

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Application No. NUSF-131
Public Service Commission, on)
its own motion, to establish) ORDER ESTABLISHING REVERSE
reverse auction procedures and) AUCTION PROCEDURES
requirements.) AND
) SCHEDULING WORKSHOP
)
) Entered: February 1, 2022

APPEARANCES:

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BY THE COMMISSION:

Background

The Nebraska Public Service Commission ("Commission") initiated this proceeding on June 29, 2021, to establish reverse auction procedures and requirements in order to carry out Neb. Rev. Stat. § 86-330 (2018). On May 7, 2021, the Governor approved the Commission's Reverse Auction Rules and Regulations, which are now codified in 291 Neb. Admin. Code, Ch. 16. In its prior orders developing the reverse auction rules and regulations, the Commission committed to providing more detail to the reverse

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auction framework through general guidance documents such as progression orders.

In its June 29, 2021 Order, the Commission sought comment on several issues including a pre-auction vetting process, the term of support, developing the budget, deployment obligations, service obligations and reasonable comparability, areas eligible for support, reserve prices, the application process, the authorization and release of support, and noncompliance measures.

Comments Filed

The Commission solicited comments to be filed on or before July 30, 2021 and reply comments on or before August 13, 2021. The Commission received comments from Qwest Corporation d/b/a CenturyLink QC (CenturyLink), Cox Nebraska Telcom, LLC (Cox), the Nebraska Rural Broadband Association (NRBA), the Rural Independent Companies (RIC), Skywave Wireless, Inc. (Skywave), and USTelecom-the Broadband Association (USTelecom). The Commission received reply comments from RIC.

The comments and reply comments are summarized and restated in response to the issues identified by the Commission as follows:

1. Pre-Auction Vetting Process

The Commission sought comment on how thorough to make the pre-auction vetting process. Specifically, the Commission asked whether it should require each auction participant demonstrate its technical capability to deliver the promised speeds prior to the auction.

The NRBA recommended the Commission require specific proof to demonstrate the participant's past record of service in rural Nebraska and that the technologies it will deploy could serve all locations in the support area. The NRBA stated that carriers subject to current or recent bankruptcy actions ought to be disqualified automatically. A provider's strong record of utilizing past federal and state support to provide fiber broadband throughout rural territories should be given heavy weight. Finally, the NRBA was supportive of the statement by Skywave suggesting the Commission should favor Nebraska native companies.¹

The RIC recommended having a single application, as opposed to filing both a short-form and a long-form application. In

¹ See NRBA Comments (August 31, 2021) at 2.

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addition, the RIC suggested requiring an auction participant to hold a certificate of public convenience and necessity or must apply for and be granted one before the reverse auction award to the participant is made.² The RIC also suggested that only minor amendments should be permitted to applications and major modifications should be prohibited after the deadline for submission of applications.³

In its reply comments, the RIC agreed with USTelecom that the guidelines listed below, under USTelecom's recommendations, would be useful aids in the Commission's pre-auction vetting process.⁴

Skywave recommended pre-auction requirements similar to the FCC RDOF short-term application. Criteria should include time in business selling broadband and voice services. According to Skywave, audited financial statements should not be required.⁵

USTelecom supported a thorough pre-auction vetting process. USTelecom stated a pre-auction vetting process was more important and effective than enforcing post-auction penalties as a means of preventing the state from investing in providers that will not be able to deliver the services and speeds promised during the bidding process.⁶ USTelecom suggested the following requirements: (1) All bidders should have a minimum of two years demonstrating a history of service at the speeds for which they are bidding and with the technology they plan to use to complete their deployment. (2) Bidders should provide subscribership information to demonstrate their ability to run a successful broadband operation and serve their customers. Lastly, (3) bidders should not be able to bid for more than its current revenues.⁷

2. Term of Support

The Commission proposed a two-year time frame in which all projects must be completed and would consider extension requests for good cause shown. In addition, winning bidders must provide invoices that show costs incurred in support of the projects. Commenters were generally supportive of the Commission's proposal.

² See RIC Comments (July 30, 2021) at 4 and 5.

³ *Id.* at 6 and 7.

⁴ See RIC Reply Comments (August 13, 2021) at 3.

⁵ See Skywave Comments (July 30, 2021) at 1.

⁶ See USTelecom Comments (July 30, 2021) at 2.

⁷ *Id.*

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CenturyLink stated the Commission's proposed obligations were generally consistent with existing support initiatives, including NUSF-99 and Nebraska Broadband Bridge Act grants, and supported the terms outlined by the Commission in its proposal.⁸

The NRBA supported a two-year project completion period, as well as the allowance of extensions for good cause.⁹

RIC suggested that once every six (6) months, a winning bidder should be required to submit, under oath, the extent to which that winning bidder is in compliance with deployment and service availability representations contained in its application. The RIC stated, no extension of the 24-month build-out requirement should be permitted absent a force majeure event.¹⁰

In its reply comments, RIC stated that consensus exists among the commenters that a 24-month build out period for projects funded through the reverse auction process is appropriate.¹¹

Skywave recommended that if the term of support was limited to two-years, there should be some regulation on the size of the project. Skywave argued that requiring invoice copies would impose an unnecessary burden on companies. Instead, a provision allowing for invoice copies only upon request would be more appropriate.¹²

USTelecom noted, a two-year timeframe for support is likely insufficient for any project at scale. Most projects require at least a year for planning and obtaining the necessary permits to begin construction.¹³ If the Commission chooses to adopt an abbreviated two-year cycle, it must also build in appropriate mechanisms for flexibility given the predictable difficulties that may arise completing the project.¹⁴

3. *Budget*

The Commission proposed it would determine the budget for each auction once the Commission knew how much support allocated to price cap carriers would go unused. Once the amounts were known, and the eligible areas were determined, the Commission proposed

⁸ See CenturyLink Comments (June 29, 2021) at 2.

⁹ See NRBA Comments (August 31, 2021) at 2.

¹⁰ See RIC Comments (July 30, 2021) at 7.

¹¹ See RIC Reply Comments (August 13, 2021) at 4.

¹² See Skywave Comments (July 30, 2021) at 1.

¹³ See USTelecom Comments (July 30, 2021) at 3.

¹⁴ *Id.*

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releasing the amounts and reserve prices for each census block. Only the census blocks which were considered wholly unserved would be eligible for the auction. The Commission sought comment on this proposal and the appropriate size of the bidding area to be used in each auction.

CenturyLink supported the Commission's plan. Further stating this was consistent with the rules for price cap carriers and represented the best way in ensuring all areas receive broadband services.¹⁵

Cox suggested the Commission use census block groups, or a smaller geography unit, as the minimum-sized geographic area for bidding, instead of an overly large bidding unit such as an entire exchange.¹⁶

The NRBA supported the Commission's proposal to establish a budget for each auction once the Commission knows how much support allocated to price cap carriers would go unused.¹⁷ However, the NRBA recommended that any action to redirect support pursuant to a rural-based plan should trump an incumbent local exchange carrier's election of BDS support for the same area.¹⁸

RIC recommended the minimum area for a reverse auction should be a Census Block Group.¹⁹ In order to come to an equitable decision, RIC suggested the use of workshops on focused topics, inviting all interested parties to participate, as it would be the best way to balance the competing objectives and concepts.²⁰

However, RIC disagreed with the NRBA's proposition as to the relative status of a rural-based plan relative to areas eligible for redirection of support. RIC disagreed with the NRBA when it stated, "the redirection of unused support to rural-based plans should trump an incumbent local exchange carrier's election of BDS for the same area."²¹

¹⁵ See CenturyLink Comments (June 29, 2021) at 2.

¹⁶ See Cox Comments (July 29, 2021) at 3.

¹⁷ See NRBA Comments (June 29, 2021) at 4.

¹⁸ *Id.*

¹⁹ See RIC Comments (July 30, 2021) at 6 and 7.

²⁰ See RIC Comments (July 30, 2021) at 8 and 9.

²¹ See RIC Reply Comments (August 13, 2021) at 5 and 6.

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Skywave recommended the Commission review standards and criteria between every auction and that bidding areas should be grouped in units that would be an entire project.²²

USTelecom recommended the Commission combine use of America Rescue Plan Act funding, capital improvement funds, and state USF and determine if additional infrastructure funds are available before committing to the auction in order to maximize its utility.²³

4. *Deployment Obligations*

The Commission sought comment on deployment obligations for auction winners. Specifically, whether any alternative deployment obligations, performance requirements, weights, or testing methodologies should be adopted for recipients of reverse auction support.

The NRBA recommended the approval of any project completed after January 1, 2022 should require infrastructure capable of delivering a minimum of 100/100 Mbps speeds. The NRBA agreed with the recommendation by USTelecom to regularly update all requirements for support to ensure investment in quality broadband infrastructure and its continued operation and maintenance.²⁴

RIC suggested the Commission set its baseline performance standard to require networks deployed by auction winners to meet the 100/100 Mbps speeds rather than a 25/3 Mbps standard.²⁵

USTelecom also recommended the Commission eliminate the 25/3 Mbps performance tier in favor of a 100/20 Mbps speed with 2 TB of monthly usage.²⁶

Skywave suggested that the speed sampling locations should be chosen by regulators.²⁷

5. *Service Offerings and Reasonable Comparability*

The Commission proposed that auction support recipients would have the flexibility to offer a variety of broadband service offerings if they offer at least one standalone voice plan and one

²² See Skywave Comments (July 30, 2021) at 2.

²³ See USTelecom Comments (July 30, 2021) at 5.

²⁴ See NRBA Comments (August 31, 2021) at 3.

²⁵ See RIC Comments (July 30, 2021) at 8.

²⁶ See USTelecom Comments (July 30, 2021) at 5.

²⁷ See Skywave Comments (July 30, 2021) at 2.

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service plan that provides broadband at the relevant performance tier and latency requirements at rates that are reasonably comparable to rates offered in urban areas. The Commission sought comment on what other safeguards it should put in place.

CenturyLink suggested that any auction winner should comply with all ETC certification requirements, including advertising in general media. CenturyLink strongly suggested that the Commission hold all ETCs to the same standards.²⁸

In its reply comments, RIC agreed with CenturyLink that any carrier receiving NUSF support must be an ETC and offer adequate voice service throughout the carrier's service area and any carrier with ETC status must meet all other requirements imposed on ETCs.²⁹ USTelecom recommended the Commission should adopt the FCC's benchmark rates for simplicity and efficiency when comparing proposed offerings against other market-based plans and rates. USTelecom stated, providers have every incentive to maximize their customer base, so it is not necessary to mandate adoption rates or marketing materials.³⁰

6. *Areas Eligible for Auction Support*

The Commission proposed prioritizing census blocks that are wholly unserved with broadband at speeds of 25/3 Mbps within the given area of a carrier not timely using support or where support has been withheld. The Commission sought comment on how best to ensure that rural census blocks that are wholly unserved by high-speed broadband are appropriately included in the auction framework.

CenturyLink recommended allowing partial exchange buildout by the price cap carrier or auction winner to accommodate for ultra-high-cost areas.³¹

The NRBA supported the Commission's prioritization of areas that are presently unserved even under current standards that require speeds of 25/3 Mbps to qualify for support. The NRBA agreed with CenturyLink that ILECs should be prohibited from participating in actions for redirection of support in the ILEC's exchanges.³² NRBA suggested including areas from the Rural Digital

²⁸ See CenturyLink Comments (June 29, 2021) at 3.

²⁹ See RIC Reply Comments (August 13, 2021) at 6.

³⁰ See USTelecom Comments (July 30, 2021) at 6.

³¹ See CenturyLink Comments (June 29, 2021) at 3 and 4.

³² See NRBA Comments (August 31, 2021) at 3.

Opportunity Fund in the auction if there are entities that default on their bids.³³ The NRBA advised the Commission not to allow the ILEC ETC from which support had been withheld to participate in either a reverse auction under the 202 Rules or a rural-based plan under LB338.³⁴

USTelecom supported prioritizing broadband funding to focus first on the unserved rather than the underserved.³⁵

7. *Reserve Prices*

The Commission proposed using the SBCM total investment support amount to determine the reserve prices and number of locations for each area eligible for support in the auction. As a way to prioritize support, the Commission sought comment on setting a reserve price for certain eligible areas that was higher than that based strictly on the model.

CenturyLink suggested that the reserve price set for an auction area be the same dollar amount offered to the respective price cap carrier for the same exchange.³⁶

RIC suggested scheduling a series of workshops where a robust discussion and alternatives could be identified and debated among all interested parties.³⁷ In its reply comments, RIC reiterated that the Commission's discussion of reserve pricing for a reverse auction required additional input based on the need to balance various competing objectives, achieved best through a series of workshops.³⁸

8. *Application Process*

The Commission sought comment on the information it should collect from each auction participant through the application process. The Commission proposed requiring each winning bidder to submit information about its qualifications, funding, and details about the network it intends to contract to meet its obligations. The Commission also sought comment regarding its proposed requirement that all winning bidders must submit audited financial

³³ *Id.*

³⁴ See NRBA Comments (June 29, 2021) at 6.

³⁵ See USTelecom Comments (July 30, 2021) at 4.

³⁶ See CenturyLink Comments (June 29, 2021) at 5.

³⁷ See RIC Comments (July 30, 2021) at 8 and 9.

³⁸ See RIC Reply Comments (August 13, 2021) at 8.

statements. Commenters also discussed this issue in the pre-auction vetting section on page 1 to 3 above.

Cox recommended the Commission streamline the application process as much as possible, removing any additional, unnecessary requirements. Cox encouraged the Commission to rely on information it may have received in the last 3 years through ETC applications or other formal Commission filings, such as annual reports, to validate a bidder's fitness to participate in the reverse auction.³⁹ Cox suggested, the Commission avoid instituting take-rate or subscribership quotas. The Commission should also not require service quality metrics, annual advertisements, subscribership data, or set engineering standards unless such obligations are in statute, rule, or have been imposed on the historical NUSF recipients via previous orders. Finally, Cox suggested the Commission provide bidders a short window of time to modify applications that contain a minor flaw or defect to increase bidder participation.⁴⁰

Skywave opposed the Commission's proposal requiring audited financial statements. The requirement substantially disadvantages small companies from participating in the program. However, audited financials would potentially be beneficial to require only for companies with less than two years of operational experience. In addition, utilizing funds to purchase existing facilities should not be allowed. Allowing this would only benefit a company's ability to use government funds for inorganic growth.⁴¹ Finally, Skywave suggested regulation should be considered to give Nebraska native companies a competitive edge over out-of-state companies.⁴²

9. *Authorization and Release of Auction Support*

The Commission proposed first reviewing long-form applications, then authorizing the project and providing notice to the winning bidder after approval. This would initiate the incremental monthly payments of the winning bid amount. The NRBA stated the Commission should recognize that after deployment is complete, ongoing support will be critical to maintain and operate the infrastructure.⁴³

³⁹ See Cox Comments (July 29, 2021) at 1 and 2.

⁴⁰ See Cox Comments (July 29, 2021) at 2.

⁴¹ See Skywave Comments (July 30, 2021) at 3.

⁴² *Id.*

⁴³ See NRBA Comments (June 29, 2021) at 4.

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RIC recommended having a single application, as opposed to filing both a short-form and a long-form application.⁴⁴

Skywave recommended that if a long form applicant does not meet criteria, the support should be awarded to the next bidder at the previous bidder's support amount.⁴⁵

10. Non-Compliance Measures

The Commission proposed a non-compliance schedule similar to the FCC. The Commission sought comment regarding this schedule.

The NRBA supported imposition of penalties on recipients of redirected support that fail to provide services in compliance with state laws, rules and regulations, and orders of the Commission.⁴⁶

Skywave recommended sanctions for non-compliance should be monetary and significant. However, revocation of designations or licenses should not be considered.⁴⁷

RIC stated establishing a thorough pre-auction vetting process is more important and effective than enforcing post-auction penalties as a means of preventing the state from investing in providers that will not be able to deliver the services and speeds promised during the bidding process.⁴⁸

Hearing

A hearing was held on August 31, 2021 in Lincoln, Nebraska. The Commission's order entered on June 29, 2021, marked as Exhibit 1, and the Notice of this docket published in The Daily Record on July 2, 2021, marked as Exhibit 2, were both made part of the hearing transcript. The comments due by July 30, 2021 were marked collectively as Exhibit 3 and received into the record. Also received into the record was the reply comments due on or before August 13, 2021 and marked as Exhibit 4.

⁴⁴ See RIC Comments (July 30, 2021) at 6 and 7.

⁴⁵ See Skywave Comments (July 30, 2021) at 3.

⁴⁶ See NRBA Comments (June 29, 2021) at 2.

⁴⁷ See Skywave Comments (July 30, 2021) at 4.

⁴⁸ See RIC Reply Comments (August 13, 2021) at 3.

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Mr. Cullen Robbins, Director of the Communications and NUSF Department, testified in support of the Commission's proposal.⁴⁹ He testified on the items the Commission sought comments for regarding the reverse auction, beginning with the pre-auction vetting process.⁵⁰ Mr. Robbins stated he believes it makes sense to have a pre-approval process for interested bidders, and more specifically, to have an approval process for the technology that participants are proposing to use. Fiber is the most logical means by which the minimum speed requirements can be met, but if there is a showing that alternatives can meet the requirement, we wouldn't rule those out. Participants that plan to use alternative technologies would be required to include an attestation from an engineer supporting the speed capabilities of the technology, as well as speed test data from existing deployments that support the capability claim.⁵¹

Mr. Robbins also addressed the proposed performance standards required of winning bidders. He proposed using just two performance tiers, an Above Baseline tier, consisting of minimum 100/100 Mbps speeds, and a gigabit speed tier, requiring minimum 1 gigabit per second downloading and 500 megabytes per second upload speeds. He stated this met the requirements laid out in LB338, where money spent from the NUSF for new deployments must be capable of 100/100 Mbps speeds.⁵²

Mr. Robbins then testified regarding the timeframe for build-out. He testified it was appropriate to include a 2-year build-out requirement, which was generally consistent with the Commission's other programs, with the ability to seek extensions if necessary.⁵³ Mr. Robbins supported using the modeled total investment cost as the reserved price for where the auction should start. He stated that this was essentially taking the amounts that we used to calculate the initial offers to the price cap carriers and using that as the starting price from which to move downwards if bidding allows for that.⁵⁴

Next, with respect to minimum bidding units for these auctions, Mr. Robbins stated it was prudent to set the minimum bidding unit at the census block group level, similar to what was done in the federal reserve auction. If the census block groups

⁴⁹ See Testimony of Cullen Robbins, Hearing Transcript (TR) 9-34.

⁵⁰ See TR 9:23-10:3.

⁵¹ See TR 10:9-11:1.

⁵² See TR 11:2-12.

⁵³ See TR 11:13-18.

⁵⁴ See TR 11:22-12:4.

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span multiple locations, they would be broken up to include census block groups only within a single exchange.⁵⁵

Finally, Mr. Robbins supported inclusion of areas from the Rural Digital Opportunity Fund, or RDOF, in this reverse auction if there are entities that default on their bids. He noted that if the waiver request from LTD Broadband for a waiver of the FCC auction rules is denied, there would be a large number of blocks that could logically be included in this reverse auction as well.

Upon questioning, Mr. Robbins clarified his comments on the model reserve and the starting bid amount.⁵⁶ He further explained his view that price cap carriers should be eligible to bid on these census blocks as they were only offered in NUSF-99 the entire exchange to build-out to. He stated that the Commission may be looking at smaller bidding units so that a carrier would not have to build-out to the entire exchange.⁵⁷ Mr. Robbins supported his recommendation by stating more participants in an auction, generally increases competition and further promotes efficient use of funding.⁵⁸ He added that if price cap carriers were to successfully participate and win areas in the auction, they would theoretically be doing it for less than they could have got before.⁵⁹ Finally, Mr. Robbins added that the price cap carriers are probably in the best position to serve some of those areas.⁶⁰

Upon further questioning, Mr. Robbins clarified his comments regarding speed tiers. He stated that 100/100 Mbps is what he recommended as the baseline speeds, but he was not opposed to removing the usage allowance caps.⁶¹ He then answered questions regarding service offerings and reasonable comparability. Mr. Robbins clarified, that for purposes of NUSF, we're looking at voice rates and their tariff rates that carriers are required to file to provide service. Unless data was reflected on one of the tariffs, the Commission could not determine for purposes of NUSF distribution that the rates were equitable. Mr. Robbins noted that further data w be obtained to make sure rates are equitable across locations using studies from other entities.⁶²

⁵⁵ See TR 12:18-24.

⁵⁶ See TR 14:6-15:7.

⁵⁷ See TR 15:10-18:13.

⁵⁸ See TR 19:15-20.

⁵⁹ See TR 19:21-20:1.

⁶⁰ See TR 20:2-6.

⁶¹ See TR 23:14-22.

⁶² See TR 24:7-26:20.

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Upon further questioning Mr. Robbins clarified the proposed recommendation requiring "auction support recipients to annually provide the Commission with copies of advertisements and marketing materials to ensure that they are promoting the availability of its services throughout the area and the prices at which the services are offered." Although not an ultimate indicator of whether carriers are offering those services at those prices, this is part of what we require and an indication that has been used by the Commission for quite a while.⁶³

Mr. Robbins also responded to questions about a proposed ten percent increase to bidders as an incentive to bid for support in certain underserved areas.⁶⁴ Giving the winning bidder slightly more than the model cost if they were the only bidder participating in a certain area might be motivation to bid.⁶⁵ However, Mr. Robbins stated the starting point should be setting the reserve price at the total investment cost.⁶⁶

Mr. Robbins was also questioned about his recommendations on how to test a bidder's operational and financial qualifications. He stated this requirement would protect consumers in rural and high-cost areas against being stranded without a service provider in the event a winning bidder or a long-form applicant defaults.⁶⁷ Mr. Robbins noted that the Commission receives financial information from carriers that receive NUSF support or are an ILEC. As such, we are confident of these entities' financial viability and comfortable with their ability to essentially deploy what they would be awarded through the auction.⁶⁸ However, Mr. Robbins further noted that there are parties that we are not particularly familiar with that wish to participate in the auction. For those bidders, audited financial statements give us some information to look at to see that they can do what they are required to do through the auction.⁶⁹

After the conclusion of Mr. Robbin's questioning, Ms. Stacey Brigham, regulatory director for TCA, Inc., testified on behalf of the Nebraska Rural Broadband Alliance (NRBA).⁷⁰ As an initial matter, she testified the NRBA is generally supportive of the

⁶³ See TR 26:21-27:13.

⁶⁴ See TR 28:21-29:5.

⁶⁵ See TR 29:6-13.

⁶⁶ See TR 29:14-25.

⁶⁷ See TR 30:1-12.

⁶⁸ See TR 32:7-15.

⁶⁹ See TR 32:16-25.

⁷⁰ See Testimony of Stacey Brigham (TR) 34-57.

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proposals made in the Commission's Order, especially in that they preserve both the Commission's authority to demand accountability and the regulatory flexibility necessary to allow rural consumers a say in the process of withholding and redirecting support.⁷¹

Ms. Brigham then proceeded to highlight and clarify some of the NRBA's written comments, as well as address comments made by other commenters, beginning with the pre-auction vetting process.⁷² She testified that reverse auctions of federal support have not served rural Nebraskans well. She stated that support has been used mostly to acquire existing, privately funded infrastructure. She stated that reverse auctions also resulted in a race to the bottom, favoring inferior technologies.⁷³ The NRBA is generally supportive of the statement by Skywave Wireless in its comments about favoring Nebraska native companies. In addition, a provider's strong record of utilizing past federal and state support to provide fiber broadband throughout rural territories should be given heavy weight.⁷⁴

Ms. Brigham then testified regarding the term of support and the budget. She supported a two-year project completion period, allowing extensions for good cause. However, she noted that after deployment is complete, ongoing support will be critical to maintain and operate the infrastructure.⁷⁵ Ms. Brigham also supported the Commission's proposal of establishing a budget for each auction once the Commission knows how much support allocated to price gap carriers will go unused.⁷⁶

Ms. Brigham then clarified statements made in her written comments regarding the interplay between actions to redirect support pursuant to rural-based plans and the elections by an ILEC in the same area. She stated that an ILEC's election of BDS support ought, as a matter of policy, be trumped by a rural-based action under LB 338 for redirection to a competitive carrier favored by rural consumers in the same area.⁷⁷

Ms. Brigham next testified regarding deployment obligations recommending any project receiving redirected support should require infrastructure capable of delivering a minimum of 100/100

⁷¹ See TR 35:10-18.

⁷² See TR 35:18-25.

⁷³ See TR 35:24-36:7.

⁷⁴ See TR 36:8-17.

⁷⁵ See TR 36:18-24.

⁷⁶ See TR 36:25-37:6.

⁷⁷ See TR 37:7-20.

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Mbps speeds. She supported recommendations by USTelecom to regularly update all requirements for support to ensure investment in quality broadband infrastructure and its continued operations and maintenance.⁷⁸

With respect to the areas eligible for auction support Ms. Brigham supported the Commission's order prioritizing areas that are presently unserved even under current standards that require speeds of only 25/3 Mbps. However, she agreed with CenturyLink that ILECs should be prohibited from participating in auctions for redirection of support in the ILEC's exchange.⁷⁹

In closing her initial testimony, Ms. Brigham raised the issue of what becomes of an ILEC's responsibilities as a carrier of last resort, or COLR, after support has been withheld from the ILEC and redirected to another carrier. She offered support for CenturyLink's position, stating that COLR duties should follow support and not remain with the ILEC.

Upon questioning, Ms. Brigham clarified her support for the transition of COLR duties, this is a process that the Commission is going to have to put into place and address as these transitions begin to occur. This transition is not a flash-cut scenario, but something that the Commission would need to address as it rolls forward.⁸⁰

Upon further questioning, Ms. Brigham clarified her position regarding the requirement of providing audited financial statements. ILECs provide either audited financial statements or other forms of financial information that the FCC has deemed a reasonable substitute. She further stated, if the Commission has access to that financial information through other reporting mechanisms, that using the information the Commission already has is the most efficient use of everybody's resources.⁸¹

Upon questioning regarding reasonable comparability, Ms. Brigham noted, the FCC conducts an annual survey of rates that are provided in urban areas, and through that using two standard deviations above that average, to come up with that reasonable comparability benchmark. Those benchmarks are something that's familiar for those who participate in the NUSF programs today and

⁷⁸ See TR 38:3-18.

⁷⁹ See TR 38:19-39:2.

⁸⁰ See TR 41:4-11.

⁸¹ See TR 41:21-42:9.

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would seem like a logical resource for the Commission to use if it were to establish a similar requirement.⁸²

Ms. Brigham clarified her comments cautioning the Commission from creating a race to the bottom. We have observed in some federal auctions there are incentives for companies who may not fully understand what they're getting into or may not fully appreciate their obligations under a program, to simply win at all costs, even to a point where the support amounts they bid at are not actually feasible. The federal controls put in place to control that outcome, appear to have been unsuccessful.⁸³ When asked of her recommendations, Ms. Brigham stated pre-auction vetting is absolutely critical. The Commission should make sure entities who are participating in this auction are familiar and have a history of providing services at 100/100 Mbps speed or above, and that they are able to prove they have done this in similar type areas.⁸⁴

Upon further questions, Ms. Brigham showed support for adding in RDOF areas to this auction, stating, I do think that adding in those RDOF areas makes a lot of sense. However, Ms. Brigham noted, it only makes a lot of sense if the Commission learns from the mistakes of the RDOF auction, by putting safeguards in the vetting process to ensure that any participants are truly eligible participants in such an auction.⁸⁵ Ms. Brigham recommended that the best way to ensure we avoid a race to the bottom is making sure that those companies that are bidding are bona fide bidders and not potentially bidders who are looking to disrupt a successful auction.⁸⁶

Ms. Brigham then responded to questioning regarding duplicative funding if RDOF areas were added to this auction.⁸⁷ She stated, it took the FCC several years to authorize support to bidders in the CAF II auction, and the pace at which they are authorizing the RDOF bidders doesn't lead her to think that were going to see much of a difference. Benchmarks for deployment under the programs are four years from the time they are authorized, and final building out isn't required until year six.⁸⁸ She stated if the Commission adopted a program that requires deployment within two years, you have the potential to get broadband out to these

⁸² See TR 42:17-43:10.

⁸³ See TR 44:3-45:1.

⁸⁴ See TR 45:2-20.

⁸⁵ See TR 46:8-47:3.

⁸⁶ See TR 48:5-17.

⁸⁷ See TR 48:24-50:8.

⁸⁸ See TR 50:17-51:4.

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areas faster than relying on and waiting for the FCC to take action with their auction. Although NRBA wishes to avoid duplicative support, in some instances, the Commission might consider that the benefit outweighs the risk.⁸⁹

Ms. Brigham then responded to questioning regarding areas that are potentially left behind because they lack funding. She stated, programs like the Broadband Bridge Act and some other opportunities provide a good option for getting dollars that may be necessary to deploy broadband in those areas and maybe finding a way to have those complement one another would be of benefit for the Commission to consider.⁹⁰ Ms. Brigham also noted that the NRBA deeply shared concerns about areas who go without any level of funding, however, she didn't think holding up broadband in other areas was going to help solve that problem.⁹¹ Finally, Ms. Brigham gave her support for the Commission's recommendation of including RDOF areas only if they are defaulted on by the winning bidder.⁹²

Mr. Dan Davis, Director of Policy and Analysis at Consortia Consulting, testified next on behalf of RIC.⁹³ Mr. Davis emphasized seven items from RIC's written comments. First, NUSF support should be auctioned in the area where the original allocation of support was not utilized by the carriers serving the area in question or was withdrawn from the carrier to which it was allocated.⁹⁴ Second, eligible locations in which such support may be used should be those that are defined as rural, are not eligible for RDOF support, are not already built to 25/3 or greater, and do not already have a competitive service defined as broadband at 25/3 Mbps or higher and voice service offered.⁹⁵ Third, the Commission should ensure service scalable to 100/100 Mbps or greater.⁹⁶ Fourth, he stated, a single application should be developed to ensure that any qualified bidder can meet the Commission's requirements concerning the projects proposed to be deployed.⁹⁷ Fifth, Mr. Davis recommended the build-out timeframe should be 24 months, and any extension request should be based on a good cause showing.⁹⁸ Sixth, he stated that workshops should be used in the following areas: To

⁸⁹ See TR 51:5-51:17.

⁹⁰ See TR 51:18-52:3.

⁹¹ See TR 53:5-54:24.

⁹² See TR 56:9-21.

⁹³ See Testimony of Dan Davis (TR) 58-72.

⁹⁴ See TR 58:21-59:3.

⁹⁵ See TR 59:4-11.

⁹⁶ See TR 59:12-19.

⁹⁷ See TR 59:20-60:3.

⁹⁸ See TR 60:4-10.

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operationalize the requirements of the application process, to identify evidence that should be provided by an applicant to demonstrate it is financially and technically qualified, and to identify how applicants will demonstrate how the required construction will be funded.⁹⁹ And seventh, separate workshops should be scheduled to foster a robust discussion regarding the balancing of competing objectives.¹⁰⁰

Mr. Davis acknowledged workshops could amount to an unwarranted delay and the scheduling and holding of workshops addressing the scope of the issues RIC has suggested will require some time. However, Mr. Davis stated that that time is well spent when viewed in light of delays that would inevitably arise if funding was provided to an entity that failed to deploy the network and provide the broadband it had promised in its application.¹⁰¹

Mr. Davis further stated that it seems rational to the RIC that this new process should be rolled out with sufficient foresight to address any issues that may arise. RIC recommended that the Commission take the time to evaluate how that process will unfold, what steps should and should not be taken in order to try to make the process as efficient as possible, and to otherwise have a plan in place if unanticipated situations arise.¹⁰² The workshop format should increase the likelihood that the NUSF reverse auctions will avoid facing the same issues faced by the FCC in the RDOF reverse auction.¹⁰³ Finally, Mr. Davis concluded that the workshop format would provide consumers impacted by future reverse auctions, as well as auction participants, a venue in which all participants may be able to gain a better understanding of the auction process.¹⁰⁴

Upon questioning, Mr. Davis supported the requirement that some sort of financial information be provided by potential auction participants in the pre-auction vetting process. Mr. Davis went on to suggest some type of threshold to include in the requirement to allow companies to work through and attempt to meet it.¹⁰⁵

Mr. Davis then answered questions regarding reasonable comparability, and the amount and nature of evidence that should

⁹⁹ See TR 60:11-61:8.

¹⁰⁰ See TR 61:9-62:2.

¹⁰¹ See TR 62:3-25.

¹⁰² See TR 63:1-20.

¹⁰³ See TR 63:21-64:5.

¹⁰⁴ See TR 64:6-11.

¹⁰⁵ See TR 65:5-24.

be required for auction participants. He suggested looking at the comparability of the rates that participants were already providing in their ILEC service area. If participants are providing the same rate structure in the reverse auction area that they're providing in their ILEC service area that would provide some sort of comparability.¹⁰⁶

Mr. Davis again stated his support for a strong vetting process. He noted that during the FCC's process, they required the short form application before the long form application, only requiring the long form after the participant had won the auction. Mr. Davis stated that part of what went wrong in the FCC's process was that the FCC auction occurred without the applicants having to provide a lot of detailed financial information.¹⁰⁷ He noted that a stronger vetting process from the very beginning would be helpful in determining whether those that are participating in the auction have the financial wherewithal to carry through with the broadband build-out they are suggesting in their application.¹⁰⁸

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

1. Pre-Auction Vetting Process

The Commission sought comment on whether to adopt a pre-auction vetting process to review potential applicants' financial and operational capacity on the front end rather than after an auction has occurred. The importance of implementing a robust pre-auction vetting process was endorsed by nearly all commenters. One commenter in particular, USTelecom, suggested specific pre-auction vetting requirements which included: (1) A minimum of two years demonstrated history of service at the speeds for which an applicant would propose bidding and with the technology they plan to use to complete their deployment; (2) Submission of subscribership information to demonstrate an applicant's ability to run a successful broadband operation and serve their customers; and (3) a requirement that the Commission not allow an applicant to bid for more than its current revenues.

RIC also supported USTelecom's recommended criteria. The NRBA recommended the Commission require specific proof to demonstrate the participant's past record of service in rural Nebraska and that the technologies it will deploy could serve all locations in the support area. The NRBA stated that carriers subject to current

¹⁰⁶ See TR 66:17-67:16.

¹⁰⁷ See TR 69:6-70:15.

¹⁰⁸ See TR 70:16-71:1.

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or recent bankruptcy actions ought to be disqualified automatically.

We agree with the majority of commenters who supported a pre-auction vetting process to review potential applicants' financial and operational capacity on the front end. While this process may delay an auction from proceeding, we believe it is better than waiting until after an award to discover that an applicant may not be capable of meeting the standards set forth in the auction. We further agree with the commenters that demonstrated history of service should be a relevant factor in the vetting process. We further agree that submission of subscribership information demonstrating that an applicant has provided service at the claimed speeds elsewhere should be included.

Accordingly, we adopt USTelecom's suggested approach and will require each potential auction bidder to file:

1. Documents showing a demonstrated history of at least two (2) years of service at the speeds for which it would propose bidding and with the technology plan to use to complete the proposed deployment;
2. Subscribership information to demonstrate its ability to run a successful broadband operation and serve its customers; and
3. Financial information documentation showing its financial capability to bid on the proposed service areas.

We decline to adopt a blanket disqualification for carriers who have filed for bankruptcy or are in the midst of bankruptcy proceedings as suggested by the NRBA. We find similar to the FCC that such disqualification would run afoul of federal bankruptcy laws which prohibit discrimination on that basis.¹⁰⁹ However, we will give serious consideration to the financial capability of each auction applicant and decide whether or not they are eligible to bid in the auction.

Moreover, we find that as a policy matter, carriers who turned back NUSF support for a given funding year, or in other words, who did not file projects to claim the allocated support, should be

¹⁰⁹ See *In the Matter of Rural Digital Opportunity Fund et al.*, WC Docket No. 19-126, et al., Report and Order, 35 FCC Rcd 686, 721, para. 77, n. 212 (February 7, 2020) ("RDOF Order") (citing 11 U.S.C. § 525 (a) which prohibits government actions that discriminate against a party on the basis that (a) the party filed for bankruptcy protection or (b) such party failed to pay a debt that is dischargeable in bankruptcy).

disqualified from bidding in the auction distributing the support not claimed by that carrier. While there could be several reasons why a carrier decides not to claim their allocation, the Commission believes it reasonable to assume that a carrier not utilizing support makes that decision based on available resources and timing of planned investments. It would make little sense to turn around and permit the carrier to seek the NUSF support it did not claim. Carriers who have had NUSF support withheld due to a complaint proceeding pursuant to Neb. Rev. Stat. § 86-330 will also be considered ineligible to bid in a subsequent auction using the withheld support.

2. *Term of Support*

Commenters were generally supportive of the proposed two-year timeframe for using and claiming auction support although commenters generally agreed that extensions should be granted where good cause exists. USTelecom commented that two years would likely be an insufficient time to plan and construct projects. Skywave opposed the requirement to submit invoices claiming that such a process would be unnecessarily burdensome.

We find that a two-year term of support is consistent with term of support for other capital improvement projects. We believe that two years strikes an appropriate balance between the urgency in getting broadband deployed and giving carriers sufficient time to plan and construct projects. We agree that some flexibility may be necessary so we will allow an extension of time where good cause exists. Good cause includes but is not limited to delays in permitting, supply chain issues, or weather-caused delays. We expect that carriers seeking an extension of time will be specific in their request both in justifying an extension request and in estimating when the project will be completed.

We also find that requiring invoices for auctioned support is consistent with our practice relative to other infrastructure programs. Any burden imposed on the carriers to collect and submit this data is outweighed by the crucial public policy considerations of transparency and accountability of NUSF funding.

3. *Budget*

Not knowing how much support would be claimed by price cap carriers at the time of our June 29 Order, we proposed to set a budget for each auction once we knew how much support allocated to price cap carriers would go unused. No commenter opposed this proposal.

Although we now know how much support was not claimed by price cap carriers for 2021 and the amount of support redirected in 2022, the amount of support available for redistribution in an auction may vary from year to year. We find there should be an annual determination of whether the amount of unused or withheld funds is sufficient to fund at least one or more substantial project. Once we feel that the amount of NUSF support is sufficient to build a meaningful project and warrants distribution through a reverse auction process, the Commission will release a public notice informing potentially interested parties that we will conduct a reverse auction using some or all of the amounts available for allocation. At that time, we will also determine the eligible areas for the auction. We will then release the amounts and reserve prices for each census block. Only the census blocks which were considered wholly unserved would be eligible for the auction.

Some commenters requested that the Commission conduct workshops to discuss the size of the bidding area. Other commenters wanted the Commission to prioritize using a rural-based plan approach option. For example, the NRBA recommended that any action to redirect support pursuant to a rural-based plan should trump an incumbent local exchange carrier's election of BDS support for the same area.¹¹⁰ While we do not believe that redirecting support pursuant to a rural-based plan should trump an incumbent carrier's election of BDS support, we believe that in some cases, it may be an alternative to conducting a reverse auction. Prior to conducting an auction, depending on the amount of support available to reallocate, the Commission may hold a workshop to decide whether to utilize a rural-based plan or a reverse auction. We note, however, that the Commission retains the discretion to choose either option.

4. *Areas Eligible for Auction Support*

We proposed setting minimum bidding units at the census block group level, similar to what was done in the RDOF auction. If the census block groups span multiple locations, they would be broken up to include census block groups only within a single exchange. We further proposed prioritizing census blocks that are wholly unserved with broadband at speeds of 25/3 Mbps within the given area of a carrier not timely using support or where support has been withheld. Additionally, we sought comment on how best to ensure that rural census blocks that are wholly unserved by high-speed broadband are appropriately included in the auction framework.

¹¹⁰ *Id.*

No commenter opposed our proposal to set the minimum bidding unit at the census block group level. We find this proposal should be adopted. We acknowledge and agree with the commenters who stated that the Commission should prioritize areas without any broadband service over the areas that are underserved.

5. *Deployment Obligations*

We also solicited comment on the deployment obligations for auction winners. Specifically, we questioned whether any alternative deployment obligations, performance requirements, weights, or testing methodologies should be adopted for recipients of NUSF reverse auction support.

With the passage of LB 338, the issue has largely been resolved. As such, most commenters confirmed any project completed after January 1, 2022 should require infrastructure capable of delivering a minimum of 100/100 Mbps speeds. We find that the minimum bidding tier should be set at 100/100 Mbps. The Commission also agrees with the commenters that it should regularly update all requirements for support to ensure investment in quality broadband infrastructure and its continued operation and maintenance.¹¹¹

6. *Service Offerings and Reasonable Comparability*

We proposed to provide auction support recipients flexibility to offer a variety of broadband service offerings if they offer at least one standalone voice plan and one service plan that provides broadband at the relevant performance tier and latency requirements at rates that are reasonably comparable to rates offered in urban areas. We sought comments on what safeguards to put in place to ensure that service offerings are affordable.

We agree with the commenters who suggest that auction winners should comply with all ETC certification requirements including the requirement to offer service at affordable rates when compared to the FCC's national rate survey. We further find that auction participants should be required to offer a Lifeline service offering. We find that bidders should be required to file proposed Lifeline service plans with the Commission during the pre-auction vetting stage. Bidders should also include information relative to whether they participate in the FCC's Emergency Broadband Benefit Program and how that participation may impact proposed service offerings to subscribers in auctioned areas.

¹¹¹ See NRBA Comments at 3.

7. *Reserve Prices*

We proposed using the SBCM total investment support amount to determine the reserve prices and number of locations for each area eligible for support in the auction. CenturyLink suggested that the reserve price be set at the same dollar amount offered to the respective price cap carrier for the same exchange. RIC suggested scheduling workshops for the Commission to receive additional input.

While we do not necessarily oppose having additional input offered at a workshop or subsequent proceeding, we are persuaded that using the SBCM total investment support amount to determine the reserve prices and number of locations is a good starting point. We further believe that this amount will be similar to the pro-rata dollar amount offered to the price cap carrier who either refused the support or had support withheld. It is our hope that through a reverse auction the prices awarded would be lower than the initial reserve price.

8. *Application Process*

We sought comment on the application process and the information to be included in the application. Consistent with our findings above, we will require each potential bidder to submit information about its qualifications, financial capacity, and detailed network proposal in a pre-auction vetting process prior to bid eligibility. We find that a pre-auction application should be submitted by any carrier interested in bidding in a reverse auction. We will devise and release a "pre-auction application form" at the time it announces that it will conduct a reverse auction. Such pre-auction applications would then be subject to approval by the Commission prior to auction commencement. We anticipate that the pre-auction application form may be revised from time to time and may change in scope depending on the details of each auction, however, the pre-auction application will generally require information about each potential bidder's technical and financial capabilities, as well as general information about its service area, its history of providing broadband service, and the broadband service type and speeds provided elsewhere.

In addition, we sought comment regarding a requirement that all winning bidders provide more detailed information to the Commission, similar to the FCC's long-form application. This is information to be provided by a winning bidder after the auction,

but prior to support authorization. Generally, commenters opposed a cumbersome application process and recommended a streamlined, or one-step, application process. We agree that given the pre-auction vetting process, the application provided following the auction could be more streamlined. However, we believe at this point, auction participants should be required to provide more detailed commitments relative to use of the support, deployment timelines, network design and testing.¹¹² This post-auction review process will be subject to internal Commission review. No outside provider review or challenge will be permitted.

9. *Authorization and Release of Support*

We sought comment on the authorization and release of support after our review of the long-form applications is complete. At this point, the Commission would provide notice to authorizing the project and releasing support. We adopt this proposal with the change we describe above that the long-form application should be considered an internal review of more detailed information and commitments of the winning bidder rather than a new application process which denotes some sort of outside participation.

Skywave recommended that if a long-form applicant does not meet the Commission's criteria, the support should be awarded to the next bidder at the previous bidder's support amount. We agree with the concern expressed by Skywave that it may be more efficient to have the next in line bidder have the opportunity to obtain support in the event that the winning bidder is determined to be ineligible. However, the first and second bidders may have been separated by a wide disparity in pricing and qualifications. In addition, the Commission believes it could conduct a subsequent auction more quickly since the areas it would be auctioning are smaller and more discrete in nature.

10. *Noncompliance Measures*

In our June 29, 2021 Order, we proposed a non-compliance framework similar to the FCC.¹¹³ No commenter specifically opposed our non-compliance framework or offered a specific modification. Accordingly, the non-compliance framework set forth as follows will be adopted:

¹¹² We also believe at that this stage providers should be pursuing any ETC application/amendment process that may need to be completed prior to support authorization.

¹¹³ See RDOF Order, 35 FCC Rcd 686, 713-714, para. 58.

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Non-Compliance Framework

Compliance Gap	Non-Compliance Measure
Tier 1: Less than 15% required number of locations	Quarterly reporting until compliance gap is eliminated. If not eliminated within one year, withhold percentage of project support based upon compliance gap but no more than 15% of project support.
Tier 2: 15% to less than 25% required number of locations	Quarterly reporting + withhold 15% to 25% of project support.
Tier 3: 25% to less than 50% required number of locations	Quarterly reporting + withhold 25% to 50% of project support; Disqualification from bidding in future reverse auctions.
Tier 4: 50% or more required number of locations	Quarterly reporting + withhold 50% to 100% of project support. Disqualification from bidding in future reverse auctions.

In addition to withholding support, we sought comment on other possible penalties in cases where a winning bidder defaults on auction commitments. Some commenters felt revocation of ETC designations should not be considered. Other commenters felt that the pre-auction vetting process was more important as a means for preventing unqualified providers from bidding and then defaulting.

While we hope that establishing robust pre-auction vetting auction procedures will minimize non-compliance, we find that strong compliance measures are still necessary and appropriate given the significant monetary support and time we are investing in the reverse auction process. We find that in the event that a winning bidder does not meet a service milestone, monetary penalties as well as revocation procedures should be remedies the Commission has available for consideration. Accordingly, in addition to the possible non-compliance measures described above, in extreme cases, we may consider bringing an action against a bidder who willfully violates auction rules, Commission orders or commitments made in obtaining auction support.

Public Workshop

The Commission hereby determines that there is sufficient funding to hold a reverse auction in the calendar year 2022. Therefore, the Commission hereby schedules a workshop in this

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proceeding for **March 29, 2022, at 1:30 p.m. Central Time** in the Commission Hearing Room, 300 The Atrium Building, 1200 N Street, Lincoln, Nebraska 68508, and via WebEx. This workshop will be held for the purpose of allowing the Department to present the reverse auction procedures, including the pre-auction vetting process and application forms, and clarify other open issues necessary for resolution prior to conducting a reverse auction.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that opinions and findings set forth herein shall be, and they are hereby, adopted.

IT IS FURTHER ORDERED that a workshop will be held in this matter on **March 29, 2022, at 1:30 p.m. Central Time** in the Commission Hearing Room, 300 The Atrium Building, 1200 N Street, Lincoln, Nebraska 68508, and by videoconference as indicated above.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska this 1st day of February, 2022.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Rod Johnson
Crystal Shroeder
Mary Kidden
Tim Schram

David W. Johnson

Chair

ATTEST:

Thomas W. Golden
Executive Director