierce Telephone Company, Plainview Telephone Company, Southeast Nebraska Communications, Inc., Stanton Telecom, Inc., Wauneta Telephone Company and Westel Systems f/k/a Hooper Telephone Company.

<sup>2</sup> See NEB. REV. STAT. § 86-1101(1).

<sup>3</sup> NEB. REV. STAT. § 86-1101(2).

company.<sup>4</sup> The new law also authorizes the Commission to redirect support to competitive providers of broadband internet services in the same areas where support is withheld.<sup>5</sup>

This significant shift in public policy reflects the growing public pressure to accelerate broadband deployment in all areas of the state and a frustration that customers in some areas of the state have excellent access to broadband services, while customers in other areas of the state do not. In LB 994, the Legislature characterized this phenomenon as the *digital divide* between rural and urban areas.<sup>6</sup>

The RTCN would respectfully suggest that the digital divide is more complicated than that. Customers in many rural parts of the state, in fact, have excellent access to broadband services at affordable rates. Both the services and the rates are comparable, if not better, than services and rates in urban areas. Regardless of the nature of the digital divide, it unquestionably exists, and the Legislature was correct in raising and attempting to take steps to address the divide. Likewise, the Commission is to be commended for initiating this rule-making docket to study and determine the best means by which to utilize public funding to bridge the divide.

The RTCN generally believes that the rules and regulations proposed in this proceeding need to be significantly modified to more specifically establish criteria for withholding and redirecting support. The RTCN does not oppose withholding and redirecting support, provided all parties, including the incumbent telecommunications company, have clear guidelines for knowing when support might be withheld and redirected.

This important rule-making was initiated by the Commission on March 12, 2019. The RTCN has worked as expeditiously as possible to discuss the implications of the proposed

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<sup>4</sup> NEB. REV. STAT. § 86-330.

<sup>5</sup> *Id.*

<sup>6</sup> NEB. REV. STAT. § 86-1101(2).

rules with members and expert consultants. In fact, in the time since the rulemaking was initiated, representatives of the RTCN have made visits to several RTCN members to study exchange maps which show the presence of facilities necessary to provide broadband services. It is critical that our comments take into account the facts and circumstances particular to all 16 members of the RTCN.

In these comments, and at the May 7 hearing, the RTCN will generally describe the concerns we have with the rules and regulations proposed. Unfortunately, time does not permit us to recommend solutions by the deadlines established. The RTCN is committed to work cooperatively and constructively with the Commission in its promulgation of rules and regulations pursuant to LB 994. The RTCN will continue to work on proposed changes to the rules and regulations to address the concerns we have raised. The concerns spelled out below, which will be echoed at the May 7 hearing, are not intended to represent our final comments on the proposed rules. We will be offering constructive alternatives.

### **Withholding Support**

Under Section 001.003(A) of the proposed rules and regulations, the Commission recognizes its authority to withhold support from an eligible telecommunications carrier ("ETC") on a census block or telephone exchange basis. The Commission then goes on to enumerate the four bases upon which it may withhold support.

The RTCN generally supports the Commission's approach, which would require due process. The RTCN strongly recommends that the rules be more detailed so the Commission may ensure a transparent and judicious process for making decisions as important as withholding support. Criteria should ensure that withholding decisions are not arbitrary or capricious. Carriers have made significant capital investments in broadband facilities, including fiber plant, that likely have many years of depreciable life remaining. Under NUSF-108, carriers have been allocated support to maintain and operate existing fiber plant,

as well as to deploy broadband facilities in unserved and underserved areas. Carriers have build-out requirements established by the federal government. Carriers have responsibilities as carriers of last resort. Carriers have secured long-term loans to invest in broadband already deployed and serviceable. Decisions to withhold support must account for important facts and circumstances, like those just mentioned, relating to service in the disputed exchange area. Withholding NUSF support must not be undertaken lightly. Loss of such support would pose risk to investments, loan obligations, as well as services to residences and businesses.

Additionally, the Commission should establish timeframes or milestones by which broadband deployment must be completed to ensure that carriers can develop the best approach to build-out in unserved and underserved areas. Knowing such timeframes, for example, will allow carriers to assess what technologies might best achieve the requirements of the Commission and Legislature, even if such technologies are transitional.

The RTCN urges the Commission to adopt criteria that favor withholding of support at the exchange level rather than the census block level. While the RTCN does not necessarily oppose withholding support at the census block level, criteria that favors an exchange-level decision will create a more efficient process, a less administratively burdensome process, and a paradigm that encourages investment and deployment of broadband-capable facilities, as well as a disincentive to neglect lower density, higher cost areas of exchanges.

Under Section 001.003(A) of the proposed rules and regulations, the Commission enumerates four bases upon which it may withhold support. The RTCN will address each basis (or subsection) separately.

Subsection 001.03(A)(i)

The first basis upon which support may be withheld is a finding by the Commission that “the availability, quality, or affordability of broadband telecommunications services is lacking.” Section 001.003(A)(i).

The RTCN does not object to the general standards set forth in this subsection. The language was taken verbatim from LB 994.<sup>7</sup> Rather, the RTCN merely requests clarification of the statutory language, which is an essential purpose of rules and regulations. The Commission should clarify language of statute so that all persons may govern their conduct accordingly.

While the RTCN is regrettably not yet in a position to propose constructive alternatives, generally we would urge the Commission, in its rules and regulations, to establish specific criteria for future Commission investigations and adjudications under this subsection.

For example, does the question of *availability* of broadband depend on service throughout the exchange or census block? If one customer out of one hundred in a census block lacks access to broadband services, does that trigger withholding of support? The question of *availability* also implicates questions of investment and timing. For example, if a carrier has purchased, but not yet installed all material and equipment necessary to upgrade its network in a particular census block, might support for that census block still be at risk? What if the carrier has a Broadband Deployment Fund application pending with the Commission to serve that area?<sup>8</sup>

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<sup>7</sup> NEB. REV. STAT. § 86-1101(1) and (2)

<sup>8</sup> The Commission established the Broadband Deployment Funding Mechanism in NUSF-108, Progression Order No. 3, *Findings and Conclusions* (November 19, 2018), pp. 40-41, in which Carriers can submit applications to access support set aside for deployment in areas not yet served with 25/3Mbps.

The criteria for considering *affordability* should at least account for rates for comparable speeds in other areas of the state.

Establishing discrete criteria for what constitutes *quality*, is less of a concern. The Legislature has defined broadband as 25/3 service.<sup>9</sup> The Commission has little choice but to insist upon reliable broadband telecommunications services at such speeds, regardless of the particular needs of the consumer. If the consumer demands broadband telecommunications services, the law essentially requires the Commission to find a way to provide it.

Finally, subsection 001.03(A)(i) is the only subsection that states that the Commission's finding to withhold support will be "[u]pon receipt of a consumer complaint." In other words, the other bases set forth in subsections 001.003(A)(ii) – (iv) appear to allow for support to be withheld upon either consumer complaint or the Commission's own initiative. The RTCN would recommend that all subsections be crafted similarly to permit the Commission to act either upon consumer complaint or its own initiative.

Subsection 001.03(A)(ii)

The second basis that might trigger withholding is a finding under subsection 001.03(A)(ii) that an ETC has not provided broadband service in a manner consistent with section 86-1101 of Nebraska law, which was newly enacted under LB 994.

Section 86-1101 is merely intent language. This does not mean that the language is inapplicable. Indeed, the Commission adopted the same language verbatim in section 001.03(A)(i), as discussed above, and the RTCN supports the language. But intent language, by its nature, is not operative. For that reason, the Commission should be particularly precise when it comes to defining what elements of this statutory provision might justify a decision

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<sup>9</sup> NEB. REV. STAT. § 86-1101(2).

to withhold support. If the Commission does not specify these elements, it will open up the potential for accusations of arbitrary and capricious decision making.

Section 86-1101, without mandating equalized rates, declares legislative concerns about access, rates, and reliability that is not comparable to access, rates, and reliability in urban areas. More specifically, this section establishes the 25/3 standard for broadband. In other words, determinations related to what constitutes sufficient access, affordable rates, and adequate reliability remain within the purview of the Commission, but the Legislature has clearly defined the minimum target broadband speeds.

Within the discretion the Legislature has afforded the Commission, the Commission should clearly define the bases (access, rates, and reliability) upon which it will condition support.

While stopping short of recommending specific language, the RTCN would recommend that subsections (i) and (ii) be folded into one subsection, or one basis upon which a finding to withhold support might be premised. Since subsection (ii) references a statute that contains mostly intent language, it adds little in terms of a substantive, operative basis for withholding support. Instead, the language of section 86-1101(2) is useful in clarifying what is intended by “quality,” as the term is used in section 86-1101(1). Quality means reliable 25/3 service.

Subsection 001.03(A)(iii)

The ambiguity of the next basis is especially concerning. Subsection 001.03(A)(iii) allows withholding support if the Commission finds that an ETC has not used NUSF support for its “intended purpose.” The RTCN supports this general principle, but would recommend that basis be more narrowly crafted to state that support may be withheld if it is not used consistently with orders of the Commission, rules and regulations, or statute. Without the

anchor of such criteria, “intended purpose” will mean different things to different persons, and will only lead to disputes and possible litigation.

Subsection 001.03(A)(iv)

The RTCN does not have concerns about the final possible basis for a decision to withhold support. Subsection 001.03(A)(iv) references findings made pursuant to section 86-324 of state statute. That provision of the Nebraska Telecommunications Universal Service Fund Act is sufficiently clear and specific to give carriers an idea of when support might be at risk.

The RTCN supports the due process requirements of section 001.03(B).

**Reverse Auctions**

The provisions relating to reverse auctions are fairly detailed and specific when it comes to what information must be provided by an applicant for participation in a reverse auction (section 001.04C) and by the winning bidder after a reverse auction (section 001.04D). The RTCN reserves the right to further comment on those two sections. Some of the provisions, such as requiring the applicant for redirected support to be an ETC, are not only prudent, but important to properly stewarding public funds.<sup>10</sup> Other provisions are unclear. For example, one provision requires the applicant to indicate the tier of bids it plans to make, without giving any guidance as to what the Commission means by a tier of bids.<sup>11</sup> Other sections would, without a legitimate basis, disqualify many highly qualified bidders, such as the requirement that the applicant submit prior financial statements that are audited by a certified public accountant.<sup>12</sup> To require audited financials without exception or options that

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<sup>10</sup> See section 001.04(c)(iii).

<sup>11</sup> See section 001.04(c)(iv).

<sup>12</sup> See section 001.04(c)(viii)(1).



adequately ensure the bidder be financially sound, would not be in the public interest and would not advance the purposes of LB 994.

When it comes to the criteria that might trigger a reverse auction or criteria the Commission will use to score applications, however, the proposed rules and regulations are inadequate. As stated above, the time between the release of the rules and the deadline for these comments was not sufficient to formulate and recommend specific suggestions for adequate criteria. The RTCN will continue to consider and formulate such criteria. At this time, the RTCN is only in a position to offer its general opinions responsive to this section of the proposed rules.

First, the RTCN strongly urges the Commission to consider alternatives to reverse auctions and promulgate rules and regulations as part of this rule-making that set forth the processes, guidelines, and criteria for such alternatives.

While LB 994 clearly calls upon the Commission to establish a reverse auction program, it makes equally clear, “The commission shall have *wide discretion* in the design, implementation, and operation of a reverse auction program.”<sup>13</sup> The Legislature has entrusted the Commission with the responsibility of redirecting high-cost support, after a decision to withdraw support has been made. The Legislature has directed the Commission to make certain that the support is directed back to the customers in the exchange area that has not been satisfactorily served by the incumbent local telecommunications company.<sup>14</sup> According to LB 994, “any funding that is withdrawn shall be utilized in the exchange area for which the funding was originally granted.”<sup>15</sup>

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<sup>13</sup> NEB. REV. STAT. § 86-330 (emphasis added).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Without disrupting any decision the Commission has made, or may make, before LB 994 is fully implemented, the Legislature has declared that support dedicated by the Commission to a particular exchange area shall remain in the area. Essentially, the Legislature has said that it trusts the Commission's decisions as to where support should be allocated.

Both the Legislature in LB 994 and the Commission's decisions in NUSF-108 have been focused on the customer. The Commission has been particularly determined to ensure that customers who are currently receiving broadband from carriers that have responsibly stewarded past high-cost support continue to receive affordable and reliable broadband. The Commission has done this while also developing new methods to accelerate deployment of broadband in areas where customers have been less fortunate.

The Legislature has declared that the support shall remain dedicated to the customers in exchange areas where the Commission has allocated support. Thus, support withheld under Section 001.003(A), must be redirected to a competitive provider eligible to receive support in the same exchange area.

The RTCN would submit that a reverse auction, which is required by LB 994, should be the last resort. The Commission should develop alternate methods for redirecting support that allow for more collaboration between not only the incumbent and competitor or competitors that ultimately receive the dedicated support, but also the local business community, both main street and agriculture, as well the hospitals, schools, municipalities, counties, and public power providers.

A reverse auction is, in essence, a race to the bottom. If more collaborative and less prescriptive methods of redirecting support fail, then the reverse auction remains the hard stop. The Legislature put it there for a reason, but the Commission should not make a reverse auction its first and only stop. Instead, using the *wide discretion* entrusted it by the

Legislature, the Commission should develop rules and regulations that establish protocols for collaborative efforts to determine the best competitive alternative.

Such protocols must preserve Commission authority over NUSF high-cost support. The Commission must have oversight to ensure that public funds allocated for broadband deployment in certain areas are properly utilized. Accountability protocols, consistent with those developed historically, including the Broadband Deployment Funding Mechanism,<sup>16</sup> and the EARN form, must be continued and modified to enhance accountability. Protocols should be established to allow more local collaboration, while not allowing unfair competition, disruption of telecommunications services, loss of investment, or other actions that might jeopardize the public interest or defeat the purposes of LB 994.

The Legislature has declared that affordable and reliable broadband is important to Nebraska residents. It is important to Nebraska residents because it is critical not only for entertainment and basic communications, but also for ensuring quality education and healthcare, as well as the ability to compete in today's world market. This is especially true in today's agricultural marketplace, where precision and technology are increasingly important to a business's success.

Because of the importance of affordable and reliable broadband, it is critical that the Commission establish methods for redirecting support that allow for the acceleration of deployment without forcing a race to the bottom, which might perhaps result in the short-term expenditure of fewer NUSF funds, but would relegate Nebraskans to less reliable services or services that will soon become obsolete.

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<sup>16</sup> See above fn. 8.

## Conclusion


The RTCN appreciates the forum the Commission has provided for public comment in this important rule-making and looks forward to constructively contributing.

DATED: April 18, 2019.

RURAL TELECOMMUNICATIONS  
COALITION OF NEBRASKA

ATC Communications, Benkelman  
Telephone Company, Inc., Cambridge  
Telephone Company, Cozad  
Telephone Company, Diller  
Telephone Company, Glenwood  
Network Services, Inc., The  
Glenwood Telephone Membership  
Corporation, Hartman Telephone  
Exchanges, Inc., Hemingford  
Cooperative Telephone Co., Mainstay  
Communications, Pierce Telephone  
Company Plainview Telephone  
Company, Southeast Nebraska  
Communications, Inc., Stanton  
Telecom Inc., Wauneta Telephone  
Company, and WesTel Systems f/k/a  
Hooper Telephone Company

By: REMBOLT LUDTKE LLP  
3 Landmark Centre  
1128 Lincoln Mall, Suite 300  
Lincoln, NE 68508  
(402) 475-5100  
[apollock@remboltlawfirm.com](mailto:apollock@remboltlawfirm.com)  
[mrodenburg@remboltlawfirm.com](mailto:mrodenburg@remboltlawfirm.com)

By:   
Andrew S. Pollock (#19872)  
Max L. Rodenburg (#26383)

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that an original and five copies of the above ***Comments*** of the Rural Telecommunications Coalition of Nebraska were filed with the Public Service Commission on April 18, 2019, and a copy was served via electronic mail, to the following:

Cullen Robbins  
Cullen.robbsins@nebraska.gov

John Monroe  
john.monroe@nebraska.gov



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Andrew S. Pollock