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By Brandy Zierott at 11:40 am, Dec 22, 2023

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public) Application No. NUSF-139
Service Commission, on its own Motion, to)
consider appropriate modifications to the)
high-cost distribution and reporting)
mechanisms in its Universal Service Fund)
program in light of federal and state)
infrastructure grants.

**COMMENTS OF THE
NEBRASKA RURAL BROADBAND ALLIANCE**

The Nebraska Rural Broadband Association (“NRBA”),¹ through its attorneys of record, submits these *Comments* (“Comments”) in response to the *Order Opening Docket and Seeking Comments* (“Order”) entered by the Public Service Commission (“Commission”) on August 29, 2023, in the above proceeding (“Order Opening Docket”). On October 12, 2023, the Commission entered an *Order Bifurcating Schedule for Comments and Extending Comment Deadline in Part* (“Bifurcating Order”). In the Bifurcating Order, the Commission invited interested parties to submit comments on issues 3, 4, 5 and 7 of Subpart II.C. of the Order on or before December 22, 2023. The NRBA comments below address those issues.

Procedural Recommendation

Before weighing in on the substantive questions for which the Commission has invited public comment, the NRBA would reiterate its strong suggestion that the Commission conduct a series of workshops to address the key issues related to high-cost reform. We will not repeat the rationale we set forth in our comments filed November 17, but we would point out that the Rural Telecommunications Coalition of Nebraska (“RTCN”) made a similar request for a workshop in its November 17 comments.²

¹ For purposes of this proceeding, the NRBA consists of the following carriers: Cambridge Telephone Company; Glenwood Telephone Membership Corporation; Glenwood Network Services; Glenwood Telecommunications, Inc.; Hemingford Cooperative Telephone Co.; Mainstay Communications; Midstates Data Transport, LLC dba Stealth Communications; Mobius Communications; Pinpoint Communications; Plainview Telephone Company; Stanton Telecom, Inc.; Town & Country Technologies; WesTel Systems, dba Hooper Telephone Company.

² *Comments of RTCN* in above proceeding, pp. 15-16 (Nov. 17, 2023)

Portability of NUSF Support

NUSF Support is Already Portable

There are currently several mechanisms by which the Commission may redirect NUSF support. Such support is already “portable,” as the Commission puts it in its Order Opening Docket.

- **Boundary changes.** Under Neb. Rev. Stat. §§ 86-135 – 86-138, a customer can change providers if its current provider is not offering Internet services at speeds of at least one hundred megabits per second for downloading and twenty megabits per second for uploading. This mechanism has been used often, but its results are relatively insignificant. Most boundary change applications involve only one customer. The state will never connect all consumers one location at a time. Further, the boundary change process allows transition of a customer only to a carrier with an adjacent boundary, severely limiting the choice in providers. Finally, and most pertinently here, the Commission has not undertaken to determine how to promptly re-allocate support based on boundary change decisions. That is part of the reason the present proceeding is important. At present, the incumbent local exchange carrier (“ILEC”) that loses a customer as a result of a boundary change continues to receive NUSF ongoing support for that customer location for what have been extended periods of time. Meanwhile, the new ILEC receives no support for an extended period yet has a duty to serve the location as the new carrier of last resort (“COLR”). The current process therefore has the effect of relieving the original ILEC from its duty to serve without promptly transitioning support from that same carrier to the current provider.

- **Reverse Auctions.** In 2018, the Nebraska Legislature passed LB994, a bill that established a reverse auction process under which the Commission may withhold NUSF deployment support from the ILEC and redirect it to another eligible telecommunications carrier (“ETC”). In its November 17 comments on Section II.C., Issue 2 of the Order Opening Docket, the RIC was critical of the reverse auction mechanism.³ The NRBA agrees that the mechanism is flawed in both the process and the allocation of support. The process is similar to federal reverse auctions that have not produced good results for Nebraska. The flaw in allocation of support is one the Commission is seeking to address in this investigation.
- **Rural-Based Plan.** The flaw with the reverse auction process is what led the NRBA to push for an alternative approach to redirection of withheld support. This process, now part of Nebraska statute after the passage of LB338 in 2021, was designed to facilitate consumer-driven choice in the new provider. That mechanism (called a rural-based plan in the statute), however, has not been utilized due to the same problems with allocation that have undermined the reverse auction mechanism. The problem is with the allocation methodology, not the process. Again, the Commission is undertaking to modify that allocation methodology in this investigatory proceeding.
- **CLEC Petition.** As the Commission noted in its Order Opening Docket, a competitive provider may petition to replace the ILEC as the recipient of NUSF support, provided the CLEC make a number of specified showings, including a commitment to accept COLR responsibilities.⁴
- **ILEC Request.** A key purpose of the Rural Communications Sustainability Act, enacted in 2023, was to make sure the Commission has a clear directive to determine

³ See Comments of RIC in the above proceeding, pp. 5-8 (Nov. 17, 2023).

⁴ Order Opening Docket, p. 16.

how to transition (port) NUSF support – as well as corresponding COLR duties – to competitive providers. Under that Act, the ILEC itself may request that the Commission port NUSF support and transfer the COLR obligations.⁵

In sum, there is no question that NUSF support is portable. There are multiple processes by which support might be redirected or ported. The question, rather, is how the Commission will allocate support necessary to sustain the broadband network the state has subsidized through NUSF and that is being built utilizing programs such as the Nebraska Broadband Bridge (“Bridge”), Capital Projects, and Broadband Equity Access and Deployment (“BEAD”). Until the Commission reforms its methodology for allocating NUSF support, the deployment programs will not be successful in reaching truly rural high-cost areas. The present uncertainty about ongoing NUSF support that is critical to meet COLR obligations is a substantial disincentive to projects that would reach such areas. That will remain true no matter how BEAD project areas are defined.

Do Not Support Obsolete Technology

The Commission specifically asks whether it should “reduce or eliminate a provider’s ongoing support level based upon the number of locations served with copper facilities?”⁶

The NRBA remains steadfast in its belief in the principle of support being “technology neutral.” Without question, the most future-proof network we are building today is fiber-based. That said, any technology capable of providing 100/100 speeds should be eligible for NUSF support. If copper infrastructure is incapable of providing 100/100 speeds to locations, then the carrier should receive no support (deployment or ongoing) for those locations. Public funds should not support obsolete infrastructure.

⁵ Neb. Rev. Stat. § 86-1505.

⁶ Order Opening Docket, p. 17.

COLR Obligations & Ensuring Universal Access to Quality Services

The Commission posits many good, complicated, interwoven questions in the span of only a few pages related to COLR obligations.⁷ Many of these questions will only be ripe for determination after the Commission considers the facts and circumstances of any particular transition. While questions pertaining to allocation of ongoing support should be determined by the Commission at a level sufficient to provide certainty and predictability needed to make investment decisions, questions relating to transition of COLR obligations will be more nuanced and fact-dependent. For example, how will 911 service obligations be transitioned?⁸ As more significant geographic areas effectively transfer from ILECs to competitive providers vis-à-vis deployment programs (e.g., Bridge, BEAD), the Commission will face myriad questions relating to transition of NUSF support and COLR duties. Some questions will be unforeseeable until actual transitions occur on a large-scale. The Rural Communications Sustainability Act makes clear that the Commission is authorized to “make determinations related to allocations and distributions of support” for transition areas.⁹ Likewise, the Act definitively establishes the Commission’s authority to determine whether COLR duties should transfer to competitive providers.¹⁰

COLR obligations must be taken seriously. The same can be said with regard to ETC designations granted and reconsidered annually by the Commission. The Commission’s past scrutiny of the ETC designations has been light-handed. Carriers that have poor performance records not only continue to be deemed an ETC and receive support, but have received large grants for areas they had historically neglected. The Commission’s rules and federal rules

⁷ Order Opening Docket, pp. 18-21.

⁸ See Neb. Admin. Code tit. 291, ch. 5, § 009.02A4; 47 C.F.R. § 54.101(a).

⁹ Neb. Rev. Stat. § 86-1505(2).

¹⁰ Neb. Rev. Stat. § 86-1505(3).

are clear: Public funding has always come with obligations.¹¹ These obligations include providing access to emergency services such as 911.¹² COLR obligations and service quality standards are no enigma. The requirements of ETCs are plainly spelled out in the Commission’s Telecommunications Rules and Regulations and federal code.¹³ As the NRBA said in its November 17 comments, current regulatory requirements relative to quality telecommunications services are clear and adequate.¹⁴ Likewise, the current regulatory requirements for ensuring quality broadband services are straightforward and enforceable.¹⁵ The Commission should enforce all such requirements with the public interest as its first and foremost concern. The days of deference to monopoly ILECs that have neglected their COLR responsibilities must come to an end.

We must get away from the ill-founded notion that NUSF support is akin to a corporate entitlement, by which ILECs generally have an effective right of first refusal on NUSF support funding. Support is to be used for the benefit of the locations it was set aside to connect. We agree with Charter when it declares: “Ongoing support from the NUSF should not be assumed or automatic for any provider.”¹⁶

Accountability Framework

There are two main types of accountability frameworks utilized by Universal Service Fund (USF) programs. One is performance-based. It involves establishing goals and obligations. For example, a USF program (whether state or federal) may set a goal of

¹¹ See Neb. Admin. Code tit. 291, ch. 5, § 009; 47 C.F.R. § 54.101. Those obligations do not include publishing hard cover pictorial coffee table books that showcase the history of publicly supported monopolies. Rather, the real obligations have since 1997 included a duty to provide quality telecommunications and broadband services to all locations in a supported exchange, even rural locations, at rates that are comparable to those in urban areas. See Neb. Rev. Stat. § 86-323.

¹² See Neb. Admin. Code tit. 291, ch. 5, § 009.02A4; 47 C.F.R. § 54.101(a). The Commission has been criticized recently for not adequately enforcing 911 obligations. See “[Agency assures state senators that finding the cause of 911 outages is top priority](#),” *Nebraska Examiner* (Dec. 6, 2023).

¹³ See footnote 11.

¹⁴ Comments of NRBA in the above proceeding, p. 3 (Nov. 17, 2023).

¹⁵ Comments of NRBA in the above proceeding, p. 4 (Nov. 17, 2023).

¹⁶ Comments of Charter in the above proceeding, p. 8 (Nov. 17, 2023).

providing service of 100/20 Mbps to a specific location. Accountability is measured by whether the provider actually built out and has the capability of provisioning service at the requisite speeds. The Commission currently employs this accountability model for broadband infrastructure deployed under the Bridge program. Such accountability specifically and primarily includes reporting speed tests to the Commission.¹⁷ Failure to provide such speed tests currently results in penalties including the repayment of funds or even potentially the disqualification from future grant cycles.¹⁸ In this case, individual company financial standings are not considered, but performance is demonstrably accounted for.

The other main type of accountability framework involves a financial and earnings analysis. Such analysis might involve over-earnings tests, revenue requirement audits, and specific geographic financial data to ensure that support is provisioned as intended by the fund. Earnings-based accountability ensures that support is appropriately directed to providers based on their financial need in order to earn a reasonable return on investment for services provided to certain locations. The Commission employs an earnings analysis with respect to ongoing NUSF support for the costs of operations and maintenance (“O&M”). This support consists of a cost model, earnings filing requirement, and subsequent reallocations of NUSF support based upon over-earnings redistributions.

The Commission’s current accountability framework is a hybrid of both models – performance-based and earnings-based. At this time, the NRBA recommends that the Commission retain this hybrid model with minimal changes. The telecommunications and broadband industries are currently in a transitional period. Carriers are experiencing significant changes in federal support, including introduction of the recent Enhanced A-CAM

¹⁷ Neb. Rev. Stat. § 86-1304; *See also* Neb. Rev. Stat. § 86-324.02, related to speed tests for receipt of ongoing high-cost support.

¹⁸ *Id.*; *See also* Nebraska Public Service Commission Order in Application No. C-5275, “Disqualifying CenturyLink Entities from Challenge Process” (Nov. 7, 2023).

funding mechanism. Future broadband infrastructure deployment funding through federal and state programs is expected to dramatically change the landscape of broadband services in Nebraska.¹⁹ Areas historically served by NUSF-supported incumbent local exchange carriers will be transitioned de facto to competitive providers as they receive deployment grants for un- and underserved locations within ILECs' exchange territories. Changes to the accountability system will be more appropriately determined once this transitory period brings some certainty to carriers.

In the event the Commission does not choose to retain the earnings redistribution accountability framework as it currently exists, then the NRBA recommends the Commission adopt a support provision that allows carriers to submit petitions to receive additional support under certain circumstances, such as when a Budget Control Mechanism-based support reduction is implemented for federal funding when the federal budget has a shortfall, or when a natural disaster occurs with a carrier's service territory that causes additional costs to be incurred that aren't otherwise supported, etc. This provision should include an in-depth financial over-earnings review to ensure the carrier has a need for additional support. With respect to changes in the accountability system as a whole, the NRBA recommends the Commission instead hold a series of workshops on such measures for the NUSF in order to align accountability more appropriately with the mission of the NUSF as funds shift to support a network that is capable of delivering 100/100 Mbps speed ubiquitously. This recommendation, however, in no way changes the NRBA's previous recommendations that the Commission find processes for reallocating O&M support in the cases where an ILEC is not performing its COLR obligations and a competitive carrier is both

¹⁹ See Neb. Rev. Stat. 86-1301, *et. seq.*, the Nebraska Broadband Bridge Act; See also 47 U.S.C.A. § 1702 (b)(1), the Broadband Equity, Access, and Deployment Program.

providing service at appropriate speed thresholds and desires to take on COLR obligations. This can be done regardless of the particular accountability system in place for NUSF, and should be done.²⁰ Further, ensuring that a competitive carrier which accepts a deployment grant to serve an unserved or underserved high-cost location in an ILEC's territory has the ability to access ongoing NUSF support after deployment is a critical component of a successful deployment effort.

NUSF-EARN.

The NRBA encourages the Commission to refrain from significantly altering the NUSF EARN form at this point given the significant changes that will occur at the federal level over the course of the next two-to-five years. Over this period, the FCC will develop new federal USF support plans for ACAM I and ACAM II carriers as well as for CAF BLS carriers as the sunset dates for these programs occur. Further, during this same timeframe, it is expected that more than \$400 million in BEAD funding will be distributed for broadband deployment in Nebraska, as well as additional deployment funding under continued grant application cycles of the Bridge program. Given the significant changes which will occur in broadband deployment as the FCC reevaluates federal USF support programs, it would be reasonable for the Commission to refrain from significantly altering the NUSF Earn form until the impact of these events can be more accurately determined.

As a matter of sound public policy, NUSF support should be directed only to areas where it is needed. The NUSF-EARN reporting and overearnings redistribution process ensures that carriers who are overearning are not receiving support they do not need. The NRBA believes the current NUSF financial reporting requirements strike the right blend of accountability and straightforward reporting requirements. However, this should be

²⁰ See Neb. Rev. Stat. § 86-1501 *et. seq.*, the Rural Communications Sustainability Act.

holistically reevaluated periodically and tethered to an accurate and transparent cost model based upon current costs as the network undergoes significant changes. This should also be considered in tandem with the need to transition NUSF support to carriers able and willing to take over COLR obligations in areas where an ILEC is not fulfilling the same. In any case, the NRBA commends the Commission on the EARN form changes made in 2018 that have allowed more equitable comparisons among all Nebraska ETCs.

Disallowed Expenses.

The NRBA agrees that personal expenses, luxury goods, lobbying, etc., should not be supported by NUSF funds, similar to the federal funding disallowed expense requirements. Any cost model utilized by the Commission to determine support levels should not include disallowed expenses in cost inputs. The simple requirement to exclude disallowed expenses in the EARN report further ensures that they are not supported by NUSF funds and the NRBA recommends the Commission not make any changes regarding these expenses.

November 28 Order

The NRBA will take this opportunity to formally comment on a few parts of the Commission's Order of November 28, 2023, in the above-captioned proceeding ("November 28 Order").

Broadband Deployment Support Speed Standards.

As the NRBA understands the November 28 Order, it would allow broadband deployment support for an ILEC to deploy infrastructure to serve locations in the ILEC's COLR exchange if neither the ILEC nor a competitor was providing 25/3 service to those locations. The NRBA does not object to such allowance. That said, we reiterate our position that the Commission should swiftly act to shift NUSF from deployment support to the ongoing support needed to sustain the broadband network over time, especially in rural areas, where costs far exceed affordable customer revenues.

To the extent the NUSF is sought for funding competitive deployment, on the other hand, the Commission should allow the support unless the ILEC convincingly demonstrates it is providing 100/20 services throughout the project area, as defined. No statutory authority would support a lesser standard for avoiding competitive overbuild.

Ongoing Support Speed Standards.

In its original comments in this proceeding, the NRBA advocated for the Commission to terminate ongoing support for infrastructure incapable of 100/100 service as of June 30, 2025. No party has presented evidence or policy-based argument as to why such a deadline is objectionable. The NRBA believes this is an issue that needs to be addressed expeditiously. We believe it should have been addressed at least three years ago. No one is asking for a “flash cut.” The NRBA acknowledged in negotiations on legislation in 2021 that a flash cut would be ill-advised and pushed for a transition period at that time. Sen. Bostelman also asked for a date. The 2021 negotiations did not produce a deadline. A deadline should be established. The Commission’s last statement on the issue does not give much assurance that this important question will be addressed in a timely fashion, considering its gravity:

“The commission will initially leave the 25/3 Mbps threshold in place while the transitional mechanism is discussed and expects to take the length of the potential transition period under further review during the next phase of the proceeding (no next phase of the proceeding has been announced).”

The NRBA applauds the Commission for undertaking this investigation to establish evidence-based reform of the methodologies by which it distributes ongoing support. We understand that transition from the present paradigm will require careful investigation. That is one of the reasons we have advocated for workshops in this proceeding. The Commission should assemble all stakeholders around a table, allowing us to put our differences on the table without anyone making a record or keeping score, and lean on

stakeholders to work out as much as we can on matters relating to the long-term sustainability of the rural network. The Commission, however, first needs to establish deadlines and benchmarks to ensure public funds don't continue to fund obsolete networks. Firm deadlines will foster more serious discussions and collaboration.

Conclusion

The NRBA appreciates the opportunity to submit these comments to the Commission and urges the Commission to expeditiously proceed through this Application. The NRBA respectfully reserves the right to supplement these comments in any reply comment period.

DATED: December 22, 2023

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CERTIFICATE OF SERVICE

The undersigned certifies that an original of the above *Comments* of the Nebraska Rural Broadband Association were filed with the Public Service Commission on December 22, 2023, and a copy was served via electronic mail, on the following:

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