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

JOINT REPLY COMMENTS OF COX NEBRASKA TELCOM, LLC AND CHARTER FIBERLINK – NEBRASKA, LLC

Cox Nebraska Telcom, LLC and Charter Fiberlink – Nebraska, LLC (hereinafter referred to as the "Joint Commenters") hereby submit these reply comments for the Nebraska Public Service Commission's (the "Commission") consideration in the above-captioned docket. These comments are being filed pursuant to the Commission's Order Seeking Further Comments entered on April 5, 2016 ("April Order") and the Order Extending Reply Comment Deadline entered on June 13, 2016.

Commission action to restructure contributions to the Nebraska Universal Service Fund (the "NUSF") while the Federal Communications Commission (the "FCC") is undertaking similar national efforts is likely to be uneconomical of both the Commission's and industry's resources and bears a substantial risk of further confusing efforts to reform the contribution methodology. If the Commission nevertheless proceeds with the process of restructuring the method of contributing to the NUSF, workshops would be necessary to consider the many details of implementing an alternative methodology that does not create disparate treatment of providers.

Moreover, it would be essential that the Commission first appropriately size the NUSF and resolve the pending uncertainty as to its goals, while also improving fund accountability and transparency. Finally, the Joint Commenters urge the Commission to be mindful that a third-party accounting or auditing firm may review carrier remittances only to the extent that such review does not violate federal law or necessitate disclosure of highly confidential "connections"-based subscribership data.[1]

I. THE JOINT COMMENTERS AGREE WITH COMMENTS CAUTIONING THE COMMISSION AGAINST CHANGING THE CONTRIBUTION METHODOLOGY BEFORE THE FCC ACTS

The Joint Commenters have recommended that the Commission maintain the present revenues-based contribution methodology until the FCC changes its revenues-based approach for federal universal service contributions. If the Commission nevertheless proceeds to revise the contribution methodology, further and substantial changes are likely to be necessary to comply or be consistent with the FCC's actions. Therefore, the Joint Commenters agree with Viaero Wireless' ("Viaero") assertion that "any effort by the Commission to implement a new contribution mechanism . . . [that] does not incorporate . . . FCC action[] could result in extensive regulatory confusion . . . and [would be] an enormous waste of [] resources and investments."[2] The Joint Commenters also agree with the CTIA –The Wireless Association's ("CTIA") position that "the best way to tailor the NUSF" is to *complement* federal programs, which will be achieved by awaiting the FCC's modifications.[3]

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[1] In an earlier order issued in this matter, the Commission stated that it "is not, at this time, considering the assessment of broadband services or broadening the base to include additional consumers not already contributing to the NUSF." Order Opening Docket and Seeking Comment, issued November 13, 2014, at p. 1. Since the Commission's statement, the FCC has preempted states from imposing new state universal service contributions on broadband Internet access services. *See In the Matter of Protecting and Promoting the Open* Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling and Order (rel. March 12, 2015), para. 432 (the "Open Internet Order"). Until the FCC concludes its review and decides whether states may direct that broadband services contribute to state funds, any new methodology that would include broadband assessments would be inconsistent with federal law. Accordingly, like other parties in this proceeding, the Joint Commenters herein do not address any issue of contributions to the NUSF from broadband services. *See* Comments of Windstream Nebraska, Inc. ("Windstream's Comments"), p. 1; Comments of CTIA In Response to the Commission's Order Seeking Further Comments ("CTIA's Comments"), p. 6; and Comments of NE Colorado Cellular, Inc. d/b/a Viaero Wireless ("Viaero's Comments"), p. 2.

[2] Viaero's Comments, p. 3.

[3] CTIA's Comments, pp. 6-7.

Moreover, as others have commented, the Commission potentially risks violating 47 U.S.C. § 254(f) by adopting a method that impermissibly relies on or otherwise burdens federal universal service,[4] or invites federal preemption.[5] Thus, the process of determining a separate contribution methodology for Nebraska before the FCC acts is likely to be ineffectual, in addition to being expensive, time-consuming and administratively difficult to implement.[6] It follows that, as Windstream asserts, of the many steps that must be taken before sweeping state contribution restructuring can be effected, prior federal action is the first order of priority.[7]

II. AS OTHER COMMENTERS URGE, WORKSHOPS SHOULD BE HELD BEFORE UNDERTAKING SIGNIFICANT CHANGES TO CONTRIBUTION METHODOLOGY

The Joint Commenters have recommended that, if the Commission proceeds to undertake significant contribution restructuring prior to FCC action, the Commission hold workshops in which interested parties can discuss the details of implementing alternative methodologies. Accordingly, the Joint Commenters agree with Windstream that "the most efficient way for the Commission to proceed [following this round of comments and replies] would be to host a []

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[4] *Id.*, pp. 7-8.

[5] Viaero's Comments, pp. 5-6.

[6] As CTIA states:

> Changes to any USF contribution methodology - federal or state - require carriers to undertake modifications of billing and accounting systems, employee training, customer education, compliance processes and more, all of which require a substantial investment of time, expertise and capital. CTIA's members have estimated that they may need 12-24 months to make changes to the multiple systems that are involved in accurately collecting NUSF contributions, train their personnel, conduct customer education, and implement compliance processes to ensure accurate collection is occurring.

CTIA's Comments, p. 8.

[7] Windstream's Comments, p. 6.

noticed workshop[]."[8] The workshop(s) to be conducted should include discussion of scheduling the many procedural steps that would need to be undertaken.[9]

CenturyLink also recommends that the Commission consider holding workshops where each of the proposed goals can be discussed, because a change of the magnitude tentatively proposed by the Commission will be neither simple nor easy.[10] Workshops would be necessary to consider the diverse service products in the market and the complex technological, market and administrative issues inherent in alternative contribution methods. These issues include legal and policy issues regarding the reporting of provider data[11] and the intricate details and consequences – which include consideration of "winners" and "losers" – in implementing any systemic overhaul of the NUSF.[12] The development and vetting of these issues, if left for analysis and development solely through written comments, would be lacking and lead to confusion and failures in implementation. Thus, the Joint Commenters believe that the most robust and constructive input will be derived from a workshop setting where the issues can be presented, considered and evaluated openly by all interested stakeholders.

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[8] *Id.*, p. 7.

[9] *Id.*, p. 6.

[10] Comments of Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink ("CenturyLink's Comments"), pp. 1-2.

[11] *See* Section V, *infra*.

[12] For example, the Commission should have a thorough understanding of multi-line, high capacity facilities, the channelization and provisioning of such facilities for voice or data, and the assignment to and use of phone numbers by businesses. *See* CTIA's Comments, p. 15.

III. BEFORE UNDERTAKING CONTRIBUTION RESTRUCTURING, THE COMMISSION MUST FIRST APPROPRIATELY SIZE AND DETERMINE PRACTICABLE AND COMPETITIVELY NEUTRAL GOALS OF THE NUSF

Any consideration of contribution restructuring not only inevitably *includes* consideration of how much money the NUSF needs, and for what purposes, it *presupposes* that the Commission has appropriately determined the size and decided on specific disbursement goals of the NUSF that are commensurate with the limitations inherent in public funding and consistent with sound economic and public policy. As CTIA agrees, the Commission must consider a proper, forward-looking vision for the NUSF before implementing reforms to the NUSF contribution methodology.[13]

The Commission also must first determine what it will cost to achieve the goals in its strategic plan before it considers what contribution methodology is most appropriate to meet funding needs. Until the Commission determines the size and goals of the NUSF, it is premature to consider what contribution methodology and customer impacts are consistent with these determinations.[14] Indeed, the FCC reformed the Federal Universal Service Fund before it revised the contribution methodology to support the fund. The Rural Independent Companies, a proponent of changing the contribution methodology, acknowledge that sizing the fund is the next logical step in the Commission's consideration.[15]

In its April Order, the Commission set forth its Strategic Plan for the "advancement of universal service in the broadband age," which includes the "deployment of fiber-based network everywhere."[16] The Joint Commenters, however, agree with other parties that *non*-fiber

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[13] CTIA's Comments, p. 1.

[14] Windstream's Comments, pp. 6-7.

[15] Comments of The Rural Independent Companies, pp. 9-10.

[16] April Order, p. 5.

technologies "will play a very large part in the provision of broadband for the foreseeable future."[17] As several commenters observe, non-fiber technologies may be available alternatives of providing broadband service.[18] And, as technology continues to evolve, emerging solutions (*e.g.*, DOCSIS 3.1) will bring greater speeds to existing modalities, meeting or exceeding those provided by fiber, and reducing or eliminating the need for new fiber plant.

In addition, the Joint Commenters join with others in encouraging the Commission to refrain from taking actions that are not technologically and competitively neutral. As CTIA urges, the Commission should be cautious in providing broadband support to incumbent local exchange carriers ("ILECs") so that it does not disrupt the competitive environment, inhibit consumer choice, or chill innovation.[19] The Joint Commenters agree with CTIA that the Commission's "goal should be universal service without regard to the modality by which it is achieved."[20]

Further, the Joint Commenters agree with others that the expenditure of NUSF support must be cost-effective.[21] An aspirational goal of "ubiquitous" fiber (or broadband) must be balanced against practical issues such as how assessments affect consumers, efficiently using those funds to meet the state's universal service goals and the existence of cheaper and comparable alternatives.[22]

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[17] *See* Comments of Citizens Telecommunications Company of Nebraska d/b/a Frontier Communications of Nebraska ("Frontier's Comments"), p. 1; *see* Windstream's Comments, p. 4.

[18] *See* Frontier's Comments, p. 1; Windstream Comments, pp. 3-4; and CTIA's Comments, pp. 3-5; CenturyLink, p. 4.

[19] CTIA's Comments, p. 4.

[20] *Id.*

[21] *Id.*, p. 5.

[22] CenturyLink's Comments, pp. 2-3.

IV. IMPROVING THE ACCOUNTABILITY AND TRANSPARENCY OF THE NUSF IS ESSENTIAL TO AVOID MARKET DISTORTIONS AND EASE PRESSURE ON UNIVERSAL SERVICE CONTRIBUTIONS

In its September 1, 2015 Order in Application No. NUSF-99, the Commission disallowed state broadband support to areas that already have an unsubsidized carrier providing comparable broadband service.[23] The Joint Commenters have long advocated that the Commission's broadband deployment goals should include targeting the NUSF's limited resources to those unserved high-cost areas that do not present a viable business case for providers to extend facilities; however, this aspect of NUSF policy has not been implemented. Without such reform, it is inequitable to ask that the costs of universal service be borne by competing providers and their customers. Therefore, the Joint Commenters agree with Windstream that the Commission must:

> limit [NUSF] resources from being used to over-build . . . existing broadband investment. . . . Such over-building is an inefficient use of scarce Fund resources and a financial deterrent to the private enterprises the Commission hopes will spend millions in broadband investment in the state. To date, the Commission has not issued guidelines or initiated a rulemaking to address the specific circumstances in which over-building should not be permitted.[24]

For the industry's support in undertaking contribution restructuring and to avoid inhibiting the development of competitive alternatives in areas already subject to competition, the Commission must ensure that recipients are not obtaining state broadband support for areas in which an unsubsidized carrier is providing competitive services.[25]

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[23] *In the Matter of the Nebraska Public Service Commission, on its Own Motion, to Administer the Universal Service Fund High-Cost Program*, Progression Order No. 1, Application No. NUSF-99, p. 6.

[24] Windstream's Comments, p. 4.

[25] In its September 1, 2015 Order, the Commission required price cap ILECs seeking state broadband support in Connect America Fund ("CAF") Phase II eligible areas to make an "additional demonstration" that high cost support is needed in conjunction with federal support. The Joint Commenters once again urge that the Commission take the step of limiting state broadband subsidies for those areas receiving CAF Phase II support.

In addition, at a time when Nebraskans face the potential of dramatic changes to their surcharge obligations, improved transparency will aid in justifying the NUSF's continued existence and goals to the public. Increased transparency ensures that carriers remain good stewards of public funds and that they continue to operate in accordance with the public interest. The Joint Commenters continue to encourage the Commission to modify its accountability measurements to ensure that high-cost support is being used solely for its intended purposes, in areas that are truly in need. The Joint Commenters recommend that recipients of state support demonstrate use of such support for network investment, as opposed to using the funds for merely operations and maintenance. The Commission can verify that such support is used for its intended purpose by requiring carriers to provide regularly scheduled project updates.

V. PROVIDERS MUST NOT BE SUBSTANTIALLY BURDENED WITH INCREASED REPORTING OBLIGATIONS THAT WOULD VIOLATE FEDERAL LAW

The April Order asks how an independent third-party accounting or auditing firm would review carrier remittances to the NUSF.[26] The April Order also asks whether the Commission should rely on Form 477 data for verification of the collection and remittances provided by providers each month.[27] Some commenters have recommended that that FCC Form 477 reports, which include granular geographic subscribership and deployment information, be used for such purpose.[28]

The Joint Commenters strongly urge that if a "connections" based approach is ultimately adopted, the Commission, in ensuring that carriers are meeting their contribution obligation, (1)

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[26] April Order, p. 10.

[27] *Id.*

[28] *See* CenturyLink's Comments, p. 8.

not require providers to file FCC Form 477 subscribership or "connections" type data, and (2) not compel the sharing of such data with third parties. Such Form 477 data is highly confidential, competitively sensitive data that reveals in granular detail broadband and voice service providers' facilities deployment and market penetration. Service providers have a compelling interest in safeguarding the confidentiality of their trade secrets and other competitively sensitive commercial information. Moreover, any requests for Form 477 data that do not comply with the FCC's rules and procedures for acquiring such data conflict with federal law. *See e.g.*, 47 C.F.R. § 1.7001(d)(4)(i) ("the Wireline Competition Bureau may release provider-specific information to . . . [a] state commission provided that the state commission has protections in place that would preclude disclosure of any confidential information").

The Commission must follow the FCC's procedures for obtaining Form 477 data, and federal law precludes the Commission from sharing this data with third parties. The FCC's form agreement concerning data sharing with state commissions requires those commissions to affirm "that the requested data will not be shared with any individuals who are not direct employees" of the state commission.[29] These provisions on their face "stand for the proposition that federal law precludes state commissions from sharing this kind of data with third parties under any circumstances."[30] Burdensome and contentious reporting requirements would complicate administration of the NUSF, encumbering the Commission's goal to "preserve and advance affordable voice service."[31]

[29] *See* FCC Form 477 Data-Sharing Agreement with State Regulatory Commission, available at https://transition.fcc.gov/form477/letter-of-agreement-format-2009.pdf (2009).

[30] *New Cingular Wireless PCS LLC, eta l v. Michael Picker, et al*, Order Granting Motion for a Preliminary Injunction, Case No. 16-CV-02461-VC (N.D. Calif. May 20, 2016) (copy attached).

[31] April Order, p. 5.

VI. CONCLUSION

In closing, the Joint Commenters again encourage the Commission to await the FCC's actions on contribution reform before significantly changing the NUSF's contribution methodology. If the Commission nevertheless proceeds to abandon the current revenues-based approach, workshops should be held where the industry has an opportunity to discuss the details of implementing a new methodology. The Joint Commenters also emphasize the necessity of appropriately sizing the NUSF, focusing on achievable goals, improving the accountability and transparency of the NUSF, and limiting the burdens on industry of audits and reporting.

Respectfully submitted this 15th of July, 2016.

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Certificate of Service

The undersigned hereby certifies that on this 15th day of July, 2016 an original and five (5) copies of the Joint Reply Comments filed by Cox Nebraska Telcom, LLC and Charter Fiberlink – Nebraska, LLC in Application NUSF-100, PI-193 were hand-delivered to the Nebraska Public Service Commission, 300 The Atrium, 1200 N Street, Lincoln NE and a copy of the same was e-mailed to:

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