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September 17, 2019

Mr. Ed Toner  
Chief Information Officer  
Nebraska Information Technology Commission  
501 S 14<sup>th</sup> Street, 4<sup>th</sup> Floor  
PO Box 95045  
Lincoln, NE 68509-5045

***RE: Recommendations of the RTCN***

Dear Mr. Toner and members of the Rural Broadband Task Force:

The Rural Telecommunications Coalition of Nebraska (“RTCN”) applauds the work of the Rural Broadband Task Force.<sup>1</sup> The preliminary recommendations of the Task Force demonstrate its commitment to accelerating deploying broadband throughout rural areas of Nebraska. The RTCN’s recommendations will focus on two general topics, both of which the Task Force is addressing: (i) the role of the Nebraska Universal Service Fund (“NUSF” or “Fund”) in facilitating broadband deployment and changes needed to accelerate the pace of deployment; and (ii) legislative changes needed to foster public-private partnerships that might also expedite deployment. In this document, we will outline the changes we believe should be made on those two fronts. We also attach position papers, which provide substantial rationale of our positions.

We do not devote as much attention to one other issue before the Task Force, that is, data (or mapping). The Federal Communications Commission (“FCC”) has announced its intention to require all telecommunications carriers to report location-specific data showing where broadband service is available. According to the FCC proposal, all carriers will be required to report geolocated data through the High Cost Universal Service Broadband portal (“HUBB”). There is no need for Nebraska to duplicate those requirements. Provided that the Nebraska Public Service Commission (“PSC” or “Commission”) has access to such federal data, which is now the case, no further reporting is necessary. Utilizing federal data, the Commission will be equipped to make informed policy decisions related to support needed for future deployment.

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<sup>1</sup> A list of all RTCN members is attached.

### **Changes Needed in NUSF Support**

No legislative changes are needed. Changes needed relating to NUSF support should be made by the Commission, which has authority to make them. The Task Force's preliminary reports correctly commended the Commission for its major reform of the Fund. The Commission's steps to stabilize contributions to the Fund appear to be working, according to early reports. Those changes became effective April 1 of this year. The Commission has also overhauled the methods by which NUSF support is distributed. This overhaul will incentivize deployment of broadband infrastructure and ensure accountability of public funds.

The same legislation that established the Task Force, LB 994 (2017), directed the Commission to establish processes for withholding support from carriers not properly investing it in infrastructure capable of delivering broadband services. For withheld support, the Commission is to develop processes for redirecting support, including reverse auctions. The Commission commenced a rulemaking proceeding this spring and has conducted one hearing and a workshop to consider public comment in the proposed rules. A revised set of rules is expected soon. The RTCN believes that reverse auctions should be utilized as a last resort when other methods of redirecting support are not viable. The attached position paper proposes a process for redirecting support that empowers the local community to partner with competitive telecommunications carriers to utilize redirected support to deploy broadband facilities. The RTCN will be proposing changes in Commission rules and policies to permit such community-based collaboration. The proposed approach will be beneficial in key aspects:

- Ensure local needs for broadband are addressed;
- Avoid permanently relegating rural areas to substandard services;
- Encouraging partnerships between traditional telecommunications carriers, wireless Internet service providers, public power, and other public entities; and
- Creating opportunities to also redirect federal support.

### **Changes Needed to Foster Public-Private Partnerships**

As the attached position paper explains, the most important change needed to facilitate public-private partnerships is improved relationships and communications between public entities and private telecommunications carriers. The Task Force has also recognized this.

Legislation, however, is needed to make partnerships involving the leasing of dark fiber less cumbersome. Current law is overly prescriptive and inserts the Commission into partnerships at times when there is no need. In addition to the attached position paper, the RTCN submits to the Task Force proposed legislation which would make the changes

described in the position paper. The RTCN proposal is substantially similar to the preliminary recommendation of the Task Force. We propose that the Legislature amend the dark fiber leasing statute in the following ways:

- Change the Commission's role from pre-lease rate-setting to dispute resolution;
- Eliminate the requirement that 50% of lease fees go to the Nebraska Internet Enhancement Fund; and
- Terminate the NIEF, transfer balance into NUSF.

Statutes that were intended to keep municipalities from creating barriers to deployment of telecommunications infrastructure may need enforceability measures as well as expansion to other public entities, such as counties, the state, and public power providers.

Thank you for your consideration of our recommendations. We would be happy to visit with any member of the Task Force or its staff to address any questions you might have.

Respectfully,



Andy S. Pollock

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Enclosures

## **Rural Telecommunications Coalition of Nebraska**

The Rural Telecommunications Coalition of Nebraska consists of the following rural independent telecommunications carriers, all of which have deployed fiber throughout their service territories:

- Arapahoe Telephone Company d/b/a ATC Communications
- Benkelman Telephone Company, Inc.
- Cambridge Telephone Company
- Cozad Telephone Company
- Diller Telephone Company
- Glenwood Network Services, Inc.
- The Glenwood Telephone Membership Corporation
- Hartman Telephone Exchanges, Inc.
- Hemingford Cooperative Telephone Co.
- Mainstay Communications
- Pierce Telephone Company, Inc.
- Plainview Telephone Company
- Southeast Nebraska Communications, Inc.
- Stanton Telecom, Inc.
- Wauneta Telephone Company
- WesTel Systems, d/b/a Hooper Telephone Company



**WITHHOLDING & REDIRECTION OF NUSF SUPPORT**  
**A Rural Telecommunications Coalition of Nebraska**  
**Position Paper**

**Executive Summary**

This paper outlines the position of the Rural Telecommunications Coalition of Nebraska (“**RTCN**”) on legislation passed by the Nebraska Legislature in 2018 and a proceeding currently underway at the Public Service Commission (“**Commission**”) to determine a process for withholding high-cost Nebraska Universal Service Fund (“**NUSF**” or “**Fund**”) support from eligible telecommunications carriers that have not made investments necessary to provide reliable voice and broadband services and redirecting that support to another carrier.<sup>1</sup> There is arguably no action more important to accelerating broadband deployment in underserved and unserved areas of the state.

In the past few years, the Commission has reformed the Fund, overhauling both the processes for contributions to the Fund and support from the Fund. Contribution reform was critical to stabilizing the Fund, which had declined precipitously for several years. Support reform was critical to ensuring reliable and stable support for those carriers that responsibly stewarded past universal service support and built networks capable of delivering broadband services to rural customers. Without such support, those networks were at risk. Support reform also established better accountability for utilization of NUSF support by requiring carriers to build first, then receive support after construction of networks capable of

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<sup>1</sup> The RTCN is made up of the following rural independent Nebraska telecommunications carriers: Arapahoe Telephone Company d/b/a ATC Communications, Benkelman Telephone Company, Inc., Cambridge Telephone Company, Cozad Telephone Company, Diller Telephone Company, Glenwood Network Services, Inc., The Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hemingford Cooperative Telephone Co., Mainstay Communications, Pierce Telephone Company, Plainview Telephone Company, Southeast Nebraska Communications, Inc., Stanton Telecom, Inc., Wauneta Telephone Company and WesTel Systems f/k/a Hooper Telephone Company.

broadband delivery. This reform has created a sound system that incentivizes deployment in areas of the state lacking broadband.

When it comes to processes for withholding and redirecting support, it is the position of the RTCN that processes should be established to protect investments made by carriers that responsibly stewarded past universal service support and built networks capable of delivering broadband services to rural customers, thus complementing the reforms already undertaken, as mentioned above. For areas lacking broadband, the processes should force change when carriers do not respond to the support incentives the Commission has established. When carriers do not deploy broadband-capable facilities, even when incented to do so, future support should be withheld and redirected to carriers that have a proven track record of deploying rural broadband networks.

### **Background**

In 2018, the Nebraska Legislature passed LB 994, which established the Rural Broadband Task Force, and directed the Public Service Commission (“**Commission**”) to adopt rules and regulations establishing standards for withholding Nebraska Universal Service Fund high-cost support from any eligible telecommunications carrier (“**ETC**”) not satisfactorily serving its customers and redirecting that support to another carrier.<sup>2</sup> The bill requires the Commission to establish a process to redirect support to another ETC and empowered the Commission to conduct reverse auctions for that purpose.<sup>3</sup>

The legislation was passed in response to mounting public pressure to accelerate broadband to all areas of the state. Throughout the state are rural areas, including communities, that do not have access to broadband services.

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<sup>2</sup> The section of LB 994 that addresses the withholding of support was codified at Neb. Rev. Stat. § 86-330.

<sup>3</sup> NEB. REV. STAT. § 86-330.

Senator Curt Friesen, a farmer from rural York County, who chairs the Transportation & Telecommunications Committee, introduced LB 994 at a hearing before his committee on February 5, 2018, saying:

This bill was introduced in response to the public hearing our committee conducted during the interim, LR 176, which was a study of the rural broadband in Nebraska. I believe it is vital to Nebraska's future well-being that our rural residents have the same opportunities to participate in the information highway as our urban residents. And that is currently not the case. As we have heard in testimony from our hearings in McCook, Central City, and Lincoln, ***in many cases rural Nebraskans have extremely slow internet speeds which prevent them from fully utilizing the technology they need to compete in the world economy.*** LB 994 is a bill which I hope jump-starts the process for bridging the digital between rural and urban Nebraska.<sup>4</sup>

During first-round floor debate on LB 994, Sen. Friesen reiterated these concerns and provided statistics.

Based on research we did in anticipation of our LR 176 hearings, about 55,000 Nebraskans have no wired Internet providers. Almost 70 percent of Nebraskans without access to fixed advanced telecommunications live in rural areas of the state.<sup>5</sup>

Senator Lynn Walz of Fremont, while voting to advance LB 994 to second-round debate, expressed concerns that the issue of rural broadband had already been studied too much, and it was time for action. During debate, Sen. Walz said:

Almost all facets of a community, from education to healthcare to agriculture to economic opportunities, can be drastically improved by high-speed Internet. Recently, more populated areas of the state, such as Lincoln and Omaha, have been able to utilize these benefits for their residents, while many, if not most, rural communities are left without them at critical moments of growth and change. Nebraska currently ranks toward the bottom in the country in Internet speeds; 51 percent

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<sup>4</sup> Transportation and Telecommunications Committee hearing on LB 994 (February 5, 2018), p. 24 (emphasis added).

<sup>5</sup> Transcript of Legislative Floor Debate (March 27, 2018), p. 116.

of Nebraska's rural population do not have access to broadband services.<sup>6</sup>

Senator Friesen's LB 994 advanced smoothly to Final Reading. It was passed by the Legislature on a near unanimous vote. Of the 49 senators, all but one voted to pass the bill, and the one was excused during the vote and had nothing to say about the bill at any stage of debate. No senator at any point challenged the reverse auction provisions of LB 994.

Codified at section 86-330 of the Nebraska statutes, the portions of LB 994 allowing for withholding and redirection of support provide:

Based on consumer complaints or upon its own motion, the Public Service Commission may open a docket to consider the implementation and operation of a reverse auction program that awards funding to broadband Internet service providers to support high-speed Internet infrastructure deployment projects in unserved or underserved exchanges within the State of Nebraska. The commission may, in its discretion, withhold funding from the Nebraska Telecommunications Universal Service Fund to any telecommunications company that has not served, to the commission's satisfaction, those areas with service that meets the criteria for successful investment of funding from the Nebraska Telecommunications Universal Service Fund.

The commission shall adopt and promulgate rules and regulations that establish standards governing the withholding of funding from the Nebraska Telecommunications Universal Service Fund from any recipient, including the provision of notice and the right to a hearing prior to the issuance of an order withdrawing such funding. If the commission withdraws funding from the Nebraska Telecommunications Universal Service Fund from any telecommunications company, the commission may use the funding that is withdrawn to implement and operate a reverse auction program, except that any funding that is withdrawn shall be utilized in the exchange area for which the funding was originally granted. The commission shall have wide discretion in the design, implementation, and operation of a reverse auction program but may use as a guide the program designed by the Federal Communications Commission in its Connect America Fund Phase II Auction process.

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<sup>6</sup> Transcript of Legislative Floor Debate (March 27, 2018), p. 118.



Following this statute, the Commission opened a rulemaking proceeding, seeking public comment on proposed rules and regulations.<sup>7</sup> The Commission has made clear that it does not expect to adopt the rules as originally proposed. Rather, the initial draft of rules and regulations were intended to spur discussions about the best approach to withhold and redirect support. Several parties, including the RTCN, advocated for detailed rules that give carriers clear expectations as to when support might be withheld.

### **RTCN Position**

The RTCN is a group of independent rural Nebraska telecommunications carriers that have deployed fiber throughout their respective territories. All have deployed fiber at least to the node throughout their territory. The term “node” is common language referring to equipment that serves as a hub close enough to the end user to allow broadband speeds. Many of the carriers have built fiber to the end users’ premises –businesses, farms, ranches, and homes. Fiber is the most reliable means of providing broadband at the highest speeds. While critical of the proposed rules for lacking in clear standards, the RTCN believes the Commission’s rule-making is critical to accelerating the pace of broadband deployment in Nebraska. In its initial public comments to the Commission after the release of the Proposed 202 Rules, the RTCN said:

A reverse auction, which is required by LB 994, should be the last resort. The Commission should develop alternate methods for redirecting support that allow for more collaboration between not only the incumbent and competitor or competitors that ultimately receive the dedicated support, but also the local business community, both main street and agriculture, as well the hospitals, schools, municipalities, counties, and public power providers.

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<sup>7</sup> In the Matter of the Commission, on its own motion, seeking to establish Title 291, Chapter 16, to adopt Reverse Auction and Wireless Registry rules and regulations in accordance with Nebraska Legislative Bill 994 [2018], Rule and Regulation No. 202, *Order Opening Docket, Releasing Proposed Rules, Seeking Comment, and Setting Hearing* (March 12, 2019) (“**Proposed 202 Rules**”).

In early August 2019, the Commission conducted a public workshop to foster dialogue on the proposed rules and regulations. The Commission is currently working on its first revisions to the proposed rules, and has announced its intention of conducting a second public workshop to allow more discussion of the rules.

The RTCN has developed a proposal for allowing local collaboration as an alternative to reverse auctions. The proposal calls for a two-step process, which is outlined below.

### **Commission Expectations**

Prior to engaging in action to withdraw or redirect support, however, the RTCN would recommend the Commission establish deployment expectations for carriers receiving support. Recognizing the Commission is both a quasi-political and quasi-judicial body, these expectations should reflect both the public political pressure for accelerated broadband deployment and due process requirements of law.

First, consistent with its approach to reforming NUSF support, the Commission should establish a requirement that carriers' systems be capable of delivering Internet services at a download speed of twenty-five megabits per second and a minimum upload speed of three megabits per second (“**25/3**” or “**Broadband**”). Originally, the Commission's priority in distributing NUSF support was the construction, operation, and maintenance of infrastructure necessary to carry voice communications, specifically referred to under Nebraska law as “telecommunications services.” The same infrastructure is also capable of providing Internet services, which is referred to as an information service under Nebraska law. Commission policy has evolved over the past 20 years to give greater emphasis on information service and specifically high-speed information services now called Broadband. Many Nebraska carriers have deployed infrastructure, usually fiber, capable of providing Broadband services. Those carriers used both equity and debt to construct Broadband networks. After deployment, carriers relied on a combination of federal and NUSF high-cost

support to make a return on investment and service debt. Not all carriers, however, utilized support to deploy fiber throughout their service territories. Copper plant was used to continue to provide voice services. This copper plant, however, was incapable of providing Broadband services to all customers, especially in rural areas, because copper cannot carry data at high speeds over long distances. Thus, while support may have been used to maintain and operate copper infrastructure and provide voice service, it was not used to construct fiber infrastructure and the associated electronics capable of providing Broadband. In its docket to reform NUSF high-cost support, the Commission has shifted its focus to supporting infrastructure not only capable of transmitting voice services, but also capable of providing Broadband.<sup>8</sup> In this proceeding, the Commission should make a clear declaration that NUSF support must be used only for systems capable of providing both reliable voice and reliable Broadband services.

Second, the Commission should find a reasonable balance between the fact that networks capable of delivering Broadband are not constructed overnight with the urgency of Broadband deployment as a critical factor to reversing rural economic decline. Currently, the Commission requires carriers to annually file reports in on-going proceedings docketed NUSF-25 and NUSF-66.<sup>9</sup> In each of those proceedings, the Commission annually recertifies Nebraska carriers for federal support (NUSF-25) and state support (NUSF-66). Rules of the Federal Communications Commission (FCC) require annual certification by the state commission.<sup>10</sup> The Commission established its requirements for recertification in 2007 and

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<sup>8</sup> In the Matter of the Nebraska Public Service Commission, on its own Motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements, NUSF-108, Progression Order No. 3, *Findings and Conclusions* (November 19, 2018).

<sup>9</sup> See In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for the purpose of certifying the use of federal universal service support; and In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for the purpose of certifying the use of state universal service support, NUSF-25/NUSF-66, Progression Order No. 20 (September 11, 2007).

<sup>10</sup> 47 C.F.R. § 54.314.

has not updated them since. The reporting required is minimal. One year of historical investment data must be provided, as well as investment plan looking forward one year. The Commission should modify the NUSF-25/66 reporting to provide meaningful public information about each carrier's deployment plans looking forward for whatever period of time is required to complete build-out in all areas served by the carrier. This period should be no more than 10 years. Current ACAM requirements do not exceed 10 years. Requirements for Price Cap carriers are now considerably less than 10 years. Further, plans required under NUSF-25/66 should include Commission-approved milestones to ensure timely deployment. These milestones should be consistent with federal milestones, although state increments might be shorter. Areas for which milestones are not reached should be subject to the withholding and redirection of support. This process would provide incentives for deployment while establishing accountability and controls that have been lacking in the past. In the same vein, the RTCN urges the Commission to enhance its threshold requirements for a carrier to become an Eligible Telecommunications Carrier. Higher standards will be critical to ensure that support is properly utilized for intended purposes in a more competitive marketplace.

Third, the Commission should prioritize unserved and underserved areas subject to withholding. Areas most critically in need of improvement should be prioritized. This need not be complicated. Looking at simple metrics will allow the Commission to establish priorities. Foremost should be areas that lack reliable basic voice services and are considered unserved when it comes to Broadband. Metrics should include the number of outages caused by plant failure (as opposed to external causes such as fiber cuts), the number of subscriber complaints relative to the total number of subscribers, as well as carriers' past demonstrated use of allocated Broadband deployment support.

These preliminary matters need only be outlined in the Proposed 202 Rules. Further details can be spelled out in policies and guidelines established by the Commission within the framework of the Proposed 202 Rules. For example, the NUSF-25/66 reporting requirements may and should be modified in those proceedings by Commission order.

### **Step One: Withholding Support**

By the Commission's own motion or customer complaint, formal or informal, the Commission should be able to open an investigation into service quality by an incumbent local exchange carrier ("**ILEC**") in one or more of its exchanges. While the Commission should not foreclose the possibility of withholding support for areas smaller than exchanges when necessary to best address the needs of a particular area or community, exchange-level withholding should be the standard for two primary reasons. First, ILECs should not be encouraged to neglect rural, less populated, higher cost areas, thinking the areas can simply be shed, knowing more profitable areas in an exchange will be preserved. Second, carriers interested in serving an unserved area should not be discouraged from doing so because more lucrative areas, which might help the carrier afford to serve the unserved area with less reliance on NUSF support, are off limits. Additionally, exchange-level scrutiny might best encourage cooperative efforts to address the needs of all customers in an exchange. For example, two competitive carriers might cooperate or even partner to serve the entire exchange in which support has been withheld. Most Nebraska exchanges include both rural and municipal areas. In such exchanges, an ETC that has a solid track-record of providing Broadband in rural areas might partner with a competitive carrier that has a solid track-record of providing service in municipalities.

The precise process need not be defined by rules and regulations. Rather, it should be consistent with the Rules of Commission Procedure.<sup>11</sup> The Commission after opening the investigation could allow a brief period of time for any entity to notify the Commission of its intent to submit a community-based plan. If no entity notifies the Commission of its intent within that period, the Commission could move directly to a reverse auction. If an entity or entities do notify the Commission, then the Commission could establish a procedural schedule for accepting community-based plans and set a hearing. All of this, or a variation thereof, could take place under the existing Rules of Commission Procedure.

Early in the investigation, the Commission should determine the amount of support going to the ILEC for any exchange subject to the investigation. This information will be important to both the ILEC and the community served by the ILEC, which will need to begin assessing alternative carriers.

The investigation must balance the needs of the community with the ILEC's commitment to the exchange. Factors for assessing community needs should include the extent to which reliable Broadband is available and whether rates for Broadband services are reasonably comparable to rates in urban areas. Factors for assessing the ILEC's commitment to the exchange should include the extent of plant depreciation, the carrier's obligations to lenders, whether the carrier is meeting federal or state milestones for deployment tied to funding, the extent of fiber deployment throughout the exchange, and credible plans the carrier has for near-future deployment.

The investigation should include a hearing conducted in the area at issue to ensure that the public in the area has a chance to weigh in. Following the investigation and hearing, the Commission, in accordance with existing procedural rules and practices, would enter a

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<sup>11</sup> NEB. ADMIN. CODE, tit. 291, ch. 1.



formal written order spelling out its findings of fact and final decision on whether to withhold support. If findings support withholding NUSF support, then, pending approval of a redirection plan, the Commission would order NUSF to be withheld, pending approval and execution of a community-based plan to utilize redirected support.

Because withdrawal of support may have the effect of impairing an ILEC's business operations and risk stranding investment in areas, the Commission's rules and regulations on this issue should clearly spell out both the process to be employed and the criteria upon which decisions are made.

### **Step Two: Redirection of Support**

As mentioned above, a reverse auction should be the last resort, and used only when there is no other feasible plan for redirection of support. The Commission should allow for community-based collaboration to determine how support should be redirected. A reverse auction is, in essence, a race to the bottom. Reverse auctions at the federal level have resulted in winning bidders that are wireless Internet service providers (“WISPs”). This is not to say there is not a role for WISPs. The RTCN believes that local WISPs are playing, and should continue to play, an important role in providing Internet services to residents for whom landline-based service is not a feasible option. Several RTCN members operate fixed wireless networks. In some instances, fixed wireless service may be the best long-term solution. In others, WISP service may be a transition step until fiber deployment is feasible. The Legislature has declared that affordable and reliable Broadband is important to Nebraska residents.<sup>12</sup> It is important to Nebraska residents because it is critical not only for entertainment and basic communications, but also for ensuring quality education and healthcare, as well as the ability to compete in today's world market. This is especially true

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<sup>12</sup> NEB. REV. STAT. § 86-323(1).

in today's agricultural marketplace, where precision technology is increasingly important to a business's success. Because of the importance of affordable and reliable Broadband, it is critical that the Commission establish methods for redirecting support that allow for the acceleration of deployment without forcing a race to the bottom, which might perhaps result in the short-term expenditure of fewer NUSF funds, but would relegate Nebraskans to less reliable services or services that may soon become obsolete. The experience of RTCN members that have employed fixed wireless networks to provide Internet service has demonstrated that the systems are relatively unreliable and not economical over the long-term.

The Commission has declared its preference for fiber as a long-term and economical means of providing Broadband service across Nebraska:

The Commission also sought comments on its desire to support fiber-based networks everywhere in high cost rural areas. We sought comment on this goal as we believed fiber may be the better long term investment. Again, we recognize the need to balance this goal with other objectives, making sure that communications services are affordable and reasonably comparable throughout the state. To the extent that other long term wireline broadband solutions are scalable for the future and meet the Commission's objectives that broadband be developed based upon a comprehensive deployment plan that will coalesce with the needs of consumers, including but not limited to those imposed in a Next Generation 911 environment, the Commission will consider those alternatives.<sup>13</sup>

The RTCN believes community-based plans for redirecting NUSF support are superior to reverse auctions. Once a determination by the Commission has been made to withhold support from the ILEC for an exchange, the Commission should accept applications

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<sup>13</sup> In the Matter of the Nebraska Public Service Commission, on its own motion, to consider revisions to the universal service fund contribution methodology, App. No. NUSF-100/PI-93, Order and Order *Seeking Further Comments and Setting Hearing* (February 22, 2017), p. 19.

for community-based support redirection plans. To be eligible for consideration, the plan must include participation by an ETC certified by the Commission.

The Commission should establish criteria for objectively scoring community-based applications. Factors should include:

- The ETC's history of providing rural telecommunications and Broadband services;
- Whether the proposed technology has been proven to be capable of providing Broadband services in remote areas;
- The support of local main street business, hospitals, schools and colleges, agricultural producers, and residents;
- Partnerships and other cooperative arrangements with local public power providers and established local WISPs; and
- Cooperation with the ILEC from which support has been ordered withheld.

Before moving on to the Commission determination on redirection of support, a word more on the final scoring criteria: cooperation with the ILEC. The system of publicly funded high-cost support in Nebraska is binary. State support complements federal support.<sup>14</sup> Withholding and redirecting state NUSF support alone will not likely accomplish the goal of accelerating Broadband deployment, and may actually be counterproductive. Only by ensuring the ILEC “has a place at the table” will the Commission ensure that state and federal support complement one another toward reaching the goal of accelerated Broadband buildout.

After the Commission has selected the best community-based plan, it should make a long-term commitment to redirect support to allow for implementation of the plan and the provision of ongoing support sufficient to maintain and operate the network, consistent with current NUSF-108 policies. To ensure that the plan is implemented, the Commission should establish milestones for deployment and subject the ETC to robust NUSF-25/66 reporting requirements. After the plan is in place and executed, support for the ILEC should cease; the ILEC's ETC designation, both federal and state, should be revoked; and the carrier of last

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<sup>14</sup> NEB. REV. STAT. § 86-317.

resort obligations should be transferred from the ILEC to the ETC participating in the selected community-based plan.

Beyond establishing a basic process for considering community-based collaborative plans and adopting the scoring criteria for objectively evaluating the plans, the Commission's rules should not be overly prescriptive. Cooperation and collaboration will be better fostered by the absence of unduly detailed rules and regulations.

### **Reverse Auction**

If no acceptable community-based plan is submitted, the Commission should commence a reverse auction to redirect support.

**PUBLIC-PRIVATE COOPERATION  
A Rural Telecommunications Coalition of Nebraska  
Position Paper**

**Executive Summary**

This paper outlines the position of the Rural Telecommunications of Nebraska (“RTCN”) on changes needed to allow public entities, including electric utilities, municipalities, counties, and the State, to partner with private telecommunications providers to accelerate the deployment of broadband infrastructure in rural Nebraska.<sup>1</sup> The issue of public-private partnerships has attracted much attention in the past few years and has been the subject of legislation, most recently brought by Sen. Lynn Walz of Fremont.<sup>2</sup> In particular, the idea of utilizing partnerships between public power providers and telecommunications to accelerate broadband deployment in rural areas has become more popular as demand for broadband services has increased.

**History**

This paper will not belabor the history of a rocky relationship between the telecommunications and electric utility industry in Nebraska. Its focus is the future and not the past. The industries battled in the late 1990s and early 2000s over the role of public power in providing broadband to rural areas of the state. The dispute was resolved by the Legislature in 2001 when it passed LB 827, introduced by Sen. Curt Bromm, who then chaired the Transportation & Telecommunications Committee, and co-sponsored by Speaker

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<sup>1</sup> The RTCN is made up of the following rural independent Nebraska telecommunications carriers: Arapahoe Telephone Company d/b/a ATC Communications, Benkelman Telephone Company, Inc., Cambridge Telephone Company, Cozad Telephone Company, Diller Telephone Company, Glenwood Network Services, Inc., The Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hemingford Cooperative Telephone Co., Mainstay Communications, Pierce Telephone Company, Plainview Telephone Company, Southeast Nebraska Communications, Inc., Stanton Telecom, Inc., Wauneta Telephone Company and WesTel Systems f/k/a Hooper Telephone Company.

<sup>2</sup> LB 208 (2019).

Doug Kristensen, and Senators Dwite Pedersen and Bob Wickersham. The legislation included a clear prohibition against public power districts providing telecommunications services and established a process by which public power districts could lease dark fiber.<sup>3</sup>

While LB 827 may have resolved differences between the industries, it did not bring them together. Very few dark fiber leases were executed pursuant to the law. More importantly and regrettably, the industries largely withdrew from one another and did little to work together to improve rural communications services. These tensions did nothing to help broadband deployment in rural Nebraska.

Growing public pressure for better broadband deployment in rural areas in recent years has been directed not only at the telecommunications industry, but also at the electricity industry, most likely because of the ubiquitous presence of electric infrastructure throughout rural areas of the state.

### **Overcoming History**

Over the past two years, representatives of the RTCN have been meeting with public power representatives in an effort to build better relationships and begin discussing the possibility of cooperating to help bridge the digital divide. Those discussions have proven beneficial, and others in the telecommunications industry, including Hamilton, Consolidated, and Nebraska Central Telephone have begun meaningful engagement with public power. The Nebraska Telecommunications Association has established a repository of information showing where territories of telecommunications carriers and public power providers overlap so carriers know the utility with which they might explore cooperative opportunities. Deepening these relationships is essential to improved communications and increases the likelihood of cooperative efforts that might help accelerate rural broadband deployment. For

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<sup>3</sup> NEB. REV. STAT. § 86-577.



those efforts to be beneficial, they need to take place at the local level. State policy and law should accommodate and facilitate local collaboration between two industries that have finally seen the value of working together.

### **The Case for Mutual Change**

The RTCN believes that communications and cooperation between telecommunications carriers and public power providers will help accelerate the pace of broadband deployment in currently underserved rural areas of Nebraska. The public power industry, speaking through the voice of the Nebraska Rural Electric Association, has been consistent in recent years in not protesting the existing prohibition against public utilities providing retail telecommunications or broadband services, asking merely for an opportunity to utilize public power infrastructure to assist private carriers in providing rural communications services. Public power providers and telecommunications carriers should open lines of communication at the local level, develop relationships of trust, and should regularly seek opportunities to cooperate and partner in ways that will accelerate deployment of broadband infrastructure.

The processes set up for the leasing of dark fiber by public power providers to private carriers has been criticized for being unduly burdensome and restrictive. The process requires prior approval by the Public Service Commission (“**Commission**”) of dark fiber leases, including a determination by the Commission that the lease rate is a market rate.<sup>4</sup>

The RTCN agrees that the process for leasing dark fiber is unnecessarily complicated and should be changed. The RTCN believes there is no need for the Commission to establish a market rate. The statute serves the useful purpose of ensuring rates are neither too high nor too low, but that purpose can be achieved by less burdensome measures. The concern

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<sup>4</sup> NEB. REV. STAT. § 86-577(1)(a).

regarding high rates is obvious: a public power provider could effectively prohibit a particular private carrier from leasing by virtue of setting lease rates artificially high. While less obvious, the concern regarding low rates is equally real. A public power provider could cut a sweetheart deal with an Internet service provider, effectively eliminating the opportunity for a telecommunications carrier to utilize the dark fiber to provide voice or more robust broadband services. Somehow, the private carrier must have a forum for objections to discriminatory rates, as well as recourse.

This could be accomplished by removing the Commission from the role of prior approval of leases while establishing the Commission as arbiter of disputes about discriminatory rates. The parties should be required to file all dark fiber leases with the Commission. The rates in those leases should be published. The leases should go into effect within 30 days of published notice unless an objection is filed. A similar streamlined process applies to changes in most telecommunications rates, and the process has been remarkably problem-free, and few, if any, objections to filed rates have been lodged.

Regardless of the option selected to simplify dark fiber leasing, the RTCN sees no need to continue the requirement that 50 percent of the profits from dark fiber leases go to the Nebraska Internet Enhancement Fund. That fund is not necessary or significantly beneficial and should be eliminated.<sup>5</sup> These changes in law would remove unnecessary regulatory obstacles that may discourage dark fiber leasing by public power providers to private telecommunications carriers.

On the other hand, private carriers have been impeded in their efforts to deploy fiber by public power providers and other public entities that have been unwilling to make poles and rights of way accessible to private carriers at affordable rates. In some instances, public

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<sup>5</sup> NEB. REV. STAT. § 86-577(1)(c).

entities have denied access to such poles and rights of way altogether. In other instances, despite law that appears clear on its face, municipalities and other political subdivisions require impermissible fees that impose a burden on broadband deployment.

Recognizing the importance of communications in all areas of the state, the Legislature in Section 86-704(1) opens with a definitive pronouncement that telecommunications infrastructure belongs in public rights-of-way:

Any telecommunications company, incorporated or qualified to do business in this state, is granted the right to construct, operate, and maintain telecommunications lines and related facilities along, upon, across, and under the public highways of this state, and upon and under lands in this state, whether state or privately owned, except that (a) such lines and related facilities shall be so constructed and maintained as not to interfere with the ordinary use of such lands or of such highways by the public and (b) all aerial wires and cables shall be placed at a height of not less than eighteen feet above all highway crossings.

The refusal of public entities to cooperate with private carriers by providing access to public poles and rights of way is an unjustified impediment to rural broadband deployment. In 1999, the Nebraska Legislature amended section 86-704 relating to telecommunications carriers' use of public highway rights-of-way, requiring municipalities to provide access to rights-of-way for telecommunications facilities. The law also restricted the fees associated with the use of those rights-of-way to limited occupation taxes and one-time fees for construction permits. On-going assessments are not allowed. The law is clear:

A public highway construction permit fee or charge to the extent that the fee or charge applies to all persons seeking use of the public highway in a substantially similar manner. All public highway construction permit fees or charges shall be directly related to the costs incurred by the municipality in providing services relating to the granting or administration of permits.

Any highway construction permit fee or charge shall also be reasonably related in time to the occurrence of such costs.<sup>6</sup>

Consideration should be given to extending those requirements and restrictions to all public rights-of-way (e.g., state highways, county roads, etc.) and other infrastructure, such as utility poles. Further, instances of municipalities continuing to impose fees that violate the 1999 law demonstrate that the law might need further tightening or that additional oversight might be necessary.

Finally, the RTCN believes that while the Legislature should generally simplify the dark fiber leasing process, the law should be tightened to make sure that dark fiber, which is a public asset, is leased only to communications carriers subject to oversight by the Commission. Current law allows leasing to any internet service provider. The RTCN is not suggesting that carriers leasing dark fiber from public utilities must be certificated as common carriers or permitted as contract carriers by the Commission to provide service, but they should be required to be certified by the Commission as eligible telecommunications carriers. Such tightening of the law will ensure that the Commission retains its critical role in overseeing and incentivizing the deployment of infrastructure necessary to provide broadband and telecommunications services throughout rural Nebraska. It will also ensure fair competition.

Neither this limited tightening of dark fiber leasing laws nor the recommendation that the Commission be responsible for resolving disputes concerning dark fiber lease rates should be taken to suggest that the Commission have any regulatory authority over public utilities when it comes to the electric services they provide. Nebraska has a long-established system of regulating electric service at the local or district level. State regulation is extremely

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<sup>6</sup> NEB. REV. STAT. § 86-704(4)(a)(ii).

limited, and essentially applies only when there are disputes between power providers as to service territory. The Power Review Board has a history of successfully resolving those disputes. Dark fiber, when used for providing communications to serve internal operational needs of the utility, should not be subject to regulation by the Commission. Only when those utilities use dark fiber for purposes of providing communications services to the public (through a private partner), should it be subject to some degree of Commission oversight.