

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
Nebraska Legislative Bill 994
[2018].

)
)
)
)
)
)
)
)

Rule and Regulation No. 202

ORDER RELEASING PROPOSED
RULES AND SEEKING COMMENT

RECEIVED

DEC - 6 2019

Nebraska
Public Service Commission

COMMENTS OF WINDSTREAM

Comes now Windstream Nebraska, Inc., and for its comments to the Nebraska Public Service Commission’s (“Commission”) Title 291, Chapter 16, Reverse Auction and Wireless Registry Rules and Regulations, states:

I. BACKGROUND AND INTRODUCTION

On April 17, 2018, the Nebraska Legislature adopted Legislative Bill 994 of 2018 (“LB 994”) which, among other things, permitted this Commission to withhold Nebraska Universal Service Funds (“NUSF”) from any carrier which had not served “to the commission’s satisfaction” those areas with service that meets the criteria for successful investment of funding from the NUSF. The funding withheld can be used for a “reverse auction.”

On March 12, 2019, the Commission established this docket releasing the proposed Reverse Auction and Wireless Registry Rules, seeking comment, and setting a hearing. Windstream filed comments on April 18, 2019, which recommended that the Commission delay implementing rules until the results of the federal Rural Development Opportunity Fund (“RDOF”) program could be determined. Windstream also recommended that a standard be established for withholding funds, based on strict guidelines, from carriers not making good faith efforts to achieve the legislative goals of expanded broadband.

On May 7, 2019, the Commission held a hearing at which, in response to commenters, it established a workshop to discuss modifications to the proposed rules. That workshop was held on July 16, 2019. On October 8, 2019, the Commission released its second set of proposed rules and set comment deadlines.

Windstream appreciates the efforts of the Commission to improve broadband service for the rural customers of Nebraska. Windstream agrees with this goal and is rapidly expanding its service offerings by deploying both fiber-fed D-SLAM and fixed wireless solutions in a cost-effective manner and increasing speeds to the 267,000 households it serves in Nebraska. As such, Windstream appreciates the opportunity to comment on the Commission's proposed Reverse Auction and Wireless Registry Rules and Regulations.

The proposed rules and regulations establishing a reverse auction and its parameters meet the Commission's goal of being flexible in the implementation, but in obtaining that goal, the Commission impermissibly sacrificed clarity and certainty which resulted in the rules that fail to pass constitutional muster. Given these difficulties, the question becomes whether a reverse auction should even be implemented at this time. Consistent with the Nebraska Rural Broadband Task Force's ("Task Force") recommendation as outlined below, the Commission should continue to investigate, but delay implementation of, a reverse auction process until such time as the actual deployment of federal RDOF reverse auction is complete.

II. THE COMMISSION'S PROPOSED RULES ARE IMPERMISSIBLY VAGUE AND UNCONSTITUTIONAL

While the Commission's stated purpose is to "implement LB 994 and set a general framework which would allow the Commission to conduct a reverse auction, while avoiding

requirements that limit the Commission's ability to carry out its purpose,"¹ the proposed rules are impermissibly vague, ambiguous, and indefinite and, as such, are also unconstitutional.

Windstream acknowledges the Commission's desire to make the process easier and less restrictive for itself, however, the rules and regulations do not govern the Commission's conduct, but rather the conduct of the regulated entities. These entities have federal and state constitutionally guaranteed rights which the Commission must consider and protect. The Commission's proposed *ad hoc* approach simply does not provide sufficient guidance or notice for the regulated entities as to what behavior is being proscribed.

The courts have described this lack of notice as the *Void for Vagueness Doctrine*. In *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 240 (2012), the Supreme Court stated:

The fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed is essential to the protections provided by the Fifth Amendment's Due Process Clause which requires the invalidation of impermissibly vague laws. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." The void for vagueness doctrine addresses at least two connected but discrete due process concerns: Regulated parties should know what is required of them so they may act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. [internal citations omitted]

The *vagueness* proscribed by the courts runs throughout the proposed regulations but begins in the definitions section. The definition of "reverse auction" proposed by the Commission is a circular definition. In other words, it uses the same word to define its meaning, thereby not really defining it. The impermissibly vague definition proposed by the Commission and the lack of specific criteria for the reverse auction process do not provide the mandated notice to the

¹ Rule and Regulation No. 202, Order Releasing Proposed Rules and Seeking Comment, p. 3.

regulated parties and will necessarily cause the Commission to act arbitrarily or in a discriminatory manner.

Beyond mere vagueness, Section 001.02 provides that “The terms and definitions in Neb. Rev. Stat. § 86-330 are hereby incorporated into this chapter.” However, Neb. Rev. Stat. § 86-330 does not contain any definitions. In addition, Section 001.03(A)(ii) provides that the Commission may withhold Support from an eligible telecommunications carrier (“ETC”), “Where an ETC has failed to comply with the requirements of Neb. Rev. Stat. § 86-324(2).” However, Neb. Rev. Stat. § 86-324(2) does not contain any requirements applicable to the ETCs. The requirements of § 86-324(2) are applicable to the Commission: “Notwithstanding the provisions of section 86-124, in addition to the other provisions of the act, and to the extent not prohibited by federal law, *the commission* [shall]” [emphasis added]. Providing references to unsupportive statutes goes beyond mere vagueness to providing no notice or guidance whatsoever which is clearly unlawful.

The stated purpose of LB 994 was to permit the Commission to withhold NUSF dollars from any carrier which had “not served to the commission’s satisfaction, *those areas with service*... [emphasis added].” One would suppose that the definitions of “Unserved Area” or “Underserved Area” would be of critical importance to the Commission in establishing equitable and unbiased criteria in determining which “areas of service” the carriers are receiving USF funds for, yet failing to serve, so that the funds may be withheld. One would also suppose that any definition which had such a severe impact would be explicit enough to provide the notice which is constitutionally due to the carriers. However, contrary to logic and fairness, these terms are not defined in Neb. Rev. Stat. § 86-330, in the *Nebraska Telecommunications Universal Service Fund Act*, or in any other Commission regulation. A term which is not defined is accorded its plain ordinary meaning and a Commission may not define the term in a manner that is inconsistent with

the plain meaning of the word. See *City of Omaha v. Kum & Go*, 263 Neb. 724, 731, 642 N.W. 2d 154, 160 (2002) (“Obviously, then, the Commission may not *define* "church" in a manner that is inconsistent with the plain *meaning* of the *word*.” [emphasis added]). While the ordinary meaning of “unserved” may mean “any location in the State of Nebraska that does not have access to broadband internet service. . .,” the ordinary meaning of “underserved” does not. In addition, the terms are contained within the same definition as if they are interchangeable when they clearly are not.

As stated above, the Commission’s proposed *ad hoc* approach simply does not provide guidance or notice for the regulated entities as to what behavior is being proscribed. This is perhaps best illustrated by subsections (a) and (b) of Section 001.03(A)(i). Subsection(a) permits withholding of support from an ETC upon a finding by the Commission that “the availability, quality, or affordability of broadband telecommunications service is *lacking*”. [emphasis added]. Subsection(b) indicates that an ETC which “has failed to follow the criteria for successful investment of Support from the Fund” is at risk for having its support withheld. Neither of these sections provides “fair notice of what conduct is required or proscribed” and could certainly lead to arbitrary and discriminatory enforcement.

Finally, Sections 001.05(C)(ix)(1) and 001.05(C)(ix)(1)(a), contain the device “and/or.” The “and” being inclusive and the “or” being exclusive results in the device being nonsensical. See *Chicago Manual of Style*, 16th ed (Chicago: University of Chicago Press, 2010), Rule 5.220 at 266:

and/or. Avoid this Janus-faced term. It can often be replaced by *and* or *or* with no loss in meaning. Where it seems needed . . . , try *or . . . or both* (take a sleeping pill or a warm drink or both). But think of other possibilities

This is yet another example of the unconstitutional imprecision and indefiniteness which runs rampant throughout the proposed regulations.

III. NEBRASKAN BROADBAND CONSUMERS WOULD BE BETTER SERVED BY DELAYING THE PROPOSED REVERSE AUCTION, CONSISTENT WITH THE RURAL BROADBAND TASK FORCE RECOMMENDATIONS

Given the Commission's difficulties in defining what a reverse auction is or its parameters, Windstream questions whether a reverse auction should even be implemented at this time. The Task Force, which was created as part of LB 994 along with Neb. Rev. Stat. §86-330, found in its November 1, 2019 Report:

The NUSF Subcommittee found no evidence that the Nebraska Universal Service Fund has deterred or delayed capital formation, broadband competition, and broadband deployment. . .

The Task Force recommended:

- Encourage the Nebraska Public Service Commission to continue *to investigate*, through their Rules and Regulations 202 docket, a state-run reverse auction as a mechanism to spur broadband build out in rural areas. [emphasis added]
- Monitor the implementation of the FCC's [Federal Communication Commission] Connect America Fund II Reverse Auction to evaluate the success of the program and to identify any key lessons learned.
- Encourage the Nebraska Public Service Commission to explore alternate methods for redirecting support that allow for more collaboration between not only the incumbent and competitive carriers, but also the local business community, both main street and agriculture, as well as hospitals, schools, libraries, municipalities, counties, and public power providers.

Consistent with the Task Force recommendations, it would behoove the Commission to continue to investigate, but delay implementation of, a reverse auction process until such time as the actual deployment of federal RDOF reverse auction is complete. Sufficient funding has not been and will not be provided to most providers to fill the entire Nebraska broadband gap that exists. Thus, providers cannot be measured on supplying broadband to every household in their

footprints in the immediate or near future. Even the FCC recognized the need for a phase-in when it set a six-year period for build-out obligations in the Connect America Fund Phase II (CAF II) for price cap carriers and recently provided a ten-year period to meet obligations for Rate-of-Return providers accepting Alternative Connect America Cost Model Program support. The RDOF provides a ten-year funding horizon. These processes should inform the providers past and future efforts to meet the reasonable broadband deployment. Delaying implementation of any reverse auction in Nebraska until the results of these programs are known will give the Commission the necessary perspective from which to evaluate the success of the program, to identify key issues, and have full knowledge of which areas of the state are not being addressed by the FCC's program.

IV. CONCLUSION

The Commission's unconsidered rules may provide flexibility to implement, but are so impermissibly vague, ambiguous, and indefinite as to be unconstitutional. As such and consistent with the Task Force recommendations, the Commission should withdraw the proposed rulemaking but continue to investigate the reverse auction process until the actual deployment of the federal RDOF reverse auction is complete. This would give the Commission an opportunity to determine the success of the program, to identify key issues, have full knowledge of which areas of the state are not being addressed by the FCC's program, and gain valuable insight as to successes and failures of the program. Once those lessons are learned, the rulemaking may be revisited.

Respectfully submitted on this the 6th day of December, 2019,

By: 
Blake E. Johnson, #24158
Bruning Law Group
1201 Lincoln Mall, Suite 100
Lincoln, NE 68508
blake@bruninglawgroup.com

and

Brad Hedrick
Trent Fellers
Windstream Nebraska, Inc.
1440 M Street
Lincoln, NE 68508
Brad.Hedrick@windstream.com
Trent.Fellers@windstream.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 6, 2019, one paper original, five paper copies, and an electronic copy of the foregoing Comments on behalf of Windstream Nebraska, Inc. in Rule and Regulation No. 202 were delivered to:

Nebraska Public Service Commission
1200 N Street, Suite 300
Lincoln, NE 68508

Cullen Robbins
Cullen.Robbins@nebraska.gov

John Monroe
John.Monroe@nebraska.gov


Blake E. Johnson