

## **FINAL AGENCY DECISION**

Docket No. 19OCIO001<sup>1</sup>

November 25, 2019

West Liberty Telephone Co.  
Jerry Melick  
413 North Calhoun Street  
West Liberty, IA 52776

Dear Mr. Melick:

In response to the Notice of Appeal (“**Appeal**”) filed by West Liberty Telephone Co. (“**Appellant**”) pursuant to and in accordance with Iowa Administrative Code rules 129—20.5(1) and (2), and following the Office of the Chief Information Officer of the State of Iowa’s (“**Office**”) notification of and opportunity for input from affected persons and parties pursuant to and in accordance with Iowa Administrative Code rule 129—20.5(3), the Office has conducted an internal review of all relevant evidence and information both submitted in connection with this Appeal and otherwise available to the Office related to the United States Census Blocks (“**Census Blocks**”) forming the basis of this Appeal. *See* Iowa Admin. Code r. 129—20.5(4). Following its review of the entire record before it, the Office issues the following **FINAL AGENCY DECISION** (“**Decision**”). Iowa Admin. Code r. 129—20.5(5).

### **I. ISSUE(S) ON APPEAL.**

Whether the Office correctly determined the Census Blocks forming the basis of this Appeal constitute “Targeted Service Areas” (“**TSAs**”)<sup>2</sup> as defined by Iowa Code section 8B.1(12).<sup>3</sup>

### **II. BACKGROUND FACTS, LAW, AND PROCEEDINGS.**

In 2015 House File 655 (“**H.F. 655**”) was signed into law. 2015 Iowa Acts, H.F. 655, ch. 120. H.F. 655 created several programs the Office was responsible for or involved in administering, including a

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<sup>1</sup>Appellant filed an “Affirmation, Attestation, and Certification of Service or lack of Service in Census Block Broadband Grants Program Broadband Availability Map Challenge Process” (“**Certification**”) to initiate this Appeal. The Office considers this Certification to constitute a proper Notice of Appeal that comports with the form and content requirements of Iowa Administrative Code rule 129—20.5(1).

<sup>2</sup>As used in this Decision, the term “non-TSA” shall refer to a Census Block that does not constitute a “Targeted Service Area” as defined by Iowa Code section 8B.1(12).

<sup>3</sup>Any references to Iowa Code chapter 8B (2019) (or any sections or subsections therein) throughout this Decision shall be understood to reference Iowa Code chapter 8B as amended by 2019 Iowa Acts, House File 772, chapter 159, Division II. In addition, capitalized terms used in this Decision but not otherwise specifically defined herein shall have the same meaning given them by Iowa Code chapter 8B.

Broadband Grants Program and a Property Tax Exemption Program. *Id.*, Div. III and IV (codified, in relevant part, at Iowa Code chapter 8B and Iowa Code section 427.1(40)). At a high level, these programs were designed to reduce or eliminate areas in the State that did not have access to Broadband service at minimally acceptable speed thresholds. *Id.* In order to identify these unserved areas and best direct the incentives available through these programs, HF 655 required the Office to make determinations of whether any Communications Service Providers already offered or facilitated Broadband service at or above twenty-five megabits per second of download speed and three megabits per second of upload speed (“25/3”) as of July 1, 2015, on an individual Census Block basis by reference to Broadband availability maps or data sources that are widely accepted for accuracy and available for public review and comment. *Id.* §§ 26, 31, 32, 41. These “Targeted Service Areas” were generally considered eligible to receive State incentives. *Id.* In 2016, the Office documented and communicated its Targeted Service Area determinations by publishing Version 1 (“V1”) of the Statewide Broadband Availability Map (“Map”). Iowa Admin. Code r. 129—20.3, .4 (October 26, 2016).

As required by H.F. 655, following the official publication of V1 of the Map, the Office opened and administered a process by which interested parties could “challenge[] . . . the office’s finding on whether an area meets the definition of a targeted service area” as represented on V1 of the Map. *Id.* § 31; Iowa Admin. Code r. 129—20.4, .5. As part of this process, the Office received seven (7) notices of appeal challenging the Office’s determination with respect to approximately 698 Census Blocks. *See Broadband Map Version 1 Appeals*, OCIO.IOWA.GOV (last visited Nov. 1, 2019), <https://ocio.iowa.gov/broadband-map-version-1-appeals>. In accordance with Iowa Administrative Code rule 129—20.5(5), after considering the evidence and information submitted to or otherwise available to the Office, the Office issued final decisions concerning all of the Census Blocks forming the basis of appeals received by the Office. *Broadband Map Version 1 Appeals*, *supra*. No further appeals were taken from the Office’s final decisions, rendering the V1 of the Map, in its entirety, final and no longer subject to challenge. Iowa Administrative Code rule 129—20.4, .5(5). The Office administered the Broadband Grants Program and a Property Tax Exemption Program by reference to V1 of the Map until 2019.

In 2019, House File 772 (“H.F. 772”), the Empower Rural Iowa Act, was signed into law. 2019 Iowa Acts, H.F. 772, ch. 159. Division II of H.F. 772 continued the Broadband Grants Program and Property Tax Exemption Programs for Broadband infrastructure installed through 2025. *Id.*, Div. II. Under H.F. 772, the core pillars of these programs remained unaltered, including, subject to several modifications described in more detail below, as it relates to the Targeted Service Area determination process and related mapping processes. *Id.* Specifically, H.F. 772 retained the “Targeted Service Area” concept and continued to require that the Office make determinations of whether any Communications Service Provider already offered or Facilitated Broadband service at or above a certain speed threshold by reference to Broadband availability maps or data sources that are widely accepted for accuracy and available for public review and comment. *Id.* §§ 3, 5, 6, 13. And the Office would continue to document and communicate these Targeted Service Area determinations by publishing a Statewide Broadband Availability Map. Iowa Admin. Code r. 129—20.3, .4 (Aug. 14, 2019). However, H.F. 772 made the following key modifications to the Census Block eligibility process—whether a census block constitutes a Targeted Service Area and is thereby eligible for State incentives: First, H.F. 772 defined the previously undefin

ed concept of “Facilitate” to mean “a communication service provider’s ability to provide broadband service at or above the download and upload speeds specified in the definition of targeted service area in this section to a home, farm, school, or business within a commercially reasonable time and at a commercially reasonable price upon request by a consumer.” 2019 Iowa Acts, H.F. 772, ch. 159 § 2 . This had the effect of establishing a standard Communications Service Providers must satisfy before reporting or claiming that they are able to Facilitate Broadband service at or above 25/3 in a Census Block, thereby rendering a Census Block a non-TSA and ineligible to receive State incentives.

- Second, H.F. 772 tied the speed benchmark for purposes of determining whether a Census Block constitutes a Targeted Service Area—previously fixed by statute at 25/3—to “the download and upload speeds identified by the federal communications commission pursuant to section 706 of the federal Telecommunications Act of 1996, as amended.” *Id.* § 3. In practice, this did not immediately impact any programs administered by the Office, as “the FCC[s] . . . existing speed benchmark [for fixed services is] 25 Mbps download/3 Mbps upload”—the same download and upload speed previously established by state law. *2018 Broadband Deployment Report*, FCC.GOV (last updated Feb. 2, 2018), <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report>.
- Third, H.F. 772 eliminated an “as of date” that was set at a fixed point in time. Under H.F. 655, the relevant point in time for Targeted Service Area determinations was fixed at July 1, 2015. 2015 Iowa Acts, H.F. 655, ch. 120, § 26 (defining “Targeted service area” to be tied to service delivery as of the effective date of the Act—July 1, 2015). This resulted in the creation of a static Map. In contrast, H.F. 772 was silent on the issue, affording the Office greater flexibility. 2019 Iowa Acts, H.F. 772, ch. 159, § 3 (eliminating statutory “as of date” concept). In turn, the Office established an “as of date” that is tied to the “as of date of the broadband availability maps and corresponding data sources utilized by the office in determining whether a communications service provider offers or facilitates broadband service in a particular census block at or above the download and upload speeds specified in the definition of targeted service area and underlying the statewide map published and then in effect.” Iowa Admin. Code r. 129—20.1; *see also id.* r. 129—20.3, .4(1). Relatedly, H.F. 772 affirmatively required the Office to “periodically make renewed determinations of whether a communications service provider offers or facilitates broadband service at or above the download and upload speeds specified in the definition of targeted service area in section 8B.1, which shall, to the extent updated maps and data sources are available at the time, include making such determinations prior to each round of grant applications solicited by the office pursuant to section 8B.11.” 2019 Iowa Acts, H.F. 772, ch. 159, § 5. Collectively, these changes permit and require the Office to refresh the Map on a recurring basis.

Consistent with the foregoing, on September 20, 2019, the Office documented and communicated renewed Targeted Service Area determinations by publishing Version 2 (“V2”) of the Map. *See Broadband Map - Version 2*, OCIO.IOWA.GOV (last visited Nov. 1, 2019), <https://ocio.iowa.gov/broadband-availability-map-version-2>.<sup>4</sup> V2 of the Map is based on FCC Broadband Deployment data representing

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<sup>4</sup>Prior to the official publication of V2 of the Map, on July 29, 2019, the Office published a preliminary draft of V2 of the Map. The Office considered this preliminary draft to be a “Pre-publication Draft,” and elicited informal

the status of fixed Broadband in Iowa as of June 30, 2018, and therefore represents the status of fixed Broadband service in Iowa as of June 30, 2018. Iowa Admin. Code r. 129—20.1, .3, .4(1); *see also About Broadband Availability Map V2*, OCIO.IOWA.GOV (last visited Nov. 1, 2019), [https://ocio.iowa.gov/sites/default/files/about\\_section\\_-\\_broadband\\_availability\\_map\\_-\\_final\\_publication.pdf](https://ocio.iowa.gov/sites/default/files/about_section_-_broadband_availability_map_-_final_publication.pdf). In publishing V2 of the Map, the Office triggered a statutorily-required challenge period whereby “[w]ithin 20 days after [September 20], any person or party aggrieved or adversely affected by such determination may challenge the office’s finding by filing a notice of appeal with the office” and “provid[ing] the office with all evidence and information necessary to support the appeal.” Iowa Admin. Code r. 129—20.5(1); *see also* Iowa Code § 8B.10(2) (“The office shall establish procedures to allow challenges to the office’s finding on whether an area meets the definition of targeted service area.”). After the expiration of this initial twenty-day appeal window, the Office was to post any notices of appeal received by the Office online at [ocio.iowa.gov/broadband](https://ocio.iowa.gov/broadband). *Id.* r. 20.5(3). From the date of such posting, any other persons or parties affected by a challenge received by the Office would “have 20 calendar days to submit evidence and information in support of, or in opposition to, such appeal” to the Office. *Id.* After expiration of this second twenty-day submission window, the Office would “consolidate all appeals involving the same census block[s] and conduct an internal review of the evidence and information submitted by all appellants related thereto, in conjunction with any other evidence and information submitted by any affected persons or parties . . . , the maps and data sources originally utilized [by the office], and any other information deemed relevant by the office.” *Id.* r. 20.5(4). Thereafter, the Office would issue a final agency decision stating the reasons for the Office’s decision concerning the census block(s) in question.” *Id.* r. 20.5(5).

On October 4, 2019, within the initial twenty-day window, Appellant filed this Appeal. Therein, Appellant challenged the Office’s determination with respect to the following eleven (11) Census Blocks:

- 191390502005055
- 191390503003042
- 191390503003058
- 191390503003061
- 191390503001014
- 191390503001015
- 191390503001047
- 191390503003000
- 191390503001046
- 191390503002082
- 190314502004164

Supporting its Appeal, Appellant completed and submitted an “Affirmation, Attestation, and Certification of Service or lack of Service in Census Block Broadband Grants Program Broadband Availability Map Challenge Process” (“**Certification**”). Pursuant to this Certification, Appellant attested and certified under penalty of perjury that it offered or Facilitated 25/3 Broadband service in each of the eleven (11) Census

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feedback/comments, some of which were incorporated into this final publication of V2 of the Map. *See About Broadband Availability Map V2*, OCIO.IOWA.GOV (last visited Nov. 1, 2019), [https://ocio.iowa.gov/sites/default/files/about\\_section\\_-\\_broadband\\_availability\\_map\\_-\\_final\\_publication.pdf](https://ocio.iowa.gov/sites/default/files/about_section_-_broadband_availability_map_-_final_publication.pdf) for more information about V2 of the Map and the history of its creation.

Blocks forming the basis of its Appeal as of June 30, 2018. With respect to each of these eleven (11) Census Blocks, Appellant explained:

The 14<sup>5</sup> Census Blocks listed above have 25/3 or greater broadband packages via service from our FTTH network. The list of Census Blocks reflects a combination of an expansion of our FTTH network built out prior June 30, 2018, and customers were in the process of being cutover from DSL to this network. A few of the census blocks reflect the correction of some customers' records in our billing database. In the course of cleaning up our customer database, we found customers that had been converted to FTTH prior to June 30, 2018 were still listed as DSL. Our minimum broadband speed with FTTH is 50/2 Mbps. Annually, West Liberty Telephone buries new fiber optic cables and drops to rural customers in our ILEC study area. Over 35 miles were constructed in the spring of 2018, and this fall we are constructing approximately 40 miles of fiber optic cable to serve our rural customers. These mileage figures do not include fiber optic drops to customer premises. We will continue these annual rural fiber construction projects until all of our customers are served via FTTH. Currently over 80% of our customers are served via FTTH.

Appellant requested that these Census Blocks be designated as non-TSAs.

As required by Iowa Administrative Code rule 129—20.5(3), the Office posted this Appeal online on October 11, 2019. *See Broadband Availability Map - Version 2 Challenge Process*, OCIO.IOWA.GOV (last visited Nov. 1, 2019), <https://ocio.iowa.gov/broadband-availability-map-version-2-Challenge-process>. Over the course of the next twenty days, “[no other] affected persons or parties . . . submit[ted] evidence and information in support of, or in opposition to, such appeal.” Iowa Admin. Code r. 129—20.5(3). The Office subsequently conducted an internal review of all relevant evidence and information submitted by Appellant and otherwise available to the Office in connection with the Census Blocks forming the basis of this Appeal. *Id.* r. 20.5(4). Based on that review, the Office now issues the following Decision. *Id.* r. 20.5(5).

### III. DECISION(S) AND REASONING.

- **BLOCK IDs: 191390502005055; 191390503003042; 191390503003058; 191390503003061; 191390503001014; 191390503001015; 191390503001047; 191390503003000; 191390503001046; 191390503002082; 190314502004164.**
- **SUMMARY: APPEAL GRANTED.** The Office will designate the eleven (11) Census Blocks forming the basis of this Appeal as non-TSAs based on Appellant’s Certification that it offered or Facilitated 25/3 Broadband in these Census Blocks as of June 30, 2018, and the lack of any evidence or information to the contrary.

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<sup>5</sup>Appellant’s Certification listed fourteen (14) Census Blocks and also stated that it was challenging the designation of fourteen (14) Census Blocks. However, three (3) of the fourteen (14) Census Blocks listed by Appellant in its Certification were duplicates. Accordingly, this Decision addresses the designation of the eleven (11) *unique* Census Blocks identified by Appellant.

- **DETAILED RESPONSE:** With respect to the eleven (11) Census Blocks forming the basis of this Appeal, the Office has reviewed the evidence and information submitted by Appellant related thereto, in conjunction with the maps and data sources originally utilized in determining whether these Census Blocks are or are not TSAs. Iowa Admin. Code r. 129—20.5(4). In reviewing this evidence and information, the Office’s specific objective is to determine whether it should change its original determination of “whether a communications service provider offers or facilitates broadband service [at or above 25/3]” in the Census Blocks forming the basis of this Appeal as of June 30, 2018, based on the additional evidence and information now available to it, or whether its original determination based on the “fixed broadband availability maps and corresponding data sources made available by the Federal Communications Commission (FCC)” should stand. Iowa Code §§ 8B.1(12), .10(1)—(2); Iowa Admin. Code r. 129—20.1, .3, .4, .5.

Here, the FCC Broadband Deployment data representing the status of fixed Broadband in Iowa as of June 30, 2018, and originally relied on by the Office in generating V2 of the Map indicates that no Communications Service Provider offered or Facilitated 25/3 Broadband as of July 30, 2018. However, in considering the additional evidence and information provided by Appellant, the Office looks to Iowa Administrative Code rule 129—20.5(8), which provides in relevant part:

Examples of evidence and information the office would consider particularly probative of broadband service at or above the download and upload speeds specified in the definition of targeted service area as of the as of date for purposes of adjudicating an appeal of the office’s determination of whether a particular census block constitutes a targeted service area include . . . [s]igned attestations submitted to the office under penalty of perjury on forms provided by the office that the applicable census block(s) was or was not served as of the as of date with broadband service at or above the download and upload speeds specified in the definition of targeted service area.

Here, Appellant completed and submitted a Certification on forms provided by the Office attesting under penalty of perjury that Appellant offered or Facilitated 25/3 Broadband in the Census Blocks forming the basis of this Appeal as of June 30, 2018. The Office considers this Certification to be particularly probative of 25/3 Broadband service as of July 30, 2018. In addition, the Office did not receive any conflicting evidence or information from other interested Communications Service Providers or members of the public as it relates to these Census Blocks during the period for input from affected persons or parties. Iowa Admin. Code r. 129—20.5(3). Considering Appellant’s Certification, and the lack of any competing evidence or information, the Office concludes 25/3 Broadband service was available in these Census Blocks as of June 30, 2018, and that these Census Blocks should be designated as non-TSAs and thereby are ineligible to receive State incentives under the programs administered by the Office.

#### IV. APPEALING FURTHER.

If you wish to appeal this Decision further, you must, within thirty (30) days of the posting of this Decision at [ocio.iowa.gov/broadband](http://ocio.iowa.gov/broadband), notify us in writing by mailing a written request for a contested case proceeding to:

Office of the Chief Information Officer  
c/o Matt Behrens  
Hoover State Office Building, Level B  
1305 East Walnut Street  
Des Moines, Iowa 50319

In so doing, please state the reason(s) you are appealing this Decision, specifically identifying the particular aspects of the decision with which you disagree and the reasons why, whether factual or legal in nature. The request for a contested case proceeding should state the name and address of the requester; identify the specific Office action which is disputed; and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute. Iowa Admin. Code r. 129—6.4.

Upon receiving your appeal, we will forward it to the Department of Inspections and Appeals where an Administrative Law Judge (“ALJ”) will perform an independent review. Iowa Admin. Code r. 129—20.6(1); Iowa Admin. Code r. 129—6.6. At that time, you will have an opportunity to make a presentation, in person or over the telephone, to an ALJ regarding the nature of your concerns. If you do not exercise your appeal right within thirty (30) days of the posting of this Decision at [ocio.iowa.gov/broadband](http://ocio.iowa.gov/broadband), this Decision shall become final and no longer subject to challenge. Iowa Admin. Code r. 129—20.5(5).

Sincerely,



Matt Behrens  
Deputy Chief Information Officer  
State of Iowa