

Before the
NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service)
Commission, on Its Own Motion, to Consider)
Revisions to the Universal Service Fund) Application No. NUSF-100/PI-193
Contribution Methodology)
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**COMMENTS OF CTIA IN RESPONSE TO
THE COMMISSION'S JULY 12, 2016
ORDER SOLICITING BRIEFS**

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TABLE OF CONTENTS

I.	Introduction and Summary	1
II.	Responses to Specific Questions	2
	1. What jurisdictional considerations are raised with respect to both interstate and intrastate traffic being carried over a given connection on which an NUSF surcharge will be assessed and how can any such issue be addressed?.....	2
	2. What issues may be presented if a state connections-based USF contribution mechanism proposes to assess a regulatory surcharge on a connection through which only broadband Internet access service access is provided versus a connection where both broadband and voice is provided?	5
	a. A state connections-based USF contribution mechanism is not permitted under the Open Internet Order.	5
	b. The Commission also lacks statutory authority to impose NUSF surcharges on connections providing only BIAS.....	6
	c. Assessing both BIAS and voice connections would risk asynchronicity with the federal mechanism, and thus impose an impermissible burden.....	8
	3. How does a party that has identified a legal issue recommend that such issue be addressed by the Commission in order to minimize or eliminate the impact of such issue on the implementation of a connections-based contribution mechanism?.....	8
III.	Conclusion	10

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CTIA – The Wireless Association® (“CTIA”) files these comments in response to the Nebraska Public Service Commission’s (“Commission’s”) July 12, 2016 Order Soliciting Briefs (“July 12 Order”), which requested input on three legal questions addressing ongoing reform of the Nebraska Universal Service Fund (“NUSF”).¹ Consistent with its prior comments in this proceeding, CTIA applauds the Commission for its detailed, careful approach to these important reforms. CTIA also continues to urge the agency, as part of these reforms, to ensure that any reform proposal embraced by the Commission benefits Nebraska’s wireless users while achieving programmatic goals.

I. INTRODUCTION AND SUMMARY

When the Commission opened this docket in November 2014,² it wisely sought to understand the implications of a range of potential measures meant to reform the NUSF. In the

¹ *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-11/PI-193, Order Soliciting Legal Briefs (July 12, 2016) (“Request”).

² *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-11/PI-193, Order Opening Docket and Seeking Comment (Nov. 13, 2016).

July 12 Order, the Commission further sought to understand more specific concerns that have emerged over the past two years. The July 12 Order poses three questions, two of which focus on issues that would arise from implementing a connections-based NUSF contribution mechanism. In these comments, CTIA highlights three legal points. First, the NUSF cannot interfere with the federal universal service mechanism. Second, the Commission is barred by both federal and state law from imposing NUSF contributions on broadband internet access services (“BIAS”). Finally, as these comments, past CTIA filings, and other commenters all have highlighted, the broad range of legal issues swept up in this proceeding warrant waiting for the Federal Communications Commission’s (“FCC’s”) pending decision on reforming the federal Universal Service Fund (“USF”) contribution mechanism.³ In addition to avoiding needless legal and practical problems, this approach also will allow the Commission to better guard against exacerbating the already high tax, fee, and surcharge burden on Nebraska wireless consumers.

II. RESPONSES TO SPECIFIC QUESTIONS

In its July 12 Order, the Commission solicited briefs responding to three questions proposed by the Nebraska Rural Independent Companies (“RICs”).⁴ CTIA addresses each of those questions below.

1. What jurisdictional considerations are raised with respect to both interstate and intrastate traffic being carried over a given connection

³ See generally *Federal State Joint Board on Universal Service, Universal Service Contribution Methodology, A National Broadband Plan For Our Future*, Order, 29 FCC Rcd 9784 (2014) (in this still-open, unresolved proceeding, the FCC requested the Federal-State Joint Board on Universal Service provide recommendations on how to modify the USF contribution methodology).

⁴ Comments of the Rural Independent Companies in Response to Order Seeking Further Comments, Application No. NUSF-100, at 3-4 (filed June 6, 2016).

on which an NUSF surcharge will be assessed and how can any such issue be addressed?

In examining the implications of implementing a connections-based NUSF contribution mechanism, the Commission should consider as a preliminary matter – and as discussed further below – that the NUSF cannot impose a burden on interstate universal service assessments. This fact necessitates the coordination of state and federal approaches to allocating revenue for mixed-use connections. Therefore, it is important that Nebraska wait to revise its NUSF contribution rules until pending FCC action on federal contribution reform has been completed.

According to federal law, state universal service mechanisms such as the NUSF must be “not inconsistent” with the federal mechanism, and may not “rely on or burden” the federal mechanism.⁵ A state mechanism that targets the same revenues or services as the federal mechanism would burden the federal mechanism and thus violate Section 254(f).⁶

Pursuant to binding USF guidelines, wireless carrier contributors currently allocate intrastate revenues from connections that carry both interstate and intrastate traffic based on the inverse of the factor that they use for federal USF contributions – based either on a traffic study, or the wireless safe harbor. If Nebraska uses a different approach to assessing interstate-intrastate connections, there is a significant risk that the Nebraska approach could impose NUSF contributions on revenue that is treated as interstate by the FCC. This would run afoul of Section 254(f).

⁵ 47 U.S.C. § 254(f).

⁶ *See, e.g., AT&T v. PUC*, 373 F.3d 641, 647 (5th Cir. 2004) (“[T]he PUC's assessment on both interstate and intrastate calls creates an inequitable, discriminatory, and anti-competitive regulatory scheme. Given the parallel language used in §§ 254(d) and (f) ... the PUC assessment of interstate and international calls is discriminatory, conflicts with § 254(f), and thus is preempted by federal law.”).

Given the crucial need to coordinate federal and state approaches to allocating connections providing both interstate and intrastate service, the Commission should wait to finalize NUSF contribution reform until it is clear how the FCC will revise the federal rules.

As CTIA and several other commenters have pointed out, it would be costly and wasteful for carriers to make significant changes to their billing and accounting systems more than once – first when the Commission revises the NUSF rules, and again when the FCC revises its rules. Such a costly and wasteful move could result in litigation, as it did in Kansas.⁷ Simply increasing the NUSF fund to cover implementation costs would not resolve this issue, but it *would* increase the burden on consumers. The fund surcharge already stands at 6.5 percent; a pivot from revenue-based to connection-based assessment would not change the fundamental fact that increasing an already-high burden is by definition more burdensome, no matter the metric for imposition. Therefore, the Commission should postpone making final decisions on NUSF contribution reform pending clarity on the FCC’s federal contribution reforms.

As CTIA has observed, this approach would not prevent the Commission from making progress on NUSF contribution reform – far from it.⁸ The Commission should work towards a strategic plan that studies issues, such as the scope of need for funding and the appropriate size

⁷ Petitioner/Appellant Motion for Stay at 7, 9-10, *Southwestern Bell Tel. Co. v. Kan. Corp.* Comm’n, No. 2016-CV-006 (Kan. D. Ct. Jan. 25, 2016) (establishing in expert affidavits that compliance costs for similar Kansas Universal Service Fund reforms would impose a burden likely to cost a single carrier between \$5 million and \$13 million).

⁸ Reply Comments of CTIA to the Further Comments Filed in Response to the Commission’s April 5, 2016 Order, App. No. NUSF-100/PI-193, at 1-2 (filed July 15, 2016) (highlighting “broad support for the Commission to develop a strategic plan before taking other steps to reform the NUSF,” and noting that development of a strategic plan could proceed prior to the FCC implementing reforms to the federal contribution methodology).

of the fund, that are not dependent on the federal proceeding. This will position the Commission to make intelligent, optimal decisions about contribution reform when the time is right.

2. What issues may be presented if a state connections-based USF contribution mechanism proposes to assess a regulatory surcharge on a connection through which only broadband Internet access service access is provided versus a connection where both broadband and voice is provided?

As discussed in more detail below, the Commission may not impose NUSF contributions on broadband Internet access services (“BIAS”). Thus, a Nebraska connections-based NUSF contribution approach – which would capture BIAS connections – would result in wasteful and costly litigation, in harmful delays, and ultimately, in impeding realization of the NUSF’s important goals.

Further, if the Commission attempted to impose NUSF contributions on a connection that provides both voice and BIAS, the contributor would have to allocate connections in order to compute its contribution obligation. As highlighted in Section II.1., *supra*, the NUSF allocation approach must be synchronized with the allocation approach used for the federal USF in order to avoid an impermissible burden on the federal mechanism. All of these concerns strongly militate in favor of waiting until the FCC’s reform is clear before reforming the NUSF contribution mechanism.

a. A state connections-based USF contribution mechanism is not permitted under the Open Internet Order.

The Commission is preempted by the FCC’s 2015 *Open Internet Order* from imposing NUSF surcharges on broadband Internet access services. In the *Open Internet Order*, the FCC concluded that “broadband Internet access service is jurisdictionally interstate for regulatory purposes” and “preempt[ed] any state from imposing any new state USF contributions on

broadband – at least until the [FCC] rules on whether to provide for such contributions.”⁹ Thus, the Commission is currently preempted from imposing NUSF contributions on BIAS services.¹⁰

b. The Commission also lacks statutory authority to impose NUSF surcharges on connections providing only BIAS.

Additionally, the Commission does not have the statutory authority to impose NUSF surcharges on BIAS. The Commission’s authority to impose NUSF contribution obligations is limited to “telecommunications companies.”¹¹ A “telecommunications company” is one providing “telecommunications service for hire,”¹² and “telecommunications service” is “the offering of telecommunications for a fee.”¹³ In turn, “telecommunications” under the statute “means the transmission between or among points specified by the user of information of the user’s choosing without change in the form or content of the information as sent and received.”¹⁴

BIAS is not a “telecommunications service” under Nebraska law. Broadband service is expressly included in the separate statutory definition of “advanced telecommunications capability service” in Neb. Rev. Stat. § 86.103.1 (“Advanced telecommunications capability service means high-speed, broadband telecommunications capability ...”).¹⁵ The legislature

⁹ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5803-04 ¶¶ 431-32 (2015) (“*Open Internet Order*”).

¹⁰ U.S. Const. art. VI, cl. 2.

¹¹ Neb. Rev. Stat. § 86-326.

¹² *Id.* at § 86-322.

¹³ *Id.* at § 86-121.

¹⁴ *Id.* at § 86-320.01.

¹⁵ *Id.* at § 86.103.1.

would not have included it in the definition of “advanced telecommunications capability service” if it fit within the definition of “telecommunications.”¹⁶

As a result, service providers are not acting as “telecommunications companies” when they are providing BIAS. The Commission has found, consistent with federal law, that entities only qualify as “telecommunications carriers” when they provide “telecommunications services.”¹⁷ Thus, a company cannot be treated as a “telecommunications company” subject to NUSF obligations relative to provision of BIAS-only service; and because the Commission can only impose NUSF obligations on telecommunications companies, it cannot impose NUSF obligations on companies relative to their provision of BIAS.

Even if the Commission disagrees with the foregoing analysis, the Commission has never determined that BIAS is a telecommunications service, and it cannot do so in this proceeding because the issues related to the definition of telecommunications services and BIAS extend well beyond the scope of this proceeding. ¹⁸ Further, the record in this proceeding is insufficient to consider the issue in this proceeding.

¹⁶ *Dean v. Nebraska*, 849 N.W.2d 138, 146 (Neb. 2014) (parties “must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence [should] be rejected as superfluous or meaningless”).

¹⁷ *Sprint Communications Company L.P.*, App. No. C-3429, 2005 Neb. PUC LEXIS 174 (2005) at *14-*16 (finding Sprint did not qualify as a “telecommunications carrier” when acting pursuant to a private contractual arrangement). *See also* 47 U.S.C. § 153(44) (a provider is only treated as a “telecommunications carrier” “to the extent it is engaged in providing telecommunications services”).

¹⁸ *See, e.g.*, Neb. Rev. Stat. § 84-907.05(1) (“An agency may not adopt a rule or regulation that is substantially different from the proposed rule or regulation contained or referenced in the published notice. An agency may terminate a rulemaking or regulation-making proceeding and commence a new rulemaking or regulationmaking proceeding for the purpose of adopting a substantially different rule or regulation.”).

Therefore, even if the Commission were not preempted by the *Open Internet Order*, imposition of NUSF surcharges on BIAS would still be statutorily impermissible.

- c. *Assessing both BIAS and voice connections would risk asynchronicity with the federal mechanism, and thus impose an impermissible burden.*

If the Commission wishes to assess connections that provide both BIAS and voice, contributors would have to allocate such connections between the assessable voice service and the unassessable BIAS service. The FCC currently provides an allocation methodology, including two safe harbors, for federal USF contributors to allocate packages that include both telecommunications and non-telecommunications components.¹⁹ A state's allocation approach must synchronize with the federal approach to avoid a "burden" on the federal mechanism. As a result, the Commission should wait to revise the NUSF contribution methodology until the FCC's reforms are clear.

Moreover, as noted above, the FCC has suggested that, if it begins assessing federal USF contributions on BIAS services, it may permit states to do the same for state USFs.²⁰ Thus, delaying action on NUSF contribution reform until the FCC's reforms are finalized may provide the Commission with greater flexibility in considering the appropriate scope of reform, and this consideration militates in favor of a brief delay in order to coordinate with the federal reforms.

- 3. How does a party that has identified a legal issue recommend that such issue be addressed by the Commission in order to minimize or**

¹⁹ See FCC Form 499-A Instructions (2016) at 33-34.

²⁰ *Open Internet Order*, 30 FCC Rcd at 5803-04 ¶¶ 431-32

eliminate the impact of such issue on the implementation of a connections-based contribution mechanism?

These comments have identified a number of legal issues that are relevant to the implementation of a connections-based contribution mechanism. CTIA²¹ and other commenters²² have also identified other such issues throughout this proceeding. The common thread among the majority of these issues is their contingency on decisions the FCC will make in reforming the federal USF contribution mechanism. NUSF reform prior to federal reform, thus, risks uncertainty, giving rise to potential dispute.

Disputes over these issues would only lead to costly litigation and delay, as they have, for example, in Kansas.²³ This delay would only impose additional needless costs and burdens on the state and providers. However, the Commission has in its power the ability to forestall such

²¹ See generally Reply Comments of CTIA to the Further Comments Filed in Response to the Commission's April 5, 2016 Order, App. No. NUSF-100/PI-193 (filed July 15, 2016); Comments of CTIA in Response to the Commission's April 5, 2016 Order Seeking Further Comments, App. No. NUSF-100/PI-193 (filed June 6, 2016); Reply Comments of CTIA – The Wireless Association® in Response to the Commission's November 13, 2015 Order Opening Docket and Seeking Comment, App. No. NUSF-100/PI-193 (filed Apr. 13, 2015); Comments of CTIA – The Wireless Association® in Response to the Commission's November 13, 2015 Order Opening Docket and Seeking Comment, App. No. NUSF-100/PI-193 (filed Feb. 13, 2015).

²² See, e.g., Reply Comments of Windstream Nebraska, Inc., Application No. NUSF-100/PI-193 (filed June 6, 2016) (calling for delay until the FCC reaches a decision and requesting the Commission hold workshops on a variety of legal issues); Joint Reply Comments of Cox Nebraska Telecom, LLC and Charter Fiberlink – Nebraska, LLC, Application No. NUSF-100/PI-193 (filed June 6, 2016) (“Cox June Reply”) (cautioning against acting prior to the FCC's decision, highlighting the need for more certainty around NUSF goals, and calling for increased NUSF transparency); Reply Comments of Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink, Application No. NUSF-100/PI-193 (filed June 6, 2016) (echoing calls for workshops to resolve outstanding issues, asking the Commission to delay until the FCC acts, and reiterating support for a NUSF Strategic Plan).

²³ See *supra* note 7 and associated text.

disputes and legal costs by waiting to implement changes until the outlines of the reform of the federal USF are clear.

III. CONCLUSION

By operating from the starting position that (1) the NUSF cannot assess interstate revenues, (2) NUSF contributions cannot be imposed on BIAS, and (3) it is necessary to wait for the FCC's decision on federal USF contribution reform, the Commission will be positioned to maximize the effectiveness of its NUSF reformation efforts. The Commission should proceed to develop a comprehensive plan related to the size and purposes of the NUSF, bearing in mind the need to avoid overburdening wireless consumers, who already face a disproportionately large tax, fee, and surcharge burden.

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August 2, 2016

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CERTIFICATE OF SERVICE

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