

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Application No. NUSF-117
Public Service Commission, on)
its own motion, to consider)
implementing a program to) ORDER SEEKING FURTHER COMMENT
incentivize new fiber) AND SETTING HEARING
construction for E-rate)
eligible entities.)
Entered: March 3, 2020

BY THE COMMISSION:

The Nebraska Public Service Commission (Commission) initiated this proceeding to consider implementing a program within the Nebraska Universal Service Fund (NUSF) to incentivize new fiber construction for E-rate eligible entities.

In 2018, LB 944 created the Rural Broadband Task Force to review issues relating to availability, adoption, and affordability of broadband services in rural areas of Nebraska. Last October, the Rural Broadband Task Force released its Findings and Recommendations. Among its recommendations, the task force encouraged the implementation of a program within the NUSF to incentivize new fiber construction to public libraries in order to maximize federal support through the Federal Communications Commission's (FCC) E-Rate Special Construction program.

The federal E-Rate program provides support for broadband connections in schools and libraries under two categories of service: Category 1 services to a school or library (telecommunications, telecommunications services, and internet access), Category 2 services that deliver internet access within schools and libraries (internal connections, basic maintenance of internal connections, and managed internal broadband services). The E-Rate program includes a matching program for special construction charges for high-speed broadband. The E-Rate program will increase an applicant's discount rate for these charges up to an additional 10 percent. However, the E-Rate program will only match funding for special construction projects if the source of funding is authorized directly by a state legislature or one or more state agencies.

If a state provides eligible carriers with funding for special construction charges for high-speed broadband, E-Rate matching funds will only be approved if the special construction project will provide high-speed broadband connections that meet the FCC's connectivity targets (100 Mbps for public libraries under 50,000

LSA & 1 Mbps per student in public schools) adopted in the E-Rate Modernization Order, and may not be applied to any other cost.

Applicants seeking additional E-Rate discounts to match state funding for special construction must submit information with their FCC 471 filing that the USAC will use to determine: (1) Whether the state funding is from an eligible source; (2) That any terms and conditions associated with state funding are not in conflict with E-Rate rules; (3) The appropriate calculation of the additional E-Rate discount, if any; and (4) Whether the project meets the Commission's connectivity targets.

For the purposes of the E-Rate program, special construction charges are the upfront, non-recurring costs of deploying new fiber or upgrading facilities to E-Rate eligible entities. Special construction consists of three components: (1) Construction of network facilities; (2) Design and Engineering; and (3) Project management. Special Construction does not include charges for Network Equipment.

Program rules permit applicants to request E-Rate discounts for special construction charges incurred up to six months prior to the July 1st start of the funding year (i.e. on or after January 1), provided that: (1) Construction begins after selection of a service provider pursuant to a valid competitive bidding process; (2) A Category One recurring service depends on the installation of the infrastructure; and (3) The service start date is on or after the start of the funding year.

The Commission sought comment on the following:

1. Whether it had the authority to implement a program to supplement the federal E-Rate Special Construction matching fund program. Specifically, the Commission sought comment on whether Neb. Rev. Stat. § 86-323 provided the Commission with the authority to create this program for libraries and schools.
2. How the Commission should determine a carrier's eligibility for the program? Whether the Commission should create a mechanism to designate eligible telecommunications carriers specifically for this purpose.

3. If implemented, what the filing requirements should be for the program. What criteria the Commission should consider relevant? Whether the program should operate similar to the Commission's Telehealth program where the Commission provides an overall budget for the program? Should the Commission provide reimbursement to the eligible carriers at a specific level for each site? How the funding should be determined for each site and whether the Commission should utilize a grant-like process.

4. If implemented, the Commission sought comment on the timeline. The Commission asked what timeline it needed to factor in for library participation in the federal E-Rate program.

5. The Commission asked what other factors it should take into consideration.

Comments Filed

Comments responsive to the Commission's December 10, 2019 Order were filed by CenturyLink, Cox Nebraska Telcom (Cox), the Nebraska Rural Independent Companies (RIC), the Butler Memorial Library, and the Nebraska Library Commission.

CenturyLink stated that the Commission did not have the authority under Neb. Rev. Stat. § 86-323 to implement this program.¹ CenturyLink stated § 86-323 recognizes the need for schools and libraries to have access to advanced telecommunications services but it does not provide (1) a mechanism to raise funds or (2) to distribute funds to schools or libraries regardless of participation in the FCCs E-Rate program.² CenturyLink further recommended the Commission wait until a decision is made on a current legislative bill, LB 992, which creates the Nebraska E-Rate Special Matching Fund Program.³ CenturyLink further commented that § 86-324 outlines the PSCs ability to award funds to "telecommunications companies" meaning that any match for federal E-Rate construction projects must be

¹ See Comments of Qwest Corporation d/b/a/ CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink (January 17, 2020) at 3 ("CenturyLink Comments").

² See *id.*

³ See *id.*

directed toward eligible telecommunications companies rather than directly to schools or libraries.⁴

CenturyLink further recommended that eligibility to participate in any state match program should be based on existing eligible telecommunications carrier requirements and existing criteria implemented by the FCC.⁵ The Commission should mirror federal eligibility guidelines. CenturyLink urged caution in setting state specific requirements however, establishing an overall budget would not run afoul with FCC guidelines and other states that have a match program have taken this approach.⁶ The Commission should take into account the ability of the recipient school or library to utilize the special construction once it is completed.⁷ The matching program is a one-time funding mechanism and does not cover on-going monthly charges of the underlying services.⁸ If a school or library cannot demonstrate the ability to fund ongoing costs, it may not be in the best interests of the ratepayers.⁹ Any filing requirements should mirror federal guidelines where possible.¹⁰ CenturyLink stated the Commission should coordinate the application and participation deadlines with the federal program.¹¹ Finally, CenturyLink cautioned that overbuilding, wasteful, and duplicative spending of ratepayer funds are a concern for the FCC and should be for the Commission as well.¹²

Butler Memorial Library stated that the Commission did have the requisite authority in § 86-323 to create a matching program.¹³ The Butler Library further recommended that the filing and

⁴ See *id.* at 4.

⁵ See *id.*

⁶ See *id.*

⁷ *Id.* at 6.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *id.*

¹² See *id.* at 7.

¹³ See Comments from the Butler Memorial Library (filed January 17, 2020) at 1 ("Butler Library Comments").

eligibility requirements should mirror the federal ones already in place.¹⁴ The timelines established by the Commission should be similar to the E-Rate program.¹⁵

Cox recommended that the Commission incorporate criteria similar to that published in the Federal Register by the Rural Utilities Service (RUS).¹⁶ According to Cox, the RUS scores rural areas with factors such as serving the least dense rural areas, as measured by the population per square mile.¹⁷ If demand exceeds the allocated funding the Commission could create rural tiers to address funding shortfalls.¹⁸ If demand exceeds funding, these tiers provide an open and transparent rationale why some locations are awarded funding over others.¹⁹

Cox further stated that the federal E-Rate program does not require Eligible Telecommunications Carriers (ETC) designation and it was not apparent to Cox what benefit requiring it would bring to the recipients of this fund.²⁰ Cox advises against creating a state ETC requirement because it could penalize libraries by limiting carrier choice.²¹ Cox stated there are companies like Cox that receive federal E-Rate support but are not Nebraska ETCs.²² Cox stated that becoming an ETC can be an expensive administrative process for the carriers.²³

Cox recommended that the Commission establish a matching requirement from the applicant to help them make cost effective choices.²⁴ A match provided by the applicant, even a modest amount

¹⁴ See *id.*

¹⁵ See *id.* at 2.

¹⁶ See Comments of Cox Nebraska Telcom, LLC (filed January 17, 2020) at 2 ("Cox Comments").

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ *Id.* at 3.

²⁰ See *id.* at 3.

²¹ See *id.* at 4.

²² See *id.*

²³ See *id.* at 3.

²⁴ See *id.* at 4.

would leverage the limited NUSF resources to finance additional projects.²⁵ If the program goes into effect, Cox recommended that a review of the program be conducted within three (3) years.²⁶ This review would enable an assessment of regulatory changes made by the FCC and/or the Commission that may have impacted this program. This review would also provide the Commission with the opportunity to predictably assess whether the program should be continued.²⁷

The Nebraska Rural Independent Companies (RIC) supported the concept of the Commission's effort to meet the demonstrated unserved broadband needs of libraries in the state.²⁸ RIC recommended that the new NUSF program should have reasonable and enforceable eligibility and accountability standards.²⁹ Support should be structured based on demonstrated need.³⁰ RIC further recommended that any request for NUSF Supplemental E-Rate support should be subject to an application where they show the level of broadband services they currently have and allow interested parties the opportunity to present evidence as to the level of broadband service currently available to the library.³¹

RIC further recommended that the Commission should restrict the supplemental program to support Nebraska ETCs that will be accountable to the Commission otherwise the Commission will lack sufficient oversight.³² Additionally, any library requesting supplemental E-Rate funding must show that are seeking funding from the FCC E-Rate program and the supplemental funding should be contingent upon approval of federal E-Rate funding.³³ RIC stated libraries should be required to show that they are not requesting funding for redundant fiber facilities to the library's location.³⁴

²⁵ *Id.* at 5.

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See* Comments of the Rural Independent Companies (filed January 17, 2020) at 3 ("RIC Comments").

²⁹ *See id.* at 4.

³⁰ *See id.*

³¹ *See id.* at 5.

³² *See id.*

³³ *See id.* at 6.

³⁴ *See id.*

In response to the Commission's specific questions, RIC stated that § 86-324(1) of the NUSF Act supports the conclusion that the Commission has been delegated authority from the Legislature to supplement the Federal E-Rate Special Construction matching fund program through NUSF deployment to libraries.³⁵ RIC further agreed that according to § 8-323(5) of the NUSF Act only NETCs are eligible to receive distributions from this NUSF program.³⁶ Because NETCs are held to be accountable or their use of NUSF funds a carrier's eligibility for NUSF supplemental E-Rate funding should be based upon such carrier's certification as a NETC.³⁷ RIC stated that the Commission has the discretion to fashion the program so as to provide for "additional definitions and standards" that would be applicable to a "specific, predictable, and sufficient" NUSF supplemental E-Rate matching program.³⁸ RIC suggested that public input be obtained regarding any proposed rules relating to the program that way all interested parties can participate in order to ensure the program achieves its proposed purposes.³⁹

RIC further stated that in order for a library to use the NUSF supplemental E-rate program to obtain the additional federal E-Rate discounts available for state matching funds for special construction the Commission will need to coordinate the implementation of the NUSF program with timelines set forth by the Universal Service Administration Company for the federal program.⁴⁰ Based on those dates and requirements for libraries the Commission would likely need to establish its funding approval process in the fourth quarter preceding the funding year.⁴¹

The Nebraska Library Commission (NLC) also provided comments in support of the implementation of a program to incentivize new fiber construction for E-rate eligible entities. The NLC deferred to the Commission on its interpretation of § 86-323 but commented that a Nebraska public library is eligible for E-rate if it is

³⁵ See *id.* at 8.

³⁶ See *id.* at 9.

³⁷ *Id.* at 10.

³⁸ See *id.* at 7.

³⁹ See *id.*

⁴⁰ See *id.* at 11.

⁴¹ See *id.* at 12.

recognized by the NLC under the federal Library Services and Technology Act and if it does not operate as a for-profit business and have a budget that is completely separate from any school.⁴² The NLC stated that since the FCC's special Construction matching Fund Program is tied to E-rate procurement, it seems logical that Nebraska would parallel the E-rate processes and timelines and have E-rate filing be a pre-requisite for eligibility in the Nebraska Special Construction Matching Fund.⁴³ The NLC stated that the amount of special construction costs bid by a telecommunications provider for a given site will be highly diverse.⁴⁴ As a result, the Commission may want to budget an annual program budget "not to exceed..." and then apply a prioritization criteria to the applications should an individual year's requests ever exceed available NUSF program support for that year.⁴⁵ The NLC provided a draft timeline for the Commission's consideration.⁴⁶ The NLC suggested that some of the factors the Commission could consider are community size, libraries that are in unserved or underserved areas, communities with increased out-migration, town and rural locales, and new libraries or libraries that are adding on new square footage.⁴⁷ Finally, the NLC recommended that the Commission consider an initial duration for the program, such as four or five years.⁴⁸

O P I N I O N A N D F I N D I N G S

Based on the initial comments filed herein, the Commission finds that it should provide a more detailed proposal for public comment. Interested parties may file reply comments to statements or recommendations made by others in this proceeding as well as file comments on the proposal and additional questions posed below.

⁴² See Comments from the Nebraska Library Commission (filed January 17, 2020) at 1 ("NLC Comments").

⁴³ See *id.* at 2.

⁴⁴ See *id.* at 3.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.* at 4.

⁴⁸ See *id.*

Commission Proposal and Further Questions*A. Budget and Support Window*

If an E-rate special construction program is implemented, the Commission proposes to establish an overall budget for the program. The Commission seeks comment on an allocated budget of \$1 million for the program as a whole. Once the \$1 million in the program is exhausted, the Commission could then re-evaluate the need to provide additional support. The Commission seeks comment on the \$1 million proposed budget.

In order to make efficient use of the support and lessen the need to make subjective judgments related to specific project value, the Commission proposes that the NUSF support be made available on a first-come, first-served basis. Is this type of allocation appropriate? If not, why not?

Alternatively, we seek comment on whether the Commission should prioritize applications based on the amount of an entity's E-rate discount. For example, should the Commission place the highest priority on the largest E-rate discounted project? This proposal would be based on the idea that the lower the discount, the more able the library is to pay the cost itself. Are there other alternative criteria upon which the Commission should base its funding priorities?

The Commission contemplates this program would encompass a one-time buildout support period which would not include recurring or ongoing NUSF support. As such, the Commission proposes to make the support available to applicants for a specific window of time. The Commission seeks comment on whether a window of four (4) one year periods for applying for and receiving support is sufficient.

B. Eligibility

The Commission believes it is necessary under § 86-324 to limit eligibility Nebraska eligible telecommunications carriers (NETCs). Similar to its findings in other contexts such as Telehealth, the Commission seeks comment on whether to allow carriers to obtain designation as an NETC for E-rate Special Construction Program purposes only.⁴⁹ We note that the Commission

⁴⁹ Eligible Telecommunications Carriers (ETCs) previously designated without such limitations would be considered automatically eligible to participate in this program.

has designated carriers as eligible for Telehealth, or Lifeline-Only programs. Would this type of designation serve as an incentive for carriers to participate in the program while staying consistent with the statutory intent? Why or why not? Please explain. If the Commission does permit carriers to obtain designation as an NETC for E-rate Special Construction Program purposes, what type of designation process should the Commission adopt?

The Commission proposes that all public libraries that are not already fiber-connected would be eligible for support. Should the Commission only support fiber projects where a fiber connection does not already exist?

The Commission further proposes that libraries must first avail themselves of E-rate support. In order to be eligible, libraries would need to demonstrate that they have in place, or have taken material steps towards a contract for procurement of fiber-based services that identifies special construction costs, and would have to have Special Construction Matching funds checked on their FCC Form 471. Is this a reasonable expectation? Should the Commission require libraries to file a copy of their FCC Form 471 with their application? Should the Commission require the libraries to file an application jointly with the carrier(s) they plan to use for the fiber construction? Should libraries be required to utilize E-rate support for their ongoing services as well? In addition, we seek further comment on whether schools should also be eligible for E-rate Special Construction program support or whether such support should be limited to libraries.

C. Timeline

If implemented, the Commission proposes to initiate the program in time for the 2021 E-Rate support year. The Commission proposes to open the grant window in November 2020 and close the grant window by the last day of December, 2020. The Commission would then plan to release its decision on proposed grant awards by the end of January, 2021. Does this timeframe allow sufficient ability to carriers and libraries to take advantage of the federal 2021 E-Rate support window? If not, how should the timeframe be modified?

D. Reporting

If implemented, what type of reporting should be required to ensure that support is being used for its intended purpose and does not duplicate existing support or facilities? Should there

be an ongoing reporting requirement to measure the effectiveness of the program? Why or why not?

Comment Deadline and Filing Procedure

Comments responsive to the Commission's proposal and further questions may be filed by interested parties on or before April 14, 2020. Commenters should file one (1) paper copy and one (1) electronic copy of their Comments with the Commission. Electronic copies should be sent to Cullen.Robbins@nebraska.gov and Brandy.Zierott@nebraska.gov.

Hearing

A hearing on this matter will be held on **April 21, 2020** beginning at 1:30 p.m., central time, in the Commission Hearing Room, 300 The Atrium Building, 1200 N Street, Lincoln, Nebraska 68508. If auxiliary aids or reasonable accommodations are needed for attendance at the meeting, please call the Commission at (402) 471-3101. For people with hearing/speech impairments, please call the Nebraska Relay System at (800) 833-7352 (TDD) or (800) 833-0920 (Voice). Advance notice of at least seven days is needed when requesting an interpreter.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that comments responsive to the proposal outlined above may be filed on or before **April 14, 2020**, in the manner prescribed herein.

IT IS FURTHER ORDERED that a hearing will be held on **April 21, 2020** at 1:30 p.m., central time, in the Commission Hearing Room, 300 The Atrium Building, 1200 N Street, Lincoln, Nebraska 68508.

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ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska this 3rd day
of March, 2020.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Crystal Knicker

Chair

Paul Johnson

Dee Williams

Tim Schram

ATTEST:

Michael H. Sp

Executive Director