BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own Motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements.	)	Application No. NUSF-108 Progression Order No. 5 ORDER Entered: February 23, 2021

BY THE COMMISSION:

Background

On December 17, 2019, the Nebraska Public Service Commission (Commission) entered an order in the above-captioned matter to consider certain modifications to the NUSF EARN Form used to determine the ongoing portion of high-cost support in the universal service fund program. Previously, the Commission solicited comments on certain modifications affecting the carriers classified federally as rate-of-return carriers (RORs). The Commission updated the distribution mechanism for ROR carriers designed to target and track Nebraska universal service fund investments in broadband infrastructure. The Commission signaled in the earlier phases of this proceeding that it believed the NUSF EARN Form needed modifications to reflect the current environment.

To that end, the Commission proposed the following modifications and sought comment:

Carrier Elections:

In our C-1628/NUSF Orders, the Commission allowed carriers the flexibility to report earnings based on a one-year or three-year test period. The Commission also permitted carriers the flexibility to choose whether to report earnings on a total company, jurisdictional or supported services basis.[1] Carriers were also permitted to change those elections with approval of the Commission. This process provided carriers some flexibility in how they wanted their earnings to be reflected. However, these

[1] See *In The Matter Of The Commission On Its Own Motion, Seeking To Conduct An Investigation Into Intrastate Access Charge Reform And Intrastate Universal Service Fund*, C-1628/NUSF, Progression Order No. 5 (March 9, 1999).

elections did not provide a way for the Commission to compare earnings in a uniform manner. Further, carriers would sometimes overlook the requirement to file requests with the Commission to make this change prior to filing annual NUSF EARN Form data. This caused delays in the determination of support and can, in some cases, have a significant impact on the support of another carrier. Accordingly, the Commission sought comment on the continued need to allow carriers to choose among the previous three options. The Commission proposed moving all carriers to a three-year average total company basis.

Permitted Expenses, Cost Allocation and Affiliate Transactions:

In 2018, the FCC adopted reforms to ensure that high-cost universal service support provided to ETCs is used only for the provision, maintenance and upgrading of facilities and services. The FCC stated that its limitations did not prevent ROR carriers from incurring any particular investment or expense but clarified the extent to which investments and expenses may be recovered through support or interstate rates. Specifically, the FCC's 2018 Order adopted a prohibition on ETC recovery in the following expenses categories: personal expenses, expenses unrelated to operations, and corporate luxury goods. Within each category the FCC specified certain types of goods and services that were not eligible for support.[2] The FCC also sought comment on limitations on corporate operations categories.

The Commission sought comment from interested parties on whether to mirror those rules, particularly as it relates to the FCC's expense limitations. The Commission sought specific rationale for deviating from FCC rules.

Prescribed Rate of Return:

The Commission sought further comment on automatically reducing the prescribed rate of return so that it is consistent with that authorized by the FCC. As of July 1, 2019, the authorized rate of return was 10.25 percent. The Commission initially set out

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[2] *See In the Matter of the Connect America Fund, et al.*, WC 10-90, et al. Report and Order, 3rd Order on Reconsideration, and Notice of Proposed Rulemaking, 33 FCC Rcd 2990, 2995 (March 23, 2018).

to do that, finding that it would adopt a similar transition from 12 percent to the 9.75 percent adopted by the FCC. The Commission lowered the prescribed rate to 11 percent but held off from making any further changes while it was examining other changes to the distribution model in NUSF-108. The Commission proposed to mirror the FCC's transition to 9.75, and have staff administratively make adjustments to mirror any subsequent changes to the FCC's prescribed rate of return.

Federal Universal Service Support Distinctions:

In addition, the Commission sought comment on whether to create two distinct NUSF EARN Form reports for rate-of-return carriers. One report would be for ROR carriers opting to stay on federal legacy support. The other report would be for ROR carriers opting into model-based support. If so, the Commission asked how the NUSF EARN Form filings should differ. The Commission sought comment on what categories of support should be included in each. The Commission asked how ROR carriers electing incentive regulation under the FCC's Broadband Data Services (BDS) Order[3] should file. Finally, given that some ROR carriers electing incentive regulation would no longer be utilizing part 36 separations accounting and may be following GAAP accounting whether any changes to the EARN Form would be appropriate.

Comments and Hearing

Comments and reply comments were filed by interested parties on February 18, and March 6, 2020 respectively. Two entities, the Rural Independent Companies (RIC) and the Rural Telecommunications Coalition of Nebraska (RTCN) filed comments and reply comments.

RIC recommended the Commission adopt the revised NUSF EARN Form attached to its comments.[4] The revised form would be based

[3] *See In the Matter of Regulation of Business Data Services For Rate-of-Return Local Exchange Carriers, et al.*, WC Docket No. 17-144 et al., Report and Order, Second Further Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 33 FCC Rcd 10403 (October 24, 2018)("Rate-of-Return BDS Order").

[4] RIC Comments at 7.

upon total company earnings.[5] RIC's revised form also would eliminate expenses that are impermissible for the FUSF high cost mechanism under 47 C.F.R. §54.7 and non-regulated revenue and expenses pursuant to the reg/non-reg rules found in 47 C.F.R. § 64.901 *et seq.*[6] In addition, RIC's form would explicitly eliminate from total company expenses those operating expenses in excess of any federally mandated FUSF expense cap.[7]

RIC recommended that absent a Commission-approved waiver for good cause shown, ROR NETCs should be required to calculate earnings on a single-year basis.[8] The use of the one-year term, is consistent with the time period that the Commission uses to establish its budget.[9]

Further RIC agreed that the Commission should follow applicable FCC rules relative to permitted expenses, cost allocation and affiliate transactions.[10] RIC did not identify any reasonable basis to deviate from these existing requirements.[11]

RIC previously supported the Commission's proposal that, for NUSF purposes, mirroring the FCC's transition from an 11.25 percent rate of return to a 9.75 rate of return, provided that such return level is applicable to both ROR carriers and price cap carriers.[12] Because the Commission suspended reductions at the 11 percent level, a new transition for reducing the rate of return percentage should be established and applied at such time intervals as reasonably determined by the Commission.[13]

On the issue of whether to use two NUSF EARN Forms or a single form, RIC Commented that a single form applicable to all NETCs can

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[5] RIC Comments at 7-8.

[6] RIC Comments at 8.

[7] *Id.*

[8] RIC Comments at 9.

[9] *See id.*

[10] RIC Comments at 10.

[11] *Id.*

[12] RIC Comments at 10-11.

[13] RIC Comments at 11.

and should be developed by the Commission.[14] RIC recommended that the revised NUSF EARN Form could be used by all ROR NETCs.[15]

Additionally, RIC commented that further refinement of the Commission's distribution regime was necessary and recommended the Commission adopt new measures to make the distribution process more transparent and predictable.[16] RIC recommended the Commission eliminate the yearly redistribution of NUSF support based on over earnings identified on the NUSF EARN Form.[17] RIC stated the capped over earnings amounts should be transferred to the recipient's NUSF BDS eligibility.[18] RIC recommended that the revised NUSF Form should be used solely to identify the treatment of an NETC's level of operating expenses in the upcoming NUSF program year.[19] RIC recommended the Commission include a line that removes from total company operating expenses any amounts above federal prescribed FUSF expense caps.[20]

In its reply comments RIC summarized the areas of agreement between its comments and RTCN's comments.[21] RIC recommended the adoption of its revised NUSF EARN Form.[22] RIC stated that the explicit allowance of the use of NUSF Broadband Deployment Support and the limited transfer of Broadband Deployment Support between affiliated carriers would also encourage increased investment in broadband-capable networks.[23] RIC stated that RTCN's concern about lumpy investment periods is addressed through RIC's use of over

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[14] *Id.*

[15] *Id.*

[16] *See* Comments of the Rural Independent Companies (RIC), filed February 18, 2020, at 3 (RIC Comments).

[17] RIC Comments at 5-6.

[18] RIC Comments at 6.

[19] *Id.*

[20] *Id.*

[21] *See* Reply Comments of RIC, filed March 6, 2020, at 1-3 (RIC Reply Comments).

[22] RIC Reply Comments at 3.

[23] RIC Reply Comments at 3-4.

earnings to increase such carrier's eligible level for Broadband Deployment Support.[24]

RTCN supported a uniform basis for reporting earnings, such as a requirement that NUSF EARN Form data be based on total company earnings.[25] RTCN stated that reporting on a total company basis will lead to the most administratively efficient process and will best ensure that state support properly complements federal support.[26]

RTCN supported requiring all carriers to utilize a three-year average rather than use a single-year test year.[27] RTCN stated that this approach would lessen year-to-year earnings volatility caused by major construction projects or unexpected material non-recurring revenue or expense entries.[28] RTCN further stated that smaller carriers have few options to avoid overearnings for significant non-recurring financial events.[29] Finally RTCN stated that utilizing a three-year average will allow the Commission to better evaluate an individual carrier's longer-term financial trends and broadband deployment progress.[30]

In its reply comments RTCN clarified its position that all carriers should be required to file a separate NUSF EARN form for each Nebraska code.[31] In addition, RTCN reiterated its objection to RIC's attempt to relitigate matters already decided by the Commission in Progression Orders 3 and 4.[32] RTCN urged the Commission to reject RIC's proposal to transfer a carrier's

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[24] *See* RIC Reply Comments at 4.

[25] *See* Comments of the Rural Telecommunications Coalition of Nebraska (RTCN), filed February 14, 2020, at 1 (RTCN Comments).

[26] *Id.*

[27] RTCN Comments at 2.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *See* Reply Comments of the RTCN, filed March 6, 2020, at 1 (RTCN Reply Comments).

[32] *See* RTCN Reply Comments at 2.

overearnings to the carrier's broadband deployment support. RTCN stated that such a change would eliminate the redistribution of support which the Commission has utilized to ensure carriers receive support for which they are eligible, but otherwise would not receive due to limited and scarce funds.[33] RTCN further recommended that non-regulated revenues (and expenses) should not be included in the NUSF EARN Form. RTCN advocated that the Commission determine earnings on a three-year averaged basis. Finally, RTCN opposed RIC's proposal to allow carriers to transfer high-cost support among affiliates.[34]

A public hearing was held on October 6, 2020. The comments and reply comments were made part of the record as Hearing Exhibits 3 through 5.

Mr. Scott Schultheis testified on behalf of RIC. He is the principal of Reynolds Schultheis Consulting, Inc.[35] He testified he was familiar with the Commission staff's use of the State Broadband Cost Model (SBCM) in connection with the NUSF-108 docket. He testified he was also familiar with the federal Alternative Cost Model (ACAM).[36] RIC recommended the Commission address and revise the current high cost distribution practice regarding Broadband Deployment Support (BDS). The change RIC seeks would allow the use of BDS for locations that are partially funded by the federal ACAM mechanism. Mr. Schultheis stated RICs concern that there were inconsistencies between the Commission's approved policies and the implementation of these policies including the use of the earnings limitation.[37]

Mr. Schultheis offered Exhibit No. 6 which was a spreadsheet which shows total SBCM-determined investment of $61.5 million in BDS support base for ROR carriers.[38] However, the $61.5 million excludes all census blocks for ACAM ROR carriers that are shown in

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[33] *Id.*

[34] RTCN Reply Comments at 3.

[35] Testimony of Scott Schultheis, Hearing Transcript (TR) at 10:9-12.

[36] TR 10:22 through 11:1.

[37] *See* TR 11:23 through 12:2.

[38] TR 13:9 through 14:25.

the model as partially funded.[39] Mr. Schultheis stated his belief that it creates a situation where consumers living in areas with partially funded census blocks may be at a disadvantage.[40] Mr. Schultheis also offered Exhibit 7 to explain RIC's position that more capped locations could be funded if the Commission would alter the manner in which capped locations were treated in the distribution model.[41]

Mr. Schultheis offered Exhibit 8 to illustrate his position that there is an inconsistency associated with BDS between ROR legacy carriers and ACAM carriers.[42] RIC was not suggesting that the legacy carrier's census block be excluded from receipt of BDS support but that the Commission should change its practice and allow the ACAM carrier's partially funded census block to receive BDS support, but only to the extent of the SBCM costs unrecovered through ACAM.[43]

Upon questioning, Mr. Schultheis agreed that ROR carriers were in a position to make a choice between receiving federal legacy or ACAM support.[44] Mr. Schultheis further agreed that carriers knew there would be partially funded census blocks at the time they made that election.[45]

Mr. Dan Davis, a consultant employed by Consortia Consulting, also testified on behalf of RIC.[46] In addition, to the questions, posed by the Commission, Mr. Davis testified about the treatment of ROR carrier's EARN FORM calculated over-earnings and the use of over-earnings for broadband deployment for locations in the carrier's service area.[47] Mr. Davis recommended changing the over-

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[39] *Id.*

[40] *Id.*

[41] *See* TR 15:4 through 20:5.

[42] *See* TR 20:6 through 21:19.

[43] TR 21:3-9.

[44] *See* TR 24:9 through 25:20.

[45] *See id.*

[46] Testimony of Dan Davis at TR 26:22-23.

[47] *See* TR 29:19 through 34:8.

earnings cap and redistribution process in the model.[48] Rather than redistributing support to carriers who are underearning, Mr. Davis recommended the Commission allocate a carrier's overearnings to their BDS support.[49] Mr. Davis further stated that using an earnings test as an accountability tool is outdated and no longer a relevant consideration.[50] Mr. Davis recommended the Commission rely on the HUBB database as a way to verify deployment to locations and to ensure that a carrier is investing in their network.[51]

Mr. Davis further testified that controls on NUSF expenses regardless of the carrier's cost has already been addressed by the Commission.[52] Both the FCC and the Commission have adopted guidelines that preclude certain costs from being reported as proper expenses, such as charitable contributions and non-work-related travel.[53] The Commission's website enumerates these expenses.[54] RIC's proposed addition of line 21.1 to the EARN Form is a simple fix to the issue of capped expenses, Mr. Davis stated.[55] He explained that proposed line 21.1 implements the policy that capped carrier expenses not allowed for federal universal service fund cost recovery should also be disallowed in calculating NUSF high-cost support.[56] RIC's position is that all ROR carriers, whether they be legacy or ACAM carriers are subject to capped expense limitations.[57]

Mr. Davis stated that RIC favored a one-year test period while RTCN favors a three-year test period.[58] RIC believes the Commission

[48] *See id.*

[49] *See* TR 31:13-17.

[50] *See* TR 30:18-21.

[51] *See* TR 30:18 through 31:3.

[52] *See* TR 35:1-3,

[53] TR 35:3-8.

[54] *Id.*

[55] TR 35:16-17.

[56] TR 35:17-20.

[57] *See* TR 36:7-12,

[58] TR 36:18-20.

should confirm the option to choose either a one-year or a three-year earning test period.[59]

Ms. Stacey Brigham, the Regulatory Director for TCA, Inc., testified on behalf of RTCN.[60] Ms. Brigham testified that RIC's attempt to relitigate the issues that the Commission already considered and adjudicated in Progression Order Nos. 3 and 4 should be not be revisited in this current proceeding which is focused very narrowly on the issue of sufficiency of the NUSF EARN Form.[61] She testified that the Commission already decided the issue of broadband deployment support and how it was to be allocated after contentious comments and hearing testimony in Progression Order No. 4.[62]

With respect to the NUSF EARN Form, the RIC group proposed a specific form to replace the existing NUSF EARN Form.[63] She testified while RIC and RTCN agree on many of the issues the Commission has specifically raised in this investigation, RTCN urges the Commission to reject the form proposed by RIC.[64]

RTCN supported using a three-year average test period for all carriers.[65] Doing so will lessen year-to-year earnings volatility caused by major construction projects or unexpected material nonrecurring revenue or expense entries.[66] Further, she testified, it will prevent manipulation of financials and will best ensure transparency and accountability.[67]

Ms. Brigham testified RTCN opposes the proposal to allow transfers of support between affiliates as it would be giving undue

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[59] TR 36:21-24.

[60] Testimony of Stacey Brigham at TR 39:17-21.

[61] *See* TR 40:16 through 41:1.

[62] *See id.*

[63] TR 41:2-7.

[64] *Id.*

[65] *See* TR 41:11-13.

[66] TR 41:13-16.

[67] *See* TR 41:21-23.

advantage to larger companies with affiliates and multiple study areas.[68] She stated the Commission should reject this proposal.[69]

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

The Commission initiated this proceeding to consider certain modifications to the NUSF EARN Form. Nebraska eligible telecommunications carriers are required to annually submit investment, expense, and revenue data, to the Commission using the NUSF-EARN Form. Currently, carriers have the option of filing the NUSF-EARN Form on three different jurisdictional levels: total company, Nebraska, or supported services jurisdiction. Carriers can also elect to provide the NUSF-EARN Form data on either a one-year or three-year average. Once selected, a carrier must seek Commission approval to alter the NUSF-EARN Form jurisdiction level or averaging basis elections. Using the Commission's agreed-upon procedures, independent auditors certify NUSF-EARN Form amounts to the financial statements of the carrier.

The Commission solicited comment on four issues. First, the Commission sought comment on setting a uniform basis for reporting earnings. Second, the Commission sought comment on whether to mirror the FCC's rules as it relates to expense limitations. Third, the Commission sought comment on whether to reduce the prescribed rate of return so that it is consistent with that authorized by the FCC. Finally, the Commission sought comment on whether to create two separate NUSF EARN Forms. One NUSF EARN Form would be used by carriers on legacy support. The other NUSF EARN Form would be used by carriers electing ACAM support. The Commission addresses each item in further detail below.

<u>Carrier Elections</u>:

The Commission sought comment on setting a uniform basis for reporting earnings. Currently, carriers have the option of filing the NUSF-EARN Form on three different jurisdictional levels: total company, Nebraska, or supported services jurisdiction. Carriers can also elect to provide the NUSF-EARN Form data on either a one-

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[68] *See* TR 42:4-11.

[69] TR 42:18-19.

year or three-year average. Once selected, a carrier must seek Commission approval to alter the NUSF-EARN Form jurisdiction level or averaging basis elections.

Both RIC and RTCN recommended the revised NUSF EARN Form should be based on total company earnings. We adopt this recommendation and will modify the NUSF EARN Form accordingly.

RTCN supported the Commission's proposal to move all carriers to a three-year average test period. RIC recommended the Commission continue to allow carriers to choose between a one-year and a three-year average period. The Commission' goal was to unify the NUSF-EARN Form evaluation for all carriers. In evaluating which test period should be used, we conclude that a three-year average will allow the Commission to better evaluate carriers' longer-term financial trends and broadband deployment progress. We therefore find that all carriers should be required to file on a three-year average.

The Commission also sought comment on whether to allow carriers to choose whether to file a collective NUSF EARN for all affiliated entities or file separate NUSF EARN forms. The Commission sought comment on whether it should continue to allow carriers to consolidate affiliate entities into one for NUSF EARN Form filing purposes. RIC recommended that the NUSF EARN Form focus on the carrier entity. RTCN stated that consolidation of affiliate entities makes it too difficult for the Commission to ensure that carriers are not manipulating earnings and cost information. The Commission finds that each ILEC entity assigned with an NE Code shall be required to file an NUSF EARN Form.

<u>Permitted Expenses, Cost Allocation and Affiliate Transactions</u>:

In 2018, the FCC adopted reforms to ensure that high-cost universal service support provided to ETCs is used only for the provision, maintenance and upgrading of facilities and services. The FCC stated that its limitations did not prevent carriers from incurring any particular investment or expense but clarified the extent to which investments and expenses may be recovered through support or interstate rates. Specifically, the FCC's 2018 Order adopted a prohibition on ETC recovery in the following expenses categories: personal expenses, expenses unrelated to operations, and corporate luxury goods. Within each category the FCC specified certain types of goods and services that were not eligible for support. The FCC also sought comment on limitations on corporate operations categories.

The Commission sought comment on whether to mirror the FCC's rules, particularly as it relates to expense limitations. Both RIC and RTCN agreed that the Commission should follow applicable FCC rules as a basis for permissible and impermissible uses of NUSF support. Accordingly, we find it appropriate to mirror the FCC's rules on expense limitations.

Prescribed Rate of Return:

The Commission sought comment on whether to mirror the FCC's prescribed rate of return transition to 9.75 percent. RIC supported a gradual reduction. RTCN also supported the proposal to mirror the FCC's transition to 9.75 and administratively direct the staff to make adjustments as the FCC's prescribed rate changes.[70] The Commission concludes that the proposal should be adopted. The Commission directs the staff to administratively make these adjustments to the NUSF EARN Form as the FCC's prescribed rate changes. The initial adjustment to the prescribed rate of return for EARN forms due June 30, 2021 will be 10.25%. The following year, for EARN forms due June 30, 2022, the adjustment will be to 9.75%.

Federal Universal Service Support Distinctions

Finally, the Commission sought comment on whether to create two NUSF EARN Forms. One would be completed by carriers receiving legacy high-cost support from the federal universal service fund. A second form would be completed by carriers receiving ACAM support.

RIC recommended the Commission continue to use a single NUSF EARN Form applicable to all NETCs. RIC submitted its own NUSF EARN Form for the Commission to consider. RTCN opposed the use of RIC's NUSF EARN Form. RTCN also recommended that the Commission utilize a single NUSF EARN Form stating that fairness and equity require the use of one form.[71]

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[70] *See* RTCN Comments at 3.

[71] *See id.*

After considering the comments and testimony at the hearing, the Commission is of the opinion and finds that it should continue to utilize a single NUSF EARN Form for all NETCs. The NUSF EARN Form should be modified consistent with the findings herein.

Other Issues

RIC made other recommendations for the Commission's consideration both in their written comments and at the public hearing. RIC proposed that NUSF high-cost distributions should be subject to limited transferability among affiliated NETCs. RIC requested the Commission direct its staff to undertake additional efforts to make the NUSF high-cost distribution framework as transparent and predictable as the NUSF eligibility framework. RIC recommended the Commission address and revise the current high cost distribution practice regarding Broadband Deployment Support (BDS). The change RIC seeks would allow the use of BDS for locations where federal support is capped by the federal ACAM mechanism. RIC recommended changing the over-earnings cap and redistribution process in the model. Rather than redistributing support to carriers who are underearning, RIC proposed the Commission allocate a carrier's overearnings to their BDS support.

RTCN opposed a number of the recommendations by RIC to the extent that they revisited issues already addressed by the Commission. RTCN opposed making modifications to the distribution of high-cost support and, specifically, the distribution of support to capped locations as they had been settled by the Commission in Progression Order Nos. 3 and 4.

The Commission appreciates the comments filed by RIC and RTCN. However, we decline to make the other changes RIC proposed in this proceeding at this time. The Commission considers these topics relevant to the high-cost distribution process rather than modifications to the NUSF EARN Form, which this phase of the proceeding was intended to address. However, the Commission is not opposed to considering modifications to the high-cost distribution in a further proceeding designed to specifically address RIC's concerns.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the findings and conclusions made herein be and they are hereby adopted.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska this 23rd day of February, 2021.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Rod Johnson

Crystal Rhoades

Mary Ridder

Tim Schram

Dan Watermeier

Chair

ATTEST:

Mark G. Hybl

Executive Director