

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 contribution methodology.	Application No. NUSF-100 PI-193
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CENTURYLINK'S RESPONSE TO ORDER SOLICITING BRIEFS

Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink (together referred to herein as "CenturyLink") submit this Brief in response to the Order Soliciting Briefs entered by the Nebraska Public Service Commission ("Commission") on July 12, 2016. The Commission solicits briefs from interested parties on three legal questions which have been raised with respect to the proposal advanced by several parties for a connections-based contributions mechanism for funding the Nebraska Universal Service Fund ("NUSF"). The legal questions asked, and CenturyLink's response, are as follows:

Question 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?

CenturyLink believes this first question forms an important predicate for the connections-based proposal, and for the second question, which focuses the jurisdictional question on application of a connections-based contribution mechanism to broadband connections. CenturyLink responds to the first question without discussion of the broadband component, which is addressed in the response to the second question.

As the Commission's first question recognizes, the business of providing telecommunications in the United States is subject to dual jurisdictional regulations by state regulatory agencies and the Federal Communications Commission ("FCC"). The Communications Act of 1934 ("Act") established the

FCC, and by Section 2(a) grants the FCC authority over “all interstate and foreign communication by wire or radio . . .” Sections 3(a) and 3(b) respectively define “wire communication” and “radio communication” as including not only transmission but also “all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission.”

State regulatory jurisdiction is set forth, in part, in Sections 2(b) of the Act. Section 2(b) provides, “[N]othing in this Act shall be construed to apply or to give Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .” (Emphasis added.) The emphasized wording indicates that the FCC authority is limited in matters relating to, or involving intrastate communications, including “charges” and “facilities” used “in connection with intrastate communication service.” From the inception of dual regulation, state commissions have regulated intrastate and exchange communications, including access to toll services.

The local loop is used in making local calls, and in making interstate calls. Section 221(c) of the Act authorizes the FCC to classify and determine what property of a carrier shall be considered as used in interstate service; and under Section 221(d), as to property classified by the FCC as interstate, the FCC may only place value on that part determined to be used in interstate service. With respect to carriers’ local loops, the FCC historically applied factors allocating the cost of customer plant between interstate and intrastate, for purposes of setting rates in each jurisdiction. Besides setting service rates, states have also always had jurisdiction over service quality and the adequacy of facilities, even though those facilities may have jurisdictionally mixed uses. The longstanding practice of assessing state USF surcharges provides convincing evidence that the charges, and the public policy objectives they are designed to meet, are legitimate state regulatory actions that are undertaken, in the words of Section 2(b) of the Act, “in connection with” its intrastate authority.

While USF surcharges have been declared to be within the Commission’s rate making authority (*Schumacher v. Johanns*, 272 Neb. 346; 722 N.W.2d 37 (2006)), the surcharges are not rates for service, per se. To CenturyLink’s knowledge, NUSF surcharges are calculated without reference in any way to the interstate/intrastate factors for jurisdictionally mixed facilities. Therefore, in response to the first question asked, an NUSF contribution which is connections-based does not burden the interstate uses any more than a surcharge which is revenues based, since both are determined without regard to jurisdictional separations—and, as discussed below, both recover the same total amount for the fund.

Before the Commission determines the amount of NUSF charge, it must first make a decision about how big the fund needs to be to meet its purposes. Then, the Commission devises the surcharge. The Commission might, as it has done before, determine the surcharge by dividing the amount needed for the fund by total state annual intrastate telecom revenues to arrive at a percent of billed revenue that needs to be charged for NUSF—or it might divide the amount needed for the fund by the total state number of connections to arrive at flat NUSF charge. Either way, the NUSF charge is billed to an intrastate user. The interstate capability and the costs that are allocated to the interstate jurisdiction are unaffected and indifferent to the method chosen.

In response to the first question, apart from the special circumstances that exist in the case of broadband service without a voice calling application which is discussed below, there are no insurmountable intrastate versus interstate jurisdictional issues raised by moving to a connections-based mechanism for assessing an NUSF surcharge.

Question 2. What issues may be presented if a state connections-based 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?

CenturyLink interprets the question to be whether (a) broadband internet access service (“BIAS”) may be assessed the NUSF surcharge, or (b) whether voice over internet protocol (“VoIP”) may be assessed the NUSF surcharge, by a connections-based mechanism.

A. NUSF Surcharge Applied to BIAS

In its *Open Internet Order*, the FCC affirmed that BIAS is jurisdictionally interstate for regulatory purposes, declaring federal preemption on the grounds that it is impossible or impractical to separate the service's intrastate from interstate components. *In the Matter of Protecting and Promoting the Open Internet*, FCC 15-24, Mar. 12, 2015, para. 431. Further, the FCC has determined that, for the time being, it will forbear from federal USF contributions, and imposes the same requirement on states with respect to any new state USF contributions on broadband. *Para. 432*. This much is clear: Nebraska may not impose the NUSF surcharge on broadband Internet access service access. That cannot be said of VoIP, however.

B. NUSF Surcharge Applied to VoIP.

(1) The FCC Has Not Preempted States from Assessing USF Surcharges on VoIP.

VoIP does not meet the definition of BIAS. BIAS is defined by the FCC as:

A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part. *Open Internet Order, para. 25*.

VoIP, however, is an application on broadband, not the underlying broadband capability, BIAS. *Open Internet Order, para. 122*. The VoIP application does not provide the capability to transmit data and receive data from all or substantially all Internet endpoints, and therefore does not meet the definition of BIAS. Accordingly, the FCC preemption of state USF charges on BIAS imposed by the *Open Internet Order* does not extend to VoIP.

(2) Unlike its forbearance from subjecting BIAS to universal service obligations, the FCC subjects VoIP to those obligations, subject to certain criteria.

The current state of regulation of USF contributions from VoIP can best be understood by the FCC's *Report and Order in the Matter of Universal Service Contribution Methodology*, FCC 06-94, June 27,

2006 (the “*Interconnected VoIP Order*”). In the *Interconnected VoIP Order*, the FCC extended universal service support obligations to “interconnected VoIP” services. The FCC defined “interconnected VoIP services” as:

[T]hose VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN. [fn. omitted] We emphasize that interconnected VoIP service offers the *capability* for users to receive calls from and terminate calls to the PSTN; the obligations we establish apply to all VoIP communications made using an interconnected VoIP service, even those that do not involve the PSTN. *Interconnected VoIP Order, para. 52.*

Interconnected VoIP providers must report and contribute to the federal USF on all their interstate and international end-user telecommunications revenues. The FCC recognized that it is difficult for some interconnected VoIP providers to separate their traffic on a jurisdictional basis.

Para. 53. Thus, the *Interconnected VoIP Order* establishes a “safe harbor” provision denoting 64.9 as the percentage of a customer’s interconnected VoIP communications determined to be interstate and to which the USF surcharge applies. *Para. 53.* Interconnected VoIP providers may report based on their actual interstate telecommunications revenues or rely on traffic studies, as alternatives to the safe harbor allocation. *Para. 52.*

- (3) The FCC Has Exclusive Regulatory Control Over Whether State USF Regulations Apply to Intrastate VoIP, And Has Not Forbidden Application Of Those Regulations.

For purposes of responding to the Commission’s Order Soliciting Briefs, it is more important to note what the FCC’s *Interconnected VoIP Order* does not dictate to states. The *Interconnected VoIP Order* does not preempt states’ application of their own USF contributions mechanisms to interconnected VoIP providers, based on an impossibility or impractical rationale, or other rationale. Court decisions which apply the reasoning from earlier FCC rulings, preempting states from applying regulation to VoIP because of the impossibility or impracticality of determining interstate versus intrastate traffic, are overtaken by the FCC’s decision. It allows that intrastate traffic can be determined, by actual studies or by safe harbor.

The FCC's determination that interconnected VoIP can be allocated into interstate and intrastate traffic tacitly overturns earlier rulings and court decisions. Important to the Nebraska Commission, an Eighth Circuit decision arising out of the Nebraska Commission's imposition of NUSF obligations on the nomadic VoIP services of Vonage held that Vonage was preempted by reasoning of earlier preemption orders of the FCC. *Vonage Holdings Corp. v. Nebraska Public Service Comm'n*, 564 F.3d 900 (8th Cir. 2008) ("*Nebraska Vonage*"). However, the opinion explicitly recognized that the decision rested on an earlier preemption order,¹ and that a reasonable interpretation of that order "is that the FCC has determined, given the impossibility of distinguishing between interstate and intrastate nomadic interconnection usage, it must have the sole regulatory control. Thus, while a universal funds surcharge could be assessed for intrastate VoIP services, the FCC has made clear it, and not state commission, has the responsibility to decide if such regulations will be applied." 564 F.3d at 905. In fact, by the time the Eighth Circuit decided *Nebraska Vonage*, upholding the FCC's preemption over VoIP according to the *Vonage Preemption Order*, the FCC had already determined that interconnected VoIP can be allocated jurisdictionally for purposes of USF, effectively overturning impossibility preemption. Yet, the Court's analysis left some to wonder whether nomadic VoIP was uniquely preempted.

- (4) The FCC's 2010 *Nebraska Kansas Ruling* Eliminates Any Doubt—States Are Not Preempted From Imposing Universal Service Contribution Obligations On Providers of Nomadic Interconnected VoIP Service.

In the wake of the Eighth Circuit's *Nebraska Vonage* decision, the Nebraska and Kansas Commissions filed their petition for declaratory ruling that states are not preempted from imposing universal service contribution requirements on future intrastate revenues of nomadic interconnected VoIP providers. The FCC ruled that while the Interconnected VoIP Order did not address preemption, its Order has shown that it is possible to separate the interstate and intrastate revenues of interconnected VoIP providers, and there is no basis to preempt states from imposing universal service contribution

¹ *Vonage Preemption Order*, 19 FCC Rcd 22404 (Nov. 12, 2004), *aff'd sub nom.*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

obligations on providers of nomadic interconnected VoIP service. *In the Matter of Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling*, FCC 10-185, Nov. 5, 2010 (“Nebraska Kansas Ruling”), paras. 15-16.

- (5) The FCC Does Not Compel A Revenue-Based State USF Contribution Mechanism For Interconnected VoIP.

While the *Interconnected VoIP Order* establishes an interim safe harbor interstate / intrastate traffic allocation, it does not compel that it be used. More importantly, however, it does not establish that states’ USF contribution mechanisms must be based on revenues. CenturyLink submits that the *Nebraska Kansas Ruling* does not compel revenue-based contribution mechanisms either, provided that providers are not unfairly assessed by the state.

The *Nebraska Kansas Ruling* concludes that state USF contribution rules are not preempted if they are consistent with the FCC’s contribution rules for interconnected VoIP providers and the state does not enforce intrastate USF assessments with respect to revenues associated with nomadic interconnected VoIP service provided in another state. *Para. 1.* More specifically, to avoid a conflict with the FCC’s rules, the FCC cautioned that a state imposing USF on interconnected VoIP revenues must allow those providers to treat as intrastate for state USF purposes the same revenues that they treat as intrastate under the FCC’s universal service contribution rules. *Para. 17.* Further, the FCC ruled that states must not subject interconnected VoIP providers to double assessment on the same revenues if two states adopt inconsistent methods for determining the intrastate revenue base used to calculate state universal service payments. *Para. 18.*

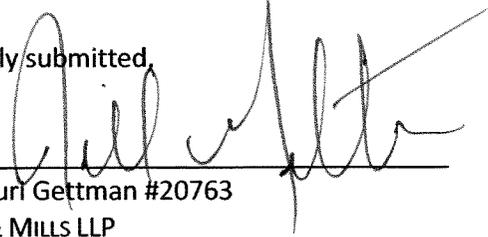
The foregoing specific conditions placed on the states relate to the risk of double assessment resulting from assignment of revenues between jurisdictions. A connections-based mechanism eliminates that risk. If the service is interconnected VoIP, one flat charge applies, and it is the same flat charge as borne by every other provider of a connection providing the capability of connecting calls to or from the public switched telephone network in the state.

Question 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?

CenturyLink submits that much more work needs to be done to identify how connections are counted for a connections-based methodology. In its initial and reply comments in this proceeding, CenturyLink recommended the Commission hold workshops where issues may be discussed in a collaborative setting. Notwithstanding the task ahead, a connections-based methodology is fundamentally legally sound.

Dated this 3rd day of August, 2016.

Respectfully submitted,

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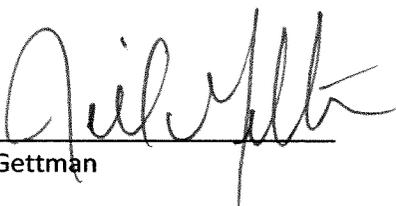
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of August, 2016, a true and correct copy of the foregoing was to the following:

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