

MEMORANDUM

To: Nebraska Rural Broadband Task Force
From: Gary Warren and Jim Ediger, Hamilton Telecommunications
Date: September 16, 2019
RE: Comments to the Nebraska Rural Broadband Task Force

Preface: The primary purpose of this Memorandum is to outline a high-level set of steps, which might be taken to improve broadband deployment in Nebraska and to comment on the public-private partnership opportunities and the role of public entities in the deployment of broadband. Maximizing the deployment of broadband in Nebraska will require focusing the resources of Nebraska broadband customers, telecommunications carriers, political subdivisions and the Nebraska Public Service Commission as set forth in the Rural Task Force Report and supplemented by this Memorandum.

Accelerating Broadband Deployment Utilizing Universal Service Funding or Similar Mechanisms

The following four (4) high-level strategies for utilizing universal service funds or similar funding mechanisms should be employed to accelerate the rate of broadband deployment in Nebraska by:

- 1) Continuing to support methodologies which broaden the contribution base and improve sustainability of the Nebraska Universal Service Fund (NUSF) such as the recently adopted connections-based contribution methodology. Support and monitor the work of the Nebraska Public Service Commission as they continue to implement a connections-based contribution methodology for the NUSF in order to maintain and increase, as needed, the funding provided by the NUSF. Maintaining a viable system of funding the NUSF from a broad base of telecommunications carriers, and therefore a broad base of telecommunications consumers, is critical. This will not in and of itself close the funding gap for last mile wireless or wireline connectivity, but it will make a significant and measurable difference in resources available to further deployment and maintenance of rural broadband networks.

To the extent Nebraska can do so, it should encourage the implementation of broader based funding mechanisms at the Federal Communications Commission (FCC) level. The current funding for broadband deployment coming from the federal government has increased recently, however it is still based on a diminishing and narrowing voice communications revenue base, which is not sustainable in the long term. On September 12, 2019, the FCC announced that the proposed universal contribution for the 4th Quarter of 2019 will be 25.0%, which highlights the need to broaden the funding mechanism.

- 2) Increasing the accountability and transparency for the distribution of NUSF funding by making the 25/3 Mbps Broadband metric visible. There should be additional transparency as to the number of additional locations which are being provided 25/3 Mbps or greater service on an annual basis, so that the public can see the progress or lack thereof to ensure that the funding is performance based. Visible and reasonably accurate measurements of the metrics desired is

fundamental to accountability of parties receiving broadband-related funding and to determine success of any broadband deployment initiatives.

- 3) Develop a mechanism for coordinating the transfer of Federal and State Universal Service Funding support to another carrier in those areas where the incumbent carrier(s) is not making a reasonable level of broadband deployment progress. If the incumbent carrier does not wish to pursue building out broadband and it is clear that it is necessary to find another carrier who will do so, then it is important to come up with a methodology for transfer of the high cost support for those areas or entire exchanges. The Nebraska Public Service Commission has the authority to implement reverse auctions as a result of the legislation passed in 2018; however, it is critical that any such auction be coordinated with the FCC in order to ensure sufficient support is available to incent building of the quality and quantity of infrastructure needed. The rules and regulations adopted should ensure that other private sector certificated telecommunications carriers (existing or newly created) are given the opportunity to become eligible for the Federal Universal Service Fund and the Nebraska Universal Service Fund support for those exchanges. The reverse auction rules and regulations should give appropriate weight and consideration to the quality, long-term costs, and benefits of the technologies proposed by the reverse auction bidders. The New York initiative may provide some guidance on how to pursue combining the use of universal service funds from both the Federal and State levels. Empowering those telecommunications companies with expertise in the deployment of broadband by providing them the combined Federal and State support to serve these unserved and under-served areas would be a key step forward for accelerating broadband deployment in Nebraska.

- 4) If needed in the higher cost rural areas, establish a supplemental grant-based broadband deployment funding methodology. If, and only if the combination of Steps (1), (2) and (3) above are taken and there are still areas in which 25/3 Mbps service is not being achieved in a reasonable time frame, pursue additional one-time funding through the Nebraska legislature to establish funding which can be utilized to further subsidize rural broadband deployment in those high cost areas where the Federal Universal Service Funds combined with Nebraska Universal Service Funds do not provide the support required. It is also conceivable that this approach might be a supplement or combined with preceding Step (3).

The Role of Public Entities in Accelerating Broadband Deployment

The Public-Private Partnership Subcommittee preliminary report identified a number of examples which, when examined more closely, reveal a broad diversity in what various parties are labeling as the “public” partners. It is critical that when defining such partnerships that Nebraska does not slip into an entirely new telecommunications economic funding model where public entities, either on a wholesale or retail basis, are in the telecommunications business. If Nebraska, under the guise of “public-private partnerships,” changes its fundamental system for investing in telecommunications by allowing public entities into the retail or wholesale telecommunications business, it will discourage further private broadband infrastructure investment at a time when we need all the private investment we can get. Instead, process changes can be made within our current regulatory system to better facilitate the public-private partnerships in order to strengthen, rather than weaken, the provision of broadband services across the state. Changes to consider include:

- 1) Process improvements can shorten the time it currently takes to comply with the statutory prerequisites found in Section 86-577 of the Nebraska Revised Statutes for any public entity to lease its dark fiber. The statutory provisions of Section 86-577 are designed to ensure that public entities which do not pay taxes and have a significantly different legal and financial structure do not get into the telecommunications business and create a playing field which is no longer competitively neutral. A playing field which is not competitively neutral will reduce the incentive for private sector investment and Nebraska can ill afford to take any steps which reduce the incentive of the private sector to invest in technology and broadband during the information or digital age.

The restrictions in Section 86-577 contain three (3) fundamental requirements designed to ensure that the competitive playing field remains equitable:

- A) The lease price should not be lower than market rates. This is designed with the idea that a public entity should not be able, given its statutory favorable tax and financial structure, to price below privately provided telecommunications services.
- B) The lessee must share pro-rata in the maintenance costs. This is designed again to make sure the pricing of the service is competitive and that the public entity (i.e. power district) is not subsidizing the provision of the fiber facilities but that the lessee of the fiber is paying its fair share of the maintenance costs.
- C) The public entity is required to contribute 50% of the “profit” from the lease. The design of this provision is to make sure public entities are not incited to build excess fiber facilities beyond the entities needs AND yet to offer the political subdivision a way to secure some recovery of the cost resulting from its overbuilding plus 50% of the profit, if there is profit. The public entity gets to recover the costs of the facilities which it built but does not have the ability to utilize; it gets to recover 50% of any profit (if any); and there is a contribution of another 50% of the profit into a fund which is used to further deploy broadband. All of which is beneficial to the public entities taxpayers or ratepayers (in the case of public power districts), and to the telecommunication carrier and its customers.

There has been some discussion that the process associated with Section 86-577 is too cumbersome or too long and should be made “easier.” If that is the case, that can be remedied by updates made to the Nebraska Public Service Commission rules and procedures. Specific proposed changes to accomplish this streamlining are attached to this document.

- 2) The public entity either individually or as a consortium of public entities (i.e. multiple power districts, a power district and a county or a power district, a county and a municipality) encourages the formation of a telecommunications cooperative as a private sector vehicle to own, lease or operate telecommunications broadband facilities. This could be an entity that operates for limited purposes (i.e. to own or lease fiber and resell it) or it could be a more robust entity offering both wholesale and retail telecommunications services. This solution minimizes the risks of cross subsidies from taxpayers or electric rate payers; provides a structure which could become eligible for telecommunications universal service support or perhaps other broadband related funding programs; and provides a governance and tax structure which maintains Nebraska’s Public Policy of providing competitive level playing field for telecom carriers.

Additional Roles Public Entities Can Take to Accelerate Broadband Deployment

There are additional incremental steps that can be taken by public entities and semi-public entities (i.e. economic development organizations, industrial parks, etc....), which should be encouraged and facilitated when feasible. These might include:

- 1) Municipalities and Counties can keep pole attachments, conduit or public easement, right of way and franchise requirements and fees to a minimum.
- 2) Municipalities, Counties, the Department of Roads and Public Power Districts can cooperate with and perhaps even seek out opportunities with telecommunications carriers to install fiber or bury conduit during the course of road and utility construction projects where trenching and other construction lends itself to installing fiber or conduit at the same time.
- 3) Municipalities and Counties can create Local Option Municipal Economic Development Plans (LB 840 Plans) which call for funding and contracting with certificated telecommunications carriers for the installation of fiber facilities or the construction of conduit facilities which could be made available to telecommunications carriers. A caveat here that should be considered is that if a municipality decides to fund fiber facilities within city limits of a community but fails to determine how the rural citizens of that community are going to be served, it will fragment the market in rural areas which will likely result in some duplication of facilities and reduction in the long-term viability of the market area for the telecommunications carriers serving that area, particularly in more rural areas.
- 4) Private foundation, nonprofit, or business sector funding can be encouraged to partner with LB 840 plans funding and private telecommunications carrier investments to build high capacity and redundant telecommunications facilities to business districts, industrial or business parks in rural areas. This would be done in a similar manner to what local development corporations do to partner with cities and counties to fund industrial and business sites with infrastructure such as streets, water and sewer facilities.

Summary: Nebraska should focus on the following steps:

- 1) Continuing to support methodologies which broaden the contribution base and improve sustainability of the Nebraska Universal Service Fund such as connections-based contribution methodology.
- 2) Increasing the accountability and transparency for the distribution of NUSF funding by making the 25/3 Mbps broadband metric visible.
- 3) Develop a mechanism for coordinating the transfer of Federal and State Universal Service Funding support to another carrier in those areas where the incumbent carrier(s) is not making a reasonable level of broadband deployment progress.
- 4) If needed in the higher cost rural areas, establish a supplemental grant-based broadband deployment funding methodology.
- 5) Public Service Commission rules and procedures for improving public entity fiber leases should be streamlined as suggested in the attached document.
- 6) If needed, public entities should encourage the formation of telecommunications cooperatives to own, lease or operate telecommunications broadband facilities.
- 7) Encourage government entities to facilitate broadband build projects by minimizing fees, permitting requirements and timelines, and working together on public infrastructure projects.

MEMORANDUM

To: Nebraska Rural Broadband Task Force
From: Gary Warren and Jim Ediger, Hamilton Telecommunications
Date: September 16, 2019
RE: Proposed Dark Fiber Leasing Rule Amendments

As provided in the Memorandum and materials Hamilton Telecommunications provided to the Public-Private Partnership Subcommittee of the Nebraska Rural Broadband Task Force dated June 18, 2019 and the Memorandum to the Nebraska Rural Broadband Task Force dated September 16, 2019, there has been some discussion that the process associated with Section 86-577 is too cumbersome or too long and should be made “easier.” If that is the case, that can be remedied by the Nebraska Public Service Commission reviewing their regulations and process to see if there is a way it can be streamlined and still stay consistent with the provisions of the Statute. No change in legislation is required to accomplish that step.

This document suggests some specific changes which could be made in the Public Service Commission rules and procedure for approving public entity fiber leases.

Proposed Change (1): Section 007.004A of the PSC Rules require that the Application for approval of a lease include a request for a competitive price comparison to determine the market rate and a request for the determination of the cost of infrastructure overbuilding. This section could be modified to include a provision providing for the Public Service Commission to determine a “safe harbor” set of market rates and costs which the Applicant could elect to utilize to eliminate the need for the determination of market rates and costs in each individual application. Following is a draft of possible language (red-faced type) to be added to this Section of the current Rules:

PSC Rules: Before entering into a lease, an agency or political subdivision must:

007.04A File an application with the Commission pursuant to the Nebraska Administrative Code, Title 291, Chapter 1. Rules of Commission Procedure, Section 05.02.

An application shall include:

007.04A1a; A request for a competitive price comparison to determine market rate, and

007.04A1b; A request for determination of the cost of infrastructure overbuilding.

007.04A2; At the discretion of the applicant, the applicant may propose a lease price and a profit distribution in the application.

007.04A3: The NPSC may, at its discretion, create pre-approved (off the shelf) market- based dark fiber lease rates and pre-approved (off the shelf) costs per fiber infrastructure mile.

007.04A4: At the discretion of the applicant, the applicant may propose to utilize NPSC's pre-approved (off the shelf) market lease rates and pre-approved (off the shelf) cost per infrastructure mile amounts. Rates and costs will be reviewed annually, posted for public comment, and approved.

Proposed Change (2): Section 007.05 states that after notice of the filing of the application has been made pursuant to the Nebraska Administrative Code, protest or formal intervention to the application shall be made pursuant to the Nebraska Administrative Code.

Next, according to Section 007.06 of the rules, the Commission shall hold a public hearing (a) to conduct a competitive price comparison to determine the market rate for leasing dark fiber and (b) to determine the cost of infrastructure overbuilding. This Section could be amended whereby a public hearing would only be required if there were a protest or formal intervention filed pursuant to Section 007.05. Following is a draft of possible language (red-faced type) to be added to this Section of the current Rules:

*007.06 Competitive Price Comparison and Cost of Infrastructure Over-building Determination: The Commission shall hold a public hearing (a) to conduct a competitive price comparison to determine the market rate for leasing dark fiber and (b) to determine the cost of infrastructure overbuilding. **If the applicant adheres to Section 007.04A4 and no protest or formal intervention is filed pursuant to Section 007.05, the Commission and Applicant agree that the application shall be approved and shall forego a public hearing. The applicant may at its discretion submit the Dark Fiber Lease Petition Approval Template available at ([Link to "Petition Template"](#)).***

See the following proposed "Petition Template" for Applicant to file with the Nebraska Public Service Commission.

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of) Application No. *XXXX*
Applicant Name)
Applicant Address)
Seeking Approval of Dark Fiber Lease with)
Name of Lessee)
Lessee Address)

**APPLICATION OF *APPLICANT NAME* FOR AUTHORITY TO LEASE DARK FIBER TO
LESSEE NAME AND SEEKING APPROVAL OF FIBER LEASE AGREEMENT**

Applicant Name (the “Applicant”) respectfully requests an Order from the Nebraska Public Service Commission (the “Commission”) Pursuant to Title 291, Chapter 5 (Telecommunications Rules and Regulations), Section 007 (Dark Fiber Leasing) authorizing the Applicant to lease to the Lessee certain optical fibers pursuant to a Fiber Lease Agreement between Applicant Name and Lessee, (“the FLA”).

The Optical Fibers are located in (*Additional Location Description*). The terms and conditions of the proposed FLA include the following:.

Consistent with Title 291, Chapter 5, Section 007.04A3

- 1) The Commission pre-approved market-based dark fiber lease rate of *\$\$/Mile* approved by the Commission in *Docket # on Date of Approval*.
- 2) The Commission pre-approved cost per fiber infrastructure mile of *\$\$/Mile* approved by the Commission in *Docket # on Date of Approval*.

- 3) Fiber Maintenance Terms and Conditions; Pursuant to Section 07.09A, the Applicant is solely responsible for maintenance of the dark fiber and the Lessee is responsible on a pro rate basis, for any such maintenance cost.
- 4) The Lessee agrees, pursuant to Section 007.09B, that each payment under the Dark Fiber Lease approved by the Commission is comprised of both the cost of the fiber infrastructure and the profit, if any, pursuant to Section 007.09B.

The Applicant respectfully requests that the Commission grant it application and issue an expedited Order authorizing the Applicant to enter into the Dark Fiber Lease with Lessee described herein.

Dated: *Date*

By: _____

Applicant Signature

Applicant Name

Applicant Title

Applicant Address

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this xx day of Month, Year, an electronic copy of the foregoing pleading was delivered to:

Nebraska Public Service Commission

Cullen.Robbins@nebraska.gov
