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October 14, 2022

Honorable Jay Dardenne  
Commissioner of Administration  
Division of Administration  
State of Louisiana  
1201 N. 3<sup>rd</sup> Street, Suite 7-210  
Baton Rouge, LA 70802

**Re: Appeal of Protest Decision for GUMBO Grant Application No. 87/Grant Protest No. 20 - East Carroll Parish**

Dear Commissioner Dardenne:

We have been retained to represent Cable One, Inc. d/b/a Sparklight and Fidelity Communications (“**Cable One**”), which protested the award made to Conexon Connect, LLC (“**Conexon**”) under the Granting Unserved Municipalities Broadband Opportunities (“**GUMBO**”) Grant Program.<sup>1</sup> Cable One’s Protest No. 20 (the “**Protest**”) specifically challenged 669 of the 851 GUMBO service locations in Conexon’s award. The Protest was denied by the Office of Broadband Development and Connectivity (“**OBDC**”) in a September 30, 2022 Decision (the “**Decision**”).<sup>2</sup> Pursuant to La. R.S. 51:2370.5(E), Cable One timely submits this appeal of the Decision.

Louisiana law provides, upon Cable One filing the instant appeal, “the commissioner shall decide within fourteen days whether the decision concerning a grant application **was in accordance with this state’s constitution, statutes, and regulations, and the terms and conditions of the application. Any prior determinations by the director or his designee shall not be final or conclusive.**” La. R.S. 51:2370.5. For the reasons stated herein, Conexon’s grant award violates Louisiana’s statutes and regulations. Permitting Conexon to receive the disputed grant

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<sup>1</sup> A copy of Cable One’s Protest with corresponding Exhibits is attached as Exhibit 1, *in globo*.

<sup>2</sup> A copy of the Decision is attached as Exhibit 2.

award violates Louisiana law and facilitates the misuse of federal funds. Therefore, this appeal should be granted.

Pursuant to La. R.S. 51:2370.2, GUMBO funds cannot be awarded to the protested service location areas because Cable One already provides available service greater than 25:3.<sup>3</sup> Therefore, the burden set forth in La. R.S. 51:2370.4(A)(5) to identify areas that would have “access to broadband *as a result of* the project” cannot be met by Conexon for the identified 669 service locations because access to broadband service already exists before the project.

Objective data available to OBDC, as well as Cable One’s Protest, established that Cable One provides available broadband internet service above the minimum transmission speeds to 669 service locations for which Conexon was awarded GUMBO grant funds. There is no credible evidence to the contrary. The Louisiana Revised Statutes which implemented the GUMBO program unequivocally forbids the use of any GUMBO funds for the already serviced locations. Put another way, the Decision denying Cable One’s Protest allows for a direct overbuild of existing service, something expressly forbidden by Louisiana law.

Cable One’s predecessor, New Wave Communications, began providing qualifying service to the protested area in 2015. Cable One acquired New Wave Communications in 2017 and since then has invested nearly **\$40 million of private capital** in northeast Louisiana extending and upgrading its high-speed data products in communities throughout the area, like Lake Providence. Cable One’s employees who provide this service are proud citizens of the area and neighboring communities.

While Conexon is fully aware of Cable One’s presence and service in the project area, it nonetheless applied for GUMBO funds to overbuild Cable One’s existing service.

As part of its protest, Cable One complied with the protest format which required it to provide maps, federally mandated data, and customer bills as further proof of service to the area. Although not required by statute, and never asked for by OBDC despite its Decision relying in part on Cable One not providing them, Cable One attaches speed tests hereto to provide further proof that its customers receive qualifying service well in excess of 25:3.<sup>4</sup> This only clarifies the obvious: Cable One provides more than adequate service to East Carroll Parish and any allocation of GUMBO funds in this area is unlawful and deprives truly unserved Louisianans of much needed

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<sup>3</sup> 25:3 is shorthand for “twenty-five Mbps download speed and three Mbps upload speed,” which is the legal threshold for an “unserved area” pursuant to La. R.S. 51:2370.2.

<sup>4</sup> Speed test data is presently available for 209 of these customers and is attached as Exhibit 3, *in globo*.

resources to obtain adequate service. This misuse of federal funds is demonstrably improper and invites post-award federal oversight of this misallocation.

### **FACTS AND BACKGROUND**

#### **Cable One's History of Serving East Carroll Parish**

Cable One has been a broadband internet service provider in East Carroll Parish since 2017, long before the federally funded GUMBO program was even imagined. While other providers may not provide 25:3 service to East Carroll Parish residents, Cable One provides qualifying service to the community and has invested tens of millions of dollars in capital and operating expenses in just the last five years toward building and maintaining broadband infrastructure in East Carroll Parish and throughout northeast Louisiana.

Specifically, Cable One and its predecessor, New Wave Communications, have provided broadband services in Lake Providence since 2015. Cable One proudly provides high speed data services to 417 residential and business customers<sup>5</sup> in the broader East Carroll market including speeds up to 960/50 megabits per second ("**Mbps**"). Cable One's existing plant in the protested area is available at speeds well above 25:3.<sup>6</sup> Of those serviceable locations, 669 locations are within Conexon's project area. Those 669 locations are subject to being overbuilt by Conexon and are made the subject of the instant appeal.

Since 2017 Cable One has invested over \$39.7 million in private capital expanding and improving its network in northeastern Louisiana, including over \$1.1 million providing quality, reliable broadband services to customers in East Carroll Parish and Lake Providence. Additionally, since 2017 Cable One has remitted \$71,837 in franchise tax payments to the Town of Lake Providence, and \$9,925 to East Carroll Parish, contributing to and improving the local tax base, and strengthening its commitment to this community and its residents.

Because Cable One provides qualifying service to the 669 protested locations, no GUMBO funds can legally be awarded.

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<sup>5</sup> See Ex. 3.

<sup>6</sup> Different methodologies of calculating "homes passed" result in different outcomes. For years, the FCC required companies to provide homes passed data on Form 477 based on census blocks and census block groups. As of September 1, 2022, the FCC required companies as part of the Broadband Data Collection ("BDC") process to provide homes passed data based on actual physical addresses. As one would expect, the different methodologies required to create Form 477 data and BDC data result in a different number of homes passed within a given area. Although the GUMBO statute requires protestors to submit Form 477 data, Cable One provided BDC data as well. Using either data point, the evidence is clear that Cable One is providing services above 25:3 to the project area.

### **Conexon's Application**

Conexon's initial application for GUMBO funding is replete with errors, omissions, misstatements of fact and law and may be statutorily deficient. To illustrate:

- The Louisiana Legislature requires GUMBO applicants to "sign a statement of attestation to attest to the office that the project areas identified within the application are eligible."<sup>7</sup> While Cable One assumes Conexon complied with this statutory requirement, a review of the publicly available materials submitted by Conexon with its application does not include such attestation.<sup>8</sup>
- Conexon provided OBDC with speed tests (presumably undertaken by the Delta Regional Authority (DRA)), including data for nineteen locations receiving services from New Wave Communications.<sup>9</sup> This data provided by Conexon indicates that 18 of the 19 locations receive service from Cable One at over 25 Mbps download and all 19 locations receive service over 3 Mbps upload, showing the ineligibility of these locations.<sup>10</sup>
- Conexon provides information in its application identifying a certain census block in central Lake Providence where it contends DRA speed tests "in this block" reveal "unsatisfactory speed of 6.08 mbps download and 0.6 mbps upload." Conexon offers no address or other location where it contends these speed tests results derive, but rather ascribes the "unsatisfactory speeds" to "this block." Cable One broadband service at speeds up to 960/50 Mbps is available to any customer residing at any location in that census block who seeks to purchase it. Significantly, Cable One presently serves a customer residing in this very census block at 104 Ingram Street and provides speed test data measured during the period between July 22 and October 4, 2022, for that customer.<sup>11</sup> During this period, Cable One's customer averaged speeds of 235.2 Mbps download and 23.0 Mbps upload, well in excess of the statutory minimum speeds and significantly above the speeds Conexon represents Cable One provides to this census block.

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<sup>7</sup> LAC 4:XXI, Ch. 3, §309A.3.a.

<sup>8</sup> Any such attestation would be incorrect. Review of the data provided with Conexon's application reveals that Conexon objectively knew Cable One provides qualifying service in the exact area it seeks GUMBO funds to overbuild. Any attestation signed by Conexon to the contrary would be disingenuous, at best.

<sup>9</sup> The speed tests provided by Conexon are attached as Exhibit 4, *in globo*. Cable One, Inc. acquired New Wave Communications in 2017.

<sup>10</sup> See Ex. 4.

<sup>11</sup> Speed test results for a customer residing at 104 Ingram Street are attached as Exhibit 5.

- Conexon’s application also includes glaring misstatements of law. Conexon contends that because it is an Eligible Telecommunications Carrier (ETC) it “is able to participate in a number of programs offered by the FCC” to increase adoption of its products and services including the former Emergency Broadband Benefit (EBB) program and its replacement, the Affordable Connectivity Program (ACP). However, despite Conexon’s representations, ETC certification is not a requirement to participate in either federal program.<sup>12</sup> Notably, Cable One’s operating entities are enrolled in ACP and provide subsidized broadband services to customers throughout its operating areas, including Sparklight in Louisiana. Other Conexon submissions in this dispute have included similar misstatements.<sup>13</sup>

Finally, the data provided in Conexon’s application does not support the award of almost \$4 million in taxpayer-provided GUMBO funds. A detailed analysis of Conexon’s data leads to the conclusion that granting its application for the 669 ineligible service locations violates Louisiana law and misuses the limited public funding to inappropriately overbuild Cable One’s system.

### **Cable One’s Protest and Supporting Documents**

When Conexon’s award was announced, Cable One timely submitted its Protest of OBDC’s award on August 1, 2022, accompanied by the items delineated in La. Admin. Code Pt XXI, Section 501.<sup>14</sup> The Protest was filed utilizing the OBDC’s Award Protest portal (the “**Protest**

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<sup>12</sup> See FCC Final Rule 86 FR 19532 (April 13, 2021) (permitting non-ETC providers to participate in EBB Program) and Final Rule 87 FR 8346 (March 16, 2022) (permitting non-ETC providers to participate in ACP Program).

<sup>13</sup> In its September 6, 2022, response, Conexon argues that because Cable One “relinquish[ed] [its] Eligible Telecommunications Carrier status” it is “prohibit[ed] from participating in the FCC’s Affordable Connectivity Program.” Conexon’s argument is entirely false. The Final Rule creating ACP goes into great detail about how a non-ETC provider can participate in ACP. See ACP Final Rule, 87 FR 8346 at 8350 (“Non-ETC Provider Applications and Approval Process”). Further, and more notably, participation in ACP is a requirement imposed on GUMBO grant recipients, not protestors. See LAC 4:XXI, Ch. 7, §701 F. (“Grant recipients shall be required to participate in federal programs that provide low-income consumers with subsidies on broadband internet access services” (emphasis supplied)). Throughout its response, Conexon argues that Cable One fails to comply with GUMBO requirements imposed on applicants and grant recipients, not protestors, including metrics relating to affordability, technology, reliability, and others. Those metrics simply do not apply to protestors. Rather, the GUMBO rules require protestors to provide proof of service limited to nine specific areas, set out with particularity at LAC 4:XXI, Ch. 5, §501 D (1-9). None of the metrics Conexon cites in its response and attempts to impose on Cable One as a protestor are included in the proof required of protestors under Louisiana law. Nor for that matter is there any requirement that a protestor submit a “developed narrative” or even “speed tests,” yet Conexon and OBDC have been robust in their criticism of Cable One for not providing these with its protest. Presumably if the Louisiana Legislature thought it necessary to require these forms of proof from protestors, it would have included them in the code or statute. It did not.

<sup>14</sup> Protests shall contain all relevant supporting documentation, including, but not limited to, the following:

1. a signed and notarized affidavit affirming the protest and attached information are true;
2. current Federal Communications Commission (FCC) Form 477 or equivalent;

**Portal**”). The Protest Portal does not call for the submission of other information.<sup>15</sup> In its Protest, Cable One provided all requisite information for the OBDC to confirm that Cable One provided service within the protested area and was disputing 669 of the service locations within Conexon’s project area.

After Cable One submitted the Protest, OBDC requested specific supplemental documentation, and Cable One readily provided that information. Specifically, on August 9, 2022, OBDC requested Cable One’s service availability by address for each protested location, including the following details in KML/Shapefile and Spreadsheet form: (1) service address; (2) subscription status; (3) subscription start date; (4) subscribed download/upload speed; (5) maximum available download/upload speed; and (6) billing statements within the six months of the documented service availability date for 10% of the subscribed protested locations. Cable One provided all the requested information to OBDC.<sup>16</sup> In OBDC’s communication requesting additional documentation from Cable One, OBDC specified that they reserved the right to request additional details. After Cable One’s response, OBDC did not request any further information.<sup>17</sup> Therefore, to the extent the Decision is based on information that was not submitted by Cable One, the denial lacks a credible basis.

### **Conexon’s Response to the Protest**

Conexon provided OBDC with a response to the Protest (the “**Conexon Response**”). Rather than addressing substantive issues around its application and the Protest, the Conexon Response focused primarily on public policy arguments and allegations, many of which are false, and all of which are irrelevant. The Conexon Response did not address the substance of the Protest because the law and the facts do not support its application.

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3. minimum/maximum speeds available in the proposed project area;
  4. number of serviceable locations within the proposed project area, including the speeds those serviceable locations are able to receive;
  5. street level data of customers receiving service within the proposed project area;
  6. point shapefiles that show each proposed passing in the challenged area, designated by a singular mapped point, in the protested area containing attribute data showing the addresses of each point;
  7. polygon shapefiles delineating the general challenged area(s);
  8. through the use of the project area map submitted by the applicant, a map indicating where the protested serviceable locations are within the proposed project area;
  9. heat maps indicating received signal strength indicator (RSSI) in the challenged area.

<sup>15</sup> A copy of the Protest Information Sheet, which is generated via the Protest Portal, is attached as Ex. 1.

<sup>16</sup> Cable One’s response to OBDC’s request for supplemental information is attached hereto as Exhibit 6.

<sup>17</sup> As discussed below, the Decision denied Cable One’s Protest based on the absence of other information never requested by the OBDC.

Conexon, not even feigning interest in statutory-based argument, appealed to OBDC that (1) “discontent among the residents of East Carroll Parish” (this appears to come from citizens who choose not to take Cable One’s services); (2) “negative media attention” directed toward Protestor (the “negative media attention” was created and fomented by Connexon); (3) “the affordability metric” (not referenced in the GUMBO statute as applied to protestors, but imagined by Conexon); (4) Cable One’s withdrawal of its Eligible Telecommunications Carrier status (falsely claimed to prohibit participation in the Affordable Connectivity Program (ACP)); and (5) the deficiency of Cable One’s advanced DOCSIS network (Cable One’s DOCSIS 3.1 broadband services reliably provide speeds to the customer of up to 960/50 Mbps which makes clear that Conexon’s unsubstantiated claim that advanced DOCSIS networks often fail to achieve 25:3 Mbps service is patently false).<sup>18</sup>

Additionally, consistent with its initial application, the Conexon Response contained unsubstantiated conclusions based on Conexon’s speed testing data, ostensibly of Cable One’s subscribers. It appears this information was assumed to be accurate without further inquiry. Yet, a simple review of Conexon’s application and Response reveals that the specific statements and assertions regarding Cable One’s service are plainly wrong.

### **The Decision**

The Decision denied Cable One’s protest, taking particular issue with the content and lack of a “narrative” in the Protest. Yet, the protest process does not require protestors to provide any specific type of narrative. When filing its protest, Cable One included the items as described in the Protest Portal, including, not exclusively, the upload and download speeds available in the proposed area, as well as the number of locations serviced in the area. The Protest Portal format does not invite a protestor to offer a narrative on these points. As seen in Cable One’s Protest, the Protest Portal is formatted only to permit the entry of the numerical value requested and the attachment of documents supporting those figures.

The Decision also cites as support a sentence in the Protest which states: “Number of serviceable locations within the proposed area, including the speeds those serviceable locations

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<sup>18</sup> Conexon’s unsupported criticisms of the “Deficiencies of DOCSIS and Copper Network Technologies” are similarly misplaced. The current DOCSIS roadmap supports multi-gigabit symmetrical services, low latency, advanced security, and continuing improvements to reliability that will serve the needs of our customers for decades to come. Service providers throughout the US continue to innovate and evolve the DOCSIS/HFC networks ahead of the needs of the customer. Indeed DOCSIS 4.0 will provide feature parity with fiber optic networks being deployed today. Contrary to Conexon’s arguments, Cable One’s utilization of DOCSIS is not evidence of the system’s inadequacy, but rather establishes its strength and flexibility to meet the needs of the citizens of East Carroll Parish today and well into the future.

are **able** to receive.”<sup>19</sup> Respectfully, the quoted language which the OBDC found so objectionable was not authored by Cable One, but rather came from a template in the Protest Portal created and maintained **by the OBDC**. The Protest Portal included this language directly from the GUMBO regulations.

According to LAC 4:XXI.501(D)(4), protests must contain all relevant supporting documentation, including the “number of serviceable locations within the proposed project area, including the speeds those serviceable locations **are able to receive**.” Cable One merely followed the template presented in the protest submission portal and uploaded the required data.<sup>20</sup> Thus, it was erroneous for the OBDC to deny a protest merely because the protester complied with OBDC’s procedures for submitting data relevant to the protest.

Furthermore, Cable One’s published transmission speeds in East Carroll Parish should have immediately established to OBDC that Conexon had not carried its burden of proof at the application stage. Speed tests are not included as part the information required to protest a GUMBO award, and the OBDC did not request any speed test data from Cable One. However, had OBDC made this request, Cable One would have provided this information as part of the protest.

With this appeal, Cable One provides speed data for each of the modems inside the premises of 209 customers it serves within the protested area.<sup>21</sup> This speed test data shows an average of 14 tests of 209 customers in the Lake Providence Area taken at random times during the period between July 17, 2022, and October 6, 2022. During this period, Cable One customers in Lake Providence achieved average download speeds of 305.5 Mbps download/24.7 Mbps upload. Thus, Cable One’s average average customer in Lake Providence received at least **twelve** times the GUMBO program’s minimum download speed and **eight** times the program’s minimum upload speed.

The Decision also raised an issue with the pertinent time period of the invoices submitted by Cable One as proof of its service in the area. Cable One submitted its most current customer information to the OBDC, but the Decision claims that only earlier invoices within six months of December 31, 2021, would be relevant. Here again, Cable One could have easily provided different invoices if they had been requested. Regardless, Cable One includes earlier invoices

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<sup>19</sup> See Ex. 2, the Decision at p. 2. (**Emphasis** added.)

<sup>20</sup> See Ex. 3, Protest Information Sheet.

<sup>21</sup> See Ex. 3.



with this appeal which also show service to customers in the protested area well above the minimum speeds.<sup>22</sup>

The Decision put the scope of the Protest and the attached information at issue. Yet, the Decision accepted unsubstantiated “speed testing” data offered by Conexon (which appears to come from a non-Cable One customer) while disregarding unrefuted customer data provided by Cable One.

Cable One’s service in East Carroll Parish meets the requisite requirements to provide service according to GUMBO. The instant appeal raises a direct and simple legal issue – the 669 protested locations which are being served by Cable One are not “unserved” and the award of GUMBO funds to Conexon for these locations violates Louisiana law.

### **Statutory Interpretation**

Louisiana has well-settled rules of statutory interpretation. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written, and no further interpretation can be made in search of the legislature’s intent. *S. Lafourche Levee Dist. v. Jarreau*, 16-0788 (La. 3/31/17), 217 So.3d 298, 304. The starting point for interpretation of any statute is the statutory text. *Id.* (citing *Pierce Foundations, Inc. v. JaRoy Construction, Inc.*, 15-0785 (La. 5/3/16), 190 So.3d 298, 303). Louisiana courts are bound by a strict interpretation of the plain language of statutory provisions that come before them. *Milbert v. Answering Bureau, Inc.*, 13-0022 (La. 6/28/13), 120 So.3d 678, 684. Here, the Decision is contrary to the clear language of the GUMBO statutes.

**1. The Decision is plainly inconsistent with the text of the GUMBO statutes because the proposed area is not “unserved.” Cable One currently serves the area at transmission speeds exceeding the statutory speed requirements.**

There is no need to look further than the plain language of the statute governing the GUMBO program to determine that the Decision is incorrect. As cited above, La. R.S. 51:2370.2(16) states that federal funding for broadband deployment “shall not be used”<sup>23</sup> to provide broadband service in any area where broadband internet service of a minimum of 25 Mbps download transmission speed and 3 Mbps upload transmission speed “is available from at least one internet service provider.” Thus, an area is “unserved” only when there is not a single

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<sup>22</sup> See Attached Exhibit 7 which includes customer invoices dated January 2022.

<sup>23</sup> The word “shall” is mandatory and the word “may” is permissive. The word “shall” in a statute or ordinance generally denotes a mandatory duty. *Sanchez v. Georgia Gulf Corp.*, 2002-1617 (La. App. 1 Cir. 8/13/03), 853 So. 2d 697, 704.

provider offering broadband internet services at transmission speeds of 25 Mbps download and 3 Mbps upload. La. R.S. 51:2370.2(16); LAC 4:XXI.103.

The text leaves no question that federal funds administered through the GUMBO program are not to be used for projects in areas already receiving service when that service meets the minimum transmission speed criteria. The language is clear, unequivocal, and does not grant the OBDC *any* discretion to vary its terms under the guise of statutory interpretation.

Here, Cable One provides broadband internet services that exceed the minimum transmission speed requirements. The broadband internet service Cable One provides has a maximum download speed of 960 Mbps and an upload speed of 50 Mbps, well in excess of the 25:3 speeds required by the GUMBO program. Yet, the Decision grants Conexon federal funds to overbuild broadband infrastructure in an area where Cable One already provides broadband services with download/upload speeds that significantly exceed the minimum statutory requirements. Thus, the Decision is blatantly inconsistent with the text of the law and must be reversed.

To reach its conclusion, the OBDC performed a quasi-qualitative analysis, adding requirements to the plain language of the statute and misreading the OBDC's Protest Portal. Specifically, the Decision provides:

Again, though, turning to the words within its one-page protest, [Cable One] states that the information it has provided is the "number of serviceable locations within the proposed project area, including the speeds those serviceable locations are able to receive." Based on this information, it appears that [Cable One] is not asserting that the locations within the area "are receiving" the speed of 960/50 mbps, but rather, that they are "able to receive" these speeds. It is OBDC's opinion that the intent and purpose of the Gumbo Act is the statutorily mandated speeds will be delivered and received **functionally** and **reliably**.<sup>24</sup>

The foregoing paragraph is the cornerstone of the Decision and is wholly reliant on attributing the following quoted phrase to Cable One: "number of serviceable locations within the proposed project area, including the speeds those serviceable locations are *able* to receive."<sup>25</sup> But this is

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<sup>24</sup> Ex. 2, Decision at Pg. 3 (**emphasis** in original).

<sup>25</sup> Even ignoring that the OBDC is tearing down its own program language, this is a specious conclusion by the OBDC. "Able to receive" means that Cable One has provided the option for a customer to receive this service should it choose to do so. A customer choosing to not take the service does not negate the fact that Cable One provides it and that it is available for anyone to choose. The OBDC's negative view of the "availability" of service is especially

not Cable One's statement, rather, as detailed above, it comes from the OBDC's Protest Portal and is one of the express protest considerations under LAC 4:XXI.501(D)(4).<sup>26</sup>

More critically, misinterpretation of OBDC language fundamentally changes applicable law by adding the requirements of "functionality" and "reliability" to the GUMBO definition of "unserved." Even ignoring that Cable One *does* provide functional and reliable service throughout the protested area, these new requirements simply do not exist as part of GUMBO. Had the legislature intended to include qualitative considerations of transmission speed being delivered "functionally" and "reliably" into the definition of "unserved," it would have. It did not, and Louisiana law does not permit this type of revisionist history under the guise of statutory interpretation. Rather, the law requires the statute to be applied as written. This is especially true where the Gumbo statutes use "shall" to foreclose the use of funds under the instant circumstances.

Further, La. R.S. 51:2370.4(B) placed the original burden on Conexon, when applying for GUMBO funds to serve a proposed area, to show that the area is, "as of the close of the application deadline, unserved." The OBDC concluded without explanation that Conexon met the statutory burden of proof required under La. R.S. 51:2370.4(B) when, Conexon's own speed test data demonstrated that Cable One was already an established service provider in the proposed area. While the Decision directly points out that Cable One has the burden of proof in this protest, there is no discussion of how Conexon met the original burden of proof to receive the award.

Louisiana law has long recognized that the burden of proof may shift multiple times during any legal proceeding.<sup>27</sup> Cable One has, at the very least, made a *prima facie* case that it has an existing presence as a provider of high speed data service well in excess of that required by GUMBO and that the award to Conexon, therefore, violates Louisiana law. At this stage, the burden shifts back to Conexon (and/or the OBDC) to refute Cable One's evidence. They cannot. The OBDC did not adhere to the GUMBO program's legal requirements in making selections for

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troubling because the "availability" of service **is the dispositive factor under the law**. The Decision wholly ignores this fact.

<sup>26</sup> Similarly, the Decision dedicates two pages parroting Conexon's argument that any information provided by FCC Form 477 is unreliable and, therefore, irrelevant. But, the OBDC *mandates* that any protesting parties provide Form 477 data as part of a submission of any protest under the GUMBO program. See Rule 501(D)(2), *supra*. The OBDC cannot require the submission of Form 477 data and then hold against a protesting party the fact that it provided such data.

<sup>27</sup> See the Louisiana Supreme Court's Decision in *Nocito v. Bussey*, 2020-00986 (La. 8/15/20), 300 So. 3d 862, 863; ("On the other hand, once the party bearing the burden of proof has established a *prima facie* case, the burden then shifts to the opposing party to present sufficient evidence to overcome the other party's *prima facie* case. Louisiana courts commonly apply this 'shifting burden of proof' in numerous specific instances, such as trial on motions for summary judgment and exceptions, and in workers' compensation cases.").

the award and in rendering the Decision to deny Cable One's Protest. Consequently, The Commissioner should reverse the OBDC's Decision.

## **2. Speed Testing Data**

In addition to the foregoing errors, the Decision alleges that Cable One has "offered no data or evidence with regard to specific speeds actually delivered and received by its customers or at locations with the area."<sup>28</sup> First, speed tests are not delineated on the Protest Portal or in applicable GUMBO rules applying to protests appearing in the La. Admin. Code<sup>29</sup> and, therefore, are not a prerequisite of a protest. Second, this data, which Cable One is readily able to share, was not requested prior to the Decision.<sup>30</sup> It is inappropriate for the Decision to rely on information that was readily available from the protestor but never requested.<sup>31</sup> Moreover, if this information is dispositive, and it was not provided by Conexon at the time Conexon filed its grant application, then Conexon could not have met its initial burden of proving that the project area was "unserved" prior to granting the award. The disparate treatment of applicants versus protestors is clear.

## **3. The Decision also contradicts the purpose of the GUMBO Program.**

The Decision to uphold the project award to Conexon runs directly contrary to the purpose of the GUMBO program, to expand broadband access across Louisiana and to accelerate the achievement of universal access for all Louisianians by 2029.<sup>32</sup> The goal of achieving statewide access is precisely why the funds are only intended for projects in wholly "unserved" areas. Given the undisputed fact that Cable One already serves the protested area with broadband service well above the minimum speed requirements for GUMBO grantee eligibility, the Decision allows for the use of GUMBO funds to overbuild private investment in ineligible areas. This is a misallocation of federal funds intended for use in areas that truly are unserved. The federal funds awarded through the GUMBO program are intended to help provide access to broadband in Louisiana where there is none—not to overbuild providers that are already serving an area.<sup>33</sup>

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<sup>28</sup> Ex. 2, Decision at pg. 4.

<sup>29</sup> LAC 4:XXI, Ch. 5, §501 D 1-9.

<sup>30</sup> See Ex. 3.

<sup>31</sup> As demonstrated above, Cable One speed tests definitively demonstrate that it provides service to East Carroll Parish well in excess of 25:3.

<sup>32</sup> See [connect.la.gov/about-us](https://connect.la.gov/about-us).

<sup>33</sup> See <https://www.route-fifty.com/finance/2022/10/republicans-gearing-aggressive-arpa-oversight-if-they-take-back-house/378161/> ("[I]f the state and local municipalities aren't spending [ARPA funds] according to the law, they're gonna have to send the money back.").

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Cable One recognizes the critical role that reliable broadband accessibility plays in the lives of all Louisiana citizens. Indeed, that is exactly why Cable One has invested heavily in providing outstanding broadband service to the people of East Carroll Parish for years, including during the COVID-19 pandemic when Cable One's service helped people work from home, educate their children from home, and receive medical care from home. Cable One provided and continues to provide excellent service to the people of East Carroll Parish well in excess of the service required by GUMBO. Thus, Cable One protested the attempt to overbuild its system with funds designated to provide service for the truly unserved. Now, it submits this appeal because of its firm commitment to continuing the expansion of broadband access to the truly unserved people of Louisiana and to protect the integrity of the GUMBO program.

Allowing Conexon to proceed with the awarded project in an already served and ineligible area defeats the purpose of GUMBO and constitutes a misuse of federal funds. Cable One requests reversal of the Decision in accordance with the clear statutory language of the GUMBO program.

### **CONCLUSION**

For the reasons set forth herein, Cable One submits this appeal and requests reversal of the OBDC's Decision to deny the Protest. Cable One has submitted significant evidence that it provides qualifying service in the protested area including maps, speed tests, and customer bills, making 669 of the awarded service locations legally ineligible. Cable One will gladly provide any additional requested information.

Further, Cable One requests an in-person hearing on these issues and will waive the Commissioner's requirement to render a written decision within 14 days of this appeal, if the Commissioner believes such a hearing would be appropriate.

Should the Commissioner have any questions, concerns or need for additional information, please contact me at your earliest convenience.

Sincerely,

BREAZEALE, SACHSE & WILSON, L.L.P.



Carroll Devillier

cc: Hon. Julia Letlow, U.S. House of Representatives, LA-05