

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

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

RECEIVED

APR 18 2019

Nebraska  
Public Service Commission

**COMMENTS OF THE RURAL INDEPENDENT COMPANIES**

**I. INTRODUCTION.**

The Nebraska Rural Independent Companies (“RIC”)<sup>1</sup> submit these Comments in response to the “Order Opening Docket, Releasing Proposed Rules, Seeking Comment, and Setting Hearing” entered in the above captioned matter on March 12, 2019 (the “*March 12<sup>th</sup> Order*”). At this time, RIC limits its comments to the proposed rules regarding “reverse auctions” (the “Proposed Rules”). RIC appreciates the opportunity to provide these Comments and looks forward to continuing participation in this docket and, in particular, participation at the public hearing set for May 7, 2019.

In 2018, the Nebraska Legislature passed LB 994 which included Section 4 that, among other things, authorized the Nebraska Public Service Commission (the “Commission”) to open a docket to consider the implementation and operation of a reverse auction program”.<sup>2</sup> In the

---

<sup>1</sup> 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, Inc., 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.

<sup>2</sup> See generally LB 994, § 4 (2018) codified as *Neb. Rev. Stat.* § 86-330.

*March 12<sup>th</sup> Order*, the Commission proposes to amend Title 291 of its Rules “by adding Reverse Auction and Wireless Registry Rules and Regulations as seen in the attached Appendix A. . .”<sup>3</sup>

Each of the RIC members receives Nebraska Universal Service Fund (“NUSF”) support.<sup>4</sup> Thus, each RIC member is an interested party in this proceeding. Based on its review, RIC understands that the *March 12<sup>th</sup> Order* was an effort to develop the beginning of a general framework for reverse auction rules. To advance that effort and due to the limited experience that exists with reverse auctions, RIC believes the public interest would be served by allowing all interested parties to provide additional assistance in fashioning what could be a significant and dramatic change in the method by which NUSF would be disbursed to Commission-designated eligible telecommunications carriers.

As explained herein, the Nebraska Legislature has made clear that the Commission’s proposed action to proceed with a reverse auction rulemaking is discretionary. The Commission is not subject to time limitations within which the rulemaking must be completed. Thus, RIC respectfully submits that the goal of the *March 12<sup>th</sup> Order* should be to establish a sufficient framework and details as to the “when, what and how” requirements regarding the implementation and operation of a Nebraska reverse auction program consistent with the provisions of Section 86-330.

Accordingly, consistent with Section 86-330 and *Neb. Rev. Stat.* § 84-907 of the Nebraska Administrative Procedure Act<sup>5</sup>, RIC respectfully submits that, following the

---

<sup>3</sup> See *March 12<sup>th</sup> Order* at 1.

<sup>4</sup> RIC uses the term “NUSF” within these comments to refer solely to the Commission’s High Cost Program within the NUSF.

<sup>5</sup> In an analogous context regarding notice when dealing with rulemaking provisions of the federal Administrative Procedures Act, the United States Court of Appeals for the Eighth Circuit has stated “[t]hat the notice should be sufficiently descriptive of the subjects and issues

submission of comments by interested parties the Commission should grant leave to interested parties to submit reply comments on or before May 20, 2019, and that the May 7, 2019 hearing scheduled by the *March 12<sup>th</sup> Order* should be continued to a future date not earlier than June 15, 2019. By allowing this second round of comments RIC is hopeful that a further opportunity will be provided for interested parties to provide their views as to the issues that the Commission should address in order to more fully develop the specific details to govern the implementation and operation of a coherent reverse auction framework.

## II. DISCUSSION

### A. Implementation of a Reverse Auction Program as Part of the NUSF Framework is Discretionary.

Section 86-330 provides that:

Based on consumer complaints or upon its own motion, *the Public Service Commission may open a docket to consider the implementation and operation of a reverse auction program* that awards funding to broadband Internet service providers to support high-speed Internet infrastructure deployment projects in unserved or underserved exchanges within the State of Nebraska. *The commission may, in its discretion, withhold funding from the Nebraska Telecommunications Universal Service Fund to any telecommunications company that has not served, to the commission's satisfaction, those areas with service that meets the criteria for successful investment of funding from the Nebraska Telecommunications Universal Service Fund.*

The commission shall adopt and promulgate rules and regulations that establish standards governing the withholding of funding from the Nebraska Telecommunications Universal Service Fund from any recipient, including the provision of notice and the right to a hearing prior to the issuance of an order withdrawing such funding. If the commission withdraws funding from the Nebraska Telecommunications Universal Service Fund from any telecommunications company, *the commission may use the funding that is withdrawn to implement and operate a*

---

involved” so that interested parties may offer informed criticism and comments.’ ” *Citizens Telecommunications Company of Minnesota, LLC v. Federal Communications Commission*, 901 F.3d 991, 1005 (8<sup>th</sup> Cir. 2018) quoting *Northwest Airlines [v. Goldschmidt]*, 645 F.2d [1309 (8<sup>th</sup> Cir. 1981)] at 1319 (quoting *Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 48 (D.C. Cir. 1976 (en banc)).

*reverse auction program*, except that any funding that is withdrawn shall be utilized in the exchange area for which the funding was originally granted. The commission shall have wide discretion in the design, implementation, and operation of a reverse auction program but may use as a guide the program designed by the Federal Communications Commission in its Connect America Fund Phase II Auction process.<sup>6</sup>

The statute clearly provides that implementation of a reverse auction by the Commission is permissive and not mandatory.<sup>7</sup> If there were any question as to this conclusion it is resolved by the Legislature's use of "may" in three separate contexts, namely, (i) opening a docket in the first instance; (ii) withholding of NUSF funds; and (iii) use of such withheld funds for a reverse auction in the area to which the withholding applies. Likewise, the Commission's "wide discretion in the design, implementation, and operation of a reverse auction program"<sup>8</sup> amply supports the discretionary nature of implementing and operating a reverse auction framework.

With these concepts in mind, RIC understands that there may be a limited base of experience regarding use of reverse auctions in connection with state universal service programs. Further, the so-called "CAF II Auction" conducted by the Federal Communications Commission *exclusively* pertained to price cap carriers' federal CAF II support.<sup>9</sup> This limited experience

---

<sup>6</sup> *Neb. Rev. Stat.* § 86-330 (emphasis added).

<sup>7</sup> Bedrock statutory interpretation rules confirm that the use of the term "may" in the context of a legislative enactment means that such directive is discretionary to the entity to which such directive is made. *See, e.g., State ex rel. Scherer v. Madison Cty. Comm'rs of Madison Cty.*, 247 Neb. 384, 390, 527 N.W.2d 615, 620 (1995) ("The operative word of the statute is "may." Generally, the word "may" when used in a statute will be given its ordinary meaning unless the meaning would manifestly defeat the object of the statute, and when used in a statute, it is permissive and discretionary, not mandatory." (citing *Roy v. Bladen School Dist. No. R-31*, 165 Neb. 170, 84 N.W.2d 119 (1957))); *see also Neb. Rev. Stat.* § 49-802 (2010).

<sup>8</sup> *Neb. Rev. Stat.* § 86-330.

<sup>9</sup> *See, e.g., Connect America Fund Phase II Auction Scheduled for July 24, 2018, Notice and Filing Requirements and the Procedures for Auction 903, Public Notice*, FCC 18-6, released February 1, 2018 at ¶ 3. Interestingly, the *March 12<sup>th</sup> Order* does not address the Legislature's grant to the Commission of "wide discretion in the design, implementation, and operation of a reverse auction program . . . [to] use as a guide the program designed by the Federal

warrants a conclusion that the Commission should forego at this time the exercise of the Legislature discretionary grant of authority to establish a reverse auction program. At the very least, implementation of reverse auction rules for Nebraska should await the availability of data regarding the actual deployment results realized from the CAF II auction.<sup>10</sup> In this regard, and in

---

Communications Commission in its Connect America Fund Phase II Auction process.” See 86-330; see also *Connect America Fund Phase II Auction Scheduled for July 24, 2018 Notice and Filing Requirements and Other Procedures for Auction 903, Public Notice*, AU Docket No. 17-182, WC Docket No. 10-90, FCC 18-6, released February 1, 2018 (“FCC CAF II Auction Public Notice”); 47 C.F.R. §§ 1.1201- 1.2115 (FCC auction rules). Quite possibly, the FCC framework and experience arising from it may be a rational starting point for the further development of the Commission’s Proposed Rules

<sup>10</sup> As the Commission is aware, in the context of NUSF reform, the vocal parties seeking implementation of reverse auctions have been Charter Fiberlink – Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC (collectively, “Charter”). See, e.g., Comments by Charter Fiberlink – Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC, Application No. NUSF-108, filed March 7, 2019; Comments by Charter Fiberlink – Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC, Application No. NUSF-108, filed December 18, 2018 (“*Charter December 2018 NUSF-108 Comments*”). As part of its efforts, Charter has also retained Joseph Gillan as its witness to support the use of auctions. See Pre-Filed Reply Testimony of Joseph Gillan on behalf of Charter Fiberlink – Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC, Application No. NUSF-100/PI 193, filed April 21, 2017; see also *Charter December 2018 NUSF-108 Comments* at 3, n.4 (incorporating by reference and attaching “Lessons from the CAF II Auction and Implications for Rural Broadband Deployment and the IP Transition” (Joseph Gillan, November 11, 2018) (“Gillan Article”). After much touting of the so-called benefits of the CAF II Auction, Mr. Gillan nonetheless notes in the conclusion to the article the “real world” ramifications of the CAF II Auction. After noting that the CAF II Auction award winners are “characterized by thin margins”, Mr. Gillan acknowledges that as

with any market entry, there is uncertainty as to whether they will be able to deliver on their services, prices and deployments described in these bids. Logic and experience suggest that at least some of these proposals will confront unexpected difficulties that directly challenge the assumptions in their business models and they will have to adapt, which could result in the auction recipient not achieving all that they hoped (and thus bid). Any such future event, however, should not be interpreted as a failure of the auction process, but rather the unavoidable consequence of such a large experiment in entry.

Gillan Article at 10.

any and all events, if reverse auction rules are approved, such rules should apply exclusively to price cap carriers receiving NUSF High Cost Program support.

**B. While the Commission has Wide Discretion with respect to the Establishment of a Reverse Auction Program, Due Process Demands that Interested Parties be Provided All Details Pertaining to such a Program in Order to be Able to Substantively Comment with regard to the Proposed Program.**

As indicated in Section I above, RIC seeks a process regarding this rulemaking in which all interested parties are afforded additional opportunities to comment on the scope of implementation and operation of any Commission reverse auction rule proposal. RIC is confident that the Commission would agree that the public interest is served when interested parties are provided ample opportunity to comment on and assist in developing the record on which a proposed rule is based.<sup>11</sup> The purposes of *Neb. Rev. Stat. § 84-907* will be undermined if the Proposed Rules proceed to hearing without additional sufficient details concerning implementation and operation of a proposed reverse auction relating to NUSF.

First, the *March 12<sup>th</sup> Order* refers to terms and definitions within *Neb. Rev. Stat. § 86-330*, but review of that statute reveals that no definitions exist in that statute. Apparently, other definitions are intended for inclusion in the Proposed Rules, but none are provided.<sup>12</sup> These definitions may, in turn, provide guidance as to the “when, what and how” of the Proposed Rules.

---

<sup>11</sup> See, e.g., *Dannehl v. Dep't of Motor Vehicles*, 3 Neb. App. 492, 499, 529 N.W.2d 100, 105 (1995) (“The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified.” (citing *Vail v. Derwinski*, 946 F.2d 589 (8th Cir. 1991))).

<sup>12</sup> See Proposed Rule 001.02

Second, while the Proposed Rules provide an outline of “when” NUSF High Cost Program support may be withheld,<sup>13</sup> the specifics of such a showing, the ability of an affected carrier to respond to threatened withholding of support, and the standards by which determinations will be made regarding any order to withhold are not a part of the Proposed Rules. The withholding of NUSF support is a significant event not only in the affected carrier’s operations but also with regard to the consumers such carrier serves or intends to serve. Thus, the terms of Proposed Rule 001.03(A)(i) seem particularly troublesome by allowing, for example, a single disgruntled consumer to trigger a Commission proceeding to consider withholding of a carrier’s NUSF High Cost Program support.

Third, RIC seeks additional guidance from the Commission as to “what” the reverse auction process may entail. Thus, RIC believes that interested parties should be provided the opportunity – possibly within a workshop setting -- to flesh out the following concepts:

- (1) the areas eligible for reverse auction;<sup>14</sup>
- (2) the timing of the submission of any such application;<sup>15</sup>
- (3) the “tier” of bids that may be proposed;<sup>16</sup>
- (4) the “bidding weights” that may be applied;<sup>17</sup>

---

<sup>13</sup> See Proposed Rule 001.03(A).

<sup>14</sup> See Proposed Rule 001.04(A) and (C). In this regard, RIC also suggests that further guidance be provided to the implementation of the following statutory language: “any funding that is withdrawn shall be utilized in the exchange area for which the funding was originally granted.” *Neb. Rev. Stat.* § 86-330.

<sup>15</sup> See Proposed Rule 001.04(B).

<sup>16</sup> See Proposed Rule 001.04(C)(iv).

<sup>17</sup> See Proposed Rule 001.04(C)(vi).

- (5) the “tiers” associated with certification of financial and technical fitness;<sup>18</sup>
- (6) the “public interest obligations” vis-à-vis the “relevant tiers” of a winning bid;<sup>19</sup>
- (7) the parameters for determining “reasonable comparability” of rates of a winning bidder;<sup>20</sup>
- (8) the “requisite performance requirements” a winning bidder must meet;<sup>21</sup>
- (9) the length of time that such NUSF reverse auction support will be provided other than a reference to “two years” made in the context of a project’s costs above the winning bid;<sup>22</sup>
- (10) the meaning of “such additional information as the Commission may require;”<sup>23</sup>
- (11) the public notice period associated with filing of applications;<sup>24</sup>
- (12) the meaning of a “minor modification” to an application;<sup>25</sup>
- (13) what would constitute “defects noted by the applicant” that could be corrected;<sup>26</sup>
- (14) what would constitute “non-material information that was inadvertently omitted”;<sup>27</sup>

---

<sup>18</sup> See Proposed Rule 001.04(D)(ii)(2).

<sup>19</sup> See Proposed Rule 001.04(D)(ii)(3); *see also* Proposed Rule 001.04(C)(ii).

<sup>20</sup> See Proposed Rule 001.04(D)(ii)(3).

<sup>21</sup> See Proposed Rule 001.04(D)(ii)(4).

<sup>22</sup> See Proposed Rule 001.04(D)(ii)(5).

<sup>23</sup> See Proposed Rule 001.04(D)(ii)(8).

<sup>24</sup> See Proposed Rule 001.04(E)(i)

<sup>25</sup> See Proposed Rule 001.04(E)(iii).

<sup>26</sup> *See id.*



- (15) what may also constitute a “major modification” other than a change in ownership that is a change of control;<sup>28</sup>
- (16) what may be considered “additional terms and conditions upon which the support was granted” to a winning bidder;<sup>29</sup> and
- (17) what is the legal basis for the recovery action that the Commission may need to take if service commitments are not met.<sup>30</sup>

Finally, with respect to the “how” of the Proposed Rules, RIC notes, by way of example, that the Proposed Rules are silent as to a minimum bid requirement, how many bidding rounds will be undertaken, the circumstances that will cause an end to the auction, and anti-collusion requirements to be imposed to eliminate gamesmanship between auction participants. Each of these areas also, in RIC’s view, should be addressed by interested parties in subsequent Commission-sponsored efforts to fully develop the reverse auction framework.

**C. Additional Detail in the Proposed Rules and Additional Rounds of Comments is Required.**

RIC understands that the Proposed Rules cannot anticipate all situations that may arise. Nonetheless, the Proposed Rules should provide sufficient detail to allow interested parties to understand how any reverse auction framework will be established. With the above-referenced points in mind, additional rounds of comments are required so that the Commission, its Staff and interested parties are provided with an opportunity to

---

<sup>27</sup> *See id.*

<sup>28</sup> *See* Proposed Rule 001.04(E)(iv).

<sup>29</sup> *See* Proposed Rule 001.04(F).

<sup>30</sup> *See* Proposed Rule 001.04(F)(i).

develop a framework that complies with the requirements of due process and *Neb., Rev. Stat. § 86-330*.

### **III. CONCLUSION**

For the reasons stated herein, RIC respectfully submits that additional development of the Proposed Rules attached to the *March 12<sup>th</sup> Order* will help ensure that all parties are provided a meaningful opportunity to assist in the development of a rational reverse auction framework. By focusing on the “when, what and how” aspects of the Proposed Rules as outlined herein, RIC is confident that a reverse auction framework can be developed in a manner consistent with *Neb. Rev. Stat. § 86-330*.

Accordingly, RIC respectfully requests that the Commission inform all interested parties that following submission of comments by interested parties the Commission should grant leave to interested parties to submit reply comments on or before May 20, 2019, and the May 7, 2019 hearing scheduled by the *March 12<sup>th</sup> Order* should be continued to a future date not earlier than June 15, 2019. By allowing this second round of comments RIC is hopeful that additional input will be provided to the Commission to more fully develop the specific details to govern the implementation and operation of a coherent reverse auction framework. RIC also submits that a constructive step that the Commission should take is to schedule a prehearing conference pursuant to Commission Procedural Rule 020 to address procedural and substantive issues to be addressed at the hearing on the Proposed Rules.

Dated: April 18, 2019.

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, Inc., 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 (the "Rural Independent Companies")

By: Paul M. Schudel  
Paul M. Schudel, NE Bar No. 13723  
WOODS & AITKEN LLP  
301 South 13th Street, Suite 500  
Lincoln, Nebraska 68508  
Telephone (402) 437-8500  
Facsimile (402) 437-8558  
[pschudel@woodsaitken.com](mailto:pschudel@woodsaitken.com)

Thomas J. Moorman  
Woods & Aitken LLP  
5335 Wisconsin Avenue, N.W., Suite 950  
Washington, D.C. 20015  
Telephone (202) 944-9502  
Facsimile (202) 944-9501  
[tmoorman@woodaitken.com](mailto:tmoorman@woodaitken.com)

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of April, 2019, an electronic copy of the foregoing pleading was delivered to:

**Nebraska Public Service Commission**  
[Cullen.Robbins@nebraska.gov](mailto:Cullen.Robbins@nebraska.gov)  
[John.Monroe@nebraska.gov](mailto:John.Monroe@nebraska.gov)

Paul M. Schudel  
Paul M. Schudel