

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Petition of ) Application No. NUSF-77  
the Nebraska Telecommunications ) Progression Order No. 5  
Association for Investigation )  
and Review of Processes and ) ORDER  
Procedures Regarding the )  
Nebraska Universal Service Fund. )  
 ) Entered: November 21, 2011

BY THE COMMISSION:

***Background***

On January 14, 2010, the Nebraska Telecommunications Association (NTA) filed a petition for investigation and review of the Nebraska Universal Service Fund (NUSF) processes and procedures. On March 8, 2010, the Commission held a planning conference to discuss a timeline for the submission and development of issues to be considered for possible inclusion in this investigation. The Commission requested that a listing of issues be filed by interested parties. Those issues were discussed at a workshop held on June 24, 2010. The issues of many of the commenters focused on establishing a program within the NUSF that would support broadband deployment in Nebraska. The Commission sought comments on how a broadband pilot program could be structured.

We invited interested parties to comment on whether the Commission should implement a broadband pilot program within the NUSF, and if so, how the broadband pilot program should be administered.

On June 14, 2011, the Commission issued Progression Order No. 3, which sought comments on the general framework and funding level for Year One of a Nebraska Broadband Pilot Program (NEBP). In that Order, the Commission proposed that the NEBP program should be administered as a grant program whereby applications are submitted, evaluated, and approved by the Commission and grantees are subject to oversight and audit processes, similar to the Commission's Dedicated Wireless Fund program. The Commission believed that specific and targeted broadband support to unserved and underserved areas will be the best method to close the broadband availability gap in the near term. The Commission sought comments on setting aside \$4 million

for Year One of the NEBP.<sup>1</sup> The Commission's proposal included a general framework for determining eligibility, provided application requirements, and general criteria to be considered when determining whether to approve applications for NEBP support.

On September 27, 2011, the Commission entered Progression Order No. 4, adopting findings and seeking further input from the interested parties on certain proposals and modifications.

### ***Summary of Hearing Testimony***

The Commission held a public hearing on the NEBP proposal on October 31, 2011. Loel Brooks entered an appearance for Viaero. Paul M. Schudel entered an appearance on behalf of the RIC. Andy Pollock entered an appearance on behalf of the RTCN. Shana Knutson entered an appearance on behalf of the Commission.

Ms. Vanicek and Mr. Dan Davis provided the Commission with pre-filed testimony. The testimony was offered into the record as Commission Exhibits numbered 3 and 5 respectively.

Ms. Vanicek, Director of the Commission's Nebraska Telecommunications Infrastructure and Public Safety (NTIPS) Department offered the Department's recommendations related to eligibility, the application and review process, as well as audit and verification requirements for applicants seeking funding from the NEBP. Ms. Vanicek stated the Department supported adding a requirement that any carrier receiving any NEBP support should abide by all applicable Commission rules and regulations.

The Department also recommended the Commission refrain from applying the same audit requirements from the NUSF rule which apply to the receipt of support from the high-cost program to grantees of the NEBP. Ms. Vanicek stated the carriers will be required to make capital expenditures according to a budget that

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<sup>1</sup> The Commission also stated that during Year One of the NEBP program, the Commission would seek further comments on transitioning the limited pilot program to a distribution process which will create incentives for carriers to meet broadband deployment objectives, taking into consideration operation and maintenance of high-cost broadband capable networks, and directing funding to carriers which have met broadband deployment objectives. At that time, we will seek comments on the long-term objectives of the high-cost distribution mechanism as well as the Dedicated Wireless Fund.

has been submitted to the Commission prior to receiving grant funds. The staff will review invoices prior to disbursing funds to ensure that payments are made according to the budget submitted and approved by the Commission. Ms. Vanicek stated this process has worked well with the Dedicated Wireless Fund support. She agreed that the Commission should preserve the authority to conduct an audit if necessary.

Ms. Vanicek also offered clarification of the 14 elements of required information to be provided in an application. She stated that for the first element, the list of all companies associated with the proposed broadband project refers only to companies that would provide broadband and the required voice grade service. It does not refer to vendors such as construction companies or equipment providers. She recommended the Commission clarify this point in its Order. Additionally, she clarified that the requirement in the fourth element is intended to apply to the proposed placement of new facilities and not the location of existing facilities.

With respect to the sixth element Ms. Vanicek recommended the Commission recognize there may be extraordinary events which may prevent a carrier from completing the build-out within that time period. In that event, she suggested, carriers should notify the Commission and the Commission can consider modifications to the timeline to account for the extraordinary event.

The seventh element was a proposed budget and depreciation schedule. Ms. Vanicek stated the Department does not believe that it is necessary to create a template for this information. Similar information is required for the dedicated wireless program and the Commission has not had requests to create a form for that information. In addition, she stated, creating a form may increase the cost and burden of applications by requiring applicants to submit their information in a manner which is different from the way they typically maintain it.

The ninth element was a description of the applicant's commitment to offer broadband services to all households within the service area of the project. Centurylink thought that this requirement should be limited to a specific time period. The Department believes that the 5 year commitment to offer the broadband service upon the completion of deployment should also serve as the specific time period in the ninth element for which the broadband services must be offered.

The eleventh element was a description of the applicant's financial qualifications. Centurylink suggested the Commission accept information which is already available such as the Annual Report Form M information. The Department believes such information would be acceptable.

The twelfth element was a demonstration of the applicant's financial, technical and managerial competence if the applicant did not have a certificate of public convenience and necessity. CenturyLink suggested that all applicants be required to have a certificate prior to seeking grant funds. However, Ms. Vanicek stated the NEBP should be a technology neutral program. Accordingly, she recommended keeping the requirement described by the Commission. She also stated that it would more efficient for applicants seeking NEBP support to commit to adhering to the conditions required of Nebraska eligible telecommunications carriers (NETCs) for the NEBP as part of their application. No additional certifications should be required.

The thirteenth element was a description of the financial match. The Department recommends the applicants submit a proposed budget for the entire project cost. As the 25 percent milestones are reached, invoices can be submitted for payment. The Commission would reimburse 75 percent of the invoice cost, up to the total amount approved, and the grantee would be responsible for the remaining 25 percent.

Ms. Vanicek stated the Department continues to recommend applicants be scored based upon the extent areas are unserved or underserved, the retail price of the service, the cost per household, the potential number of households served, area density, the proposed benefit to consumers, and the strength of the applicant's commitments. The Department also proposed to use data from the broadband mapping project and other evidence presented. Ms Vanicek stated the best way to deal with any inaccuracies in the broadband map is to allow for intervenors or applicants to present information concerning the inaccuracies.

In response to additional comments, Ms. Vanicek stated that the Commission should wait on the determination of the exact scoring criteria. Not having the scoring criteria available ahead of time places every applicant on equal footing. She stated the staff will develop an objective process and the scoring methodology should be described in the testimony and in the hearings on applications. She further stated that it is

possible that the scoring criteria may need to be adjusted after the first year. The Department does not believe that it is prudent to make funding commitments beyond Year One of the NEBP at this point.

Viaero presented one witness Mr. Andrew Newell, General Counsel for Viaero.<sup>2</sup> Mr. Newell testified Viaero is concerned that the structure created by the Commission may favor small broadband projects over the larger projects, which could disfavor wireless broadband deployment projects. He recommended the Commission consider larger projects more favorably even if the amount needed exceeds the available NEBP support in a given year. Mr. Newell also recommended using a subjective approach for scoring broadband projects. He had concerns about the Commission's use of a rigid scoring process. Viaero suggested the Commission should not universally favor projects in unserved areas over projects in underserved areas. Mr. Newell also recommended the Commission release its scoring criteria before applicants compile their applications.

RIC presented Mr. Dan Davis, a consultant with Consortia Consulting. RIC supported Ms. Vanicek's previous recommendation to have the Commission utilize an all or nothing approach to grant applications received for the NEBP. Mr. Davis recommended inclusion of this proposal in the Commission's Order. RIC recommended the Commission place the burden of showing a service area as "unserved" or "underserved" on the applicant. RIC had concerns related to a total reliance on the Nebraska broadband map as the determining factor for "unserved" and "underserved" areas. RIC also recommended the Commission release the scoring criteria prior to the application window so that applicants can use the Commission's formula when selecting broadband projects.

In response to Viaero's testimony, Mr. Davis testified that large scale projects requiring funding beyond 2012 are outside the scope of the NEBP as described by the Commission in Progression Order #3 and #4. Mr. Davis stated NEBP funding beyond 2012 is entirely speculative.

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<sup>2</sup> Viaero filed comments in response to the Commission's order which were received as Commission Exhibit 2.

***Further Comments***

The Rural Telecommunications Coalition of Nebraska (RTCN) and United Telephone Company of the West d/b/a CenturyLink and Qwest Corporation d/b/a CenturyLink QC (CenturyLink) filed comments in lieu of pre-filed testimony.<sup>3</sup>

RTCN provided general support for the Commission's proposals. RTCN noted a couple of concerns with the Commission's findings in Progression Order No. 4. Specifically, the RTCN encouraged the Commission to revisit its conclusions related to audits, verification and enforcement. RTCN advocated mandatory verification protocol related to the use of NEBP support including broadband speed verification, plant improvement verification and fulfillment of commitments. RTCN also had concerns related to the source of the NEBP funding. RTCN further noted that designation as an NETC is not listed as a requirement for eligibility under the NEBP. Finally, RTCN requested the Commission establish and disclose the details of the scoring process in advance of the opening of the application window.

Centurylink also provided general support for the Commission's proposals. However, CenturyLink recommended the Commission clarify some of its findings. Additionally, Centurylink commented that some of the application requirements may create an undue administrative burden for potential applicants. Centurylink also asked the Commission to release its scoring criteria prior to the opening of the application window.

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

The Commission enters this Progression Order to adopt further findings as it relates to the establishment of a Nebraska Broadband Program (NEBP) and to provide guidance for applicants intending to file applications for Year One of the NEBP. In general, the commenters were supportive of the Commission's proposal to implement a broadband pilot program and with the general process described in the Commission's previous Progression Orders.

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<sup>3</sup> These companies' comments were offered into the Commission's record as Exhibit No. 2.

Although a number of commenters recommended the Commission release scoring criteria prior to the application period, the Commission agrees with the Department that it should not delay the application process by developing scoring criteria through another comment period. The Commission believes, based on the application criteria, that companies applying for broadband grant support have a general understanding of the importance which will be placed on a number of factors and used by the Commission to determine supported projects. For example, the Commission already found that it will prioritize areas which are "unserved" by broadband providers as that term was defined in Progression Order No. 4. In addition, the Commission may determine which "underserved" areas should receive support based on the attributes of the area to be served, population density, cost of the project, price at which broadband will be offered, and the commitments of the broadband provider. The Commission directs the Department to develop scoring criteria and present its recommendations to the Commission during the hearings on the filed applications.

Some commenters were also concerned about the Commission's use of the broadband mapping data provided through the State Broadband Initiative (SBI) grant program. The Commission is the designated state entity which collects and publishes broadband availability information for the National Information and Telecommunications Administration (NTIA). For that initiative, broadband data has been collected directly from willing broadband providers. Because the SBI initiative relies on a voluntary response from providers, the Commission recognizes that some providers have not participated and the data may not represent a complete picture of broadband availability in Nebraska. The NTIA's business rules for broadband data collection also vary by provider type and geographic attributes which should be recognized by the Department in the determination of "unserved" and "underserved" areas. In addition, the Commission notes there are differences in how broadband is defined or perceived for the two projects. Broadband availability at speeds of 768kbps download and 200kbps upload are displayed on the Commission's SBI map whereas the speeds relevant for this proceeding are different and defined as 4 Mbps download and 1 Mbps upload.

However, the SBI initiative has created a valuable database of broadband availability and speed data in Nebraska. With the indispensable assistance of broadband providers, that database is being continually improved and updated. While not a perfect

depiction of broadband availability, the Commission finds the data collected and broadband availability displayed on the SBI map should be used as a starting point when reviewing applications for broadband support. The data collected through the SBI initiative will not be the sole determinative factor, however, when considering whether an area is "unserved" or "underserved." The Commission will also rely heavily on the information provided by the applicant. In addition, the Commission will consider any conflicting information provided by intervenors or protestants which may be involved in the review process. Finally, the Commission notes that it will give consideration to the fact that some broadband providers, depending on modality, are permitted to provide broadband information to the Commission in differing formats for the SBI data collection project which may in some cases overstate or understate broadband deployment in a given area. In short, the potential applicants should not be concerned that the Commission will take a closed-minded approach when reviewing the data collected through the SBI initiative.

Some commenters requested the Commission clarify whether it will use an all or nothing approach when determining which broadband projects will be supported by the NEBP grants. The Commission clarifies that it will not engage in negotiations with broadband providers over the proposed projects. The Commission agrees with the Department that such negotiations with providers may be unfair to other providers also filing applications. The Commission finds that applications will be considered on an all or nothing basis to the extent that projects not meeting the criteria or exceeding the available funding will not be negotiated by the Department so that such projects receive approval. The Commission invites applicants to file applications which contain alternatives for the Commission to consider. If a particular project is a large scale project which would not be completed with the available funding in a given year, the Commission encourages such applicants to provide the Commission with alternatives to consider along with a description of a potential long-term project plan.

### ***Eligibility Requirements***

In Progression Order No. 4, the Commission sought further comment on the eligibility requirements of an applicant seeking NEBP support. No one opposed the eligibility requirements or the proposed modifications. Accordingly, we find the applicant must:

- (1) Commit to offer the supported broadband service upon completion of the deployment to all households within the area defined by the application, for a minimum period of 5 years;
- (2) Commit to offer a voice grade service to customers within the service area of the broadband deployment;
- (3) Commit to offer access to emergency services;
- (4) Commit to using broadband support only for the purposes intended and which have been approved by the Commission through the application process;
- (5) Commit to offering the voice and broadband service at reasonably comparable rates for comparable services in urban areas; and
- (6) Commit to fulfilling reporting and audit requirements adopted by the Commission for oversight of the NEBP program; and
- (7) Commit to abide by all applicable Commission rules, regulations and orders.

### ***Application Requirements***

The Commission adopts the application requirements proposed in Progression Order No. 4 as clarified by the Commission in this Order. No party strongly opposed the application requirements proposed by the Commission. However, some commenters thought certain elements may be burdensome or rigid. With the clarifications below, the Commission believes it has addressed some of these concerns. In particular, with respect to the financial demonstration, the Commission agrees with the Department that the information provided in the Form M or to the Department through an NUSF-EARN filing would satisfy that requirement. For carriers not filing an annual report or a NUSF-EARN form, the templates are publicly available and provide guidance to such carriers about the type of information the Commission will require. The Commission finds each of the application requirements described below will provide the Commission with the necessary information for determining which projects should be considered. Applicants must provide the

requisite information described for each of the numbered requirements.

<b><u>PROPOSED APPLICATION CHECKLIST</u></b>	
1. A listing of all companies associated with the proposed broadband project that will provide the broadband or voice component of the service to consumers, including a main point of contact for all companies. (This requirement does not refer to vendors such as construction companies or equipment providers.)	
2. A description of the proposed broadband project plan for which NEBP funding is being requested including download and upload speed capabilities which can be provided using the proposed infrastructure. Minimum speed standards should be 4 mbps download and 1 mbps upload.	
3. A description of which areas are "unserved" or "underserved" in accordance with the Commission's definition.	
4. An electronic map <sup>4</sup> of all geographic locations where broadband facilities would be deployed under the proposed project which shall include 2010 Census Block boundaries of service area, by project, along with a demonstration that the area is currently unserved or underserved. The map must demonstrate coverage in 2010 census blocks. (The map must show proposed project locations and does not need to depict the applicant's other service territory.)	
5. An estimate of the number of potential new broadband subscribers.	
6. A schedule for broadband deployment with commitment to complete the build-out within 24 months of approval of the application. The schedule should describe milestones in project completion increments	

<sup>4</sup> Electronic maps shall be submitted in an editable, ESRI compatible format with all underlying data included and available.

of 25 percent, and the estimated date by which the milestones will be completed. <sup>5</sup>	
7. A proposed budget, showing total project costs, in electronic format, <sup>6</sup> with a detailed breakdown of the cost elements and a depreciation schedule showing the life of the investment.	
8. Proposed retail pricing, including both monthly recurring costs and nonrecurring costs for the new broadband service(s) to be offered.	
9. A description of the applicant's commitment to offer broadband services to all households within the service area of the project for a minimum of five (5) years.	
10. A description of the applicant's commitment to provide broadband data to the Commission and its vendors for the duration of the State Broadband Data and Development (SBDD) program so that this broadband coverage area can be depicted on the Commission's state broadband data inventory map and on the National Telecommunications and Information Administration's (NTIA's) national broadband map.	
11. A description of the applicant's financial qualifications, which may be filed on a confidential basis, to meet the commitments made in the application. <sup>7</sup>	
12. If the applicant does not have a certificate of public convenience and necessity to provide telecommunications services in Nebraska, a demonstration of the applicant's financial, technical, and managerial competence. <sup>8</sup>	

<sup>5</sup> While the applicant must provide a build-out plan which shows a commitment to complete the project within 24 months. This timeframe may be extended by the Commission upon a showing of extraordinary circumstances.

<sup>6</sup> A proposed budget shall be submitted in an editable, Microsoft Excel format with all underlying data included and available.

<sup>7</sup> For companies filing Annual Report Form M information, such information would be sufficient to meet this requirement.

<sup>8</sup> A balance sheet and income statement can be submitted to demonstrate financial competency.

13. A description of the applicant's financial match which will be used to meet the commitments made in the application. Applicant shall submit a proposed budget for the entire project cost. <sup>9</sup>	
14. An affidavit from the Applicant attesting to the truth and accuracy of all information included in the application.	

All confidential materials must be clearly marked. A redacted copy of the application must be filed for public dissemination.

### ***Review Process***

In Progression Order No. 4, the Commission adopted a procedural process for administering NEBP applications. The Commission will publish notice of the applications consistent with its Rules of Commission Procedure. Interested parties will then be permitted to file Protests or Petitions of Intervention where an interest has been demonstrated in the applicable time frame pursuant to the Commission's rules. Where appropriate, the Commission may consolidate the hearings on all applications received in a given calendar year, where administratively convenient similar to its hearings on Dedicated Wireless Fund support.

### ***Application Window***

The Commission finds the application window for Year One of the NEBP should open on **January 2, 2012**. Applications for NEBP support may be filed between **January 2, 2012 and February 1, 2012**. Consistent with the procedure described above, the Commission will publish notice of the applications and determine an appropriate hearing date.

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<sup>9</sup> Consistent with the Department's recommendation, the applicants may provide invoices to the Commission based upon 25 percent milestones. Once those are reached, the Commission would reimburse 75 percent of the invoice cost and the grantee would be responsible for the remaining 25 percent.

O R D E R

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

IT IS FURTHER ORDERED that the window for Year one of the NEBP for the receipt of broadband applications shall be open from **January 2, 2012** and shall remain open until 3:00 p.m. on February 1, 2012. The Commission will publish notice of all applications filed.

MADE AND ENTERED at Lincoln, Nebraska this 21st day of November, 2011.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

O R D E R

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NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

*Rob Johnson*  
*Anne Boyer*  
*David L. Kay*

//s// Frank Landis

//s// Tim Schram

*Tim Schram*  
Chairman

ATTEST:

*Shirley J. [Signature]*  
Executive Director