

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

**REPLY BRIEF OF COX NEBRASKA TELCOM, LLC AND CHARTER FIBERLINK –  
NEBRASKA, LLC IN RESPONSE TO  
THE COMMISSION’S AUGUST 3, 2016 ORDER SOLICITING BRIEFS**

Cox Nebraska Telcom, LLC and Charter Fiberlink – Nebraska, LLC (collectively, the “Joint Commenters”) hereby make this filing in the above-captioned docket, as allowed by the Nebraska Public Service Commission (“Commission”) Order Soliciting Reply Briefs, entered August 3, 2016.

As an initial matter, by responding herein, the Joint Commenters do not change or deviate from their position conveyed through previously filed comments that it is ill-advised for the Commission to proceed independently, prior to the Federal Communications Commission (the “FCC”) taking action on this subject. The Joint Commenters reiterate it would be most prudent for the Commission to await FCC guidance and direction in order to avoid administrative burdens that otherwise will be foisted on all parties, and to prevent likely inconsistencies that will need to be addressed and rectified by the Commission. Reform done on a stand-alone basis will be a waste of resources for all involved when a national framework that answers the presently unresolved questions is forthcoming.

Having said that, the Joint Commenters file these comments to respond to the brief filed by the Rural Independent Companies (“RIC”). The RIC’s brief was filed August 3, 2016, pursuant to the Commission Order entered herein on July 12, 2016.



The RIC's brief discussed rationale and support for the Commission obtaining FCC Form 477 data, and also recommended that the Commission obtain FCC Form 499-A data. The RIC advised that such highly-confidential material would be protected through the Commission's entry of routinely utilized protection orders. The Joint Commenters respond to that assertion with the following points.

First, it is not clear that the Commission needs Form 477 data or Form 499-A data to resolve questions about the Commission's jurisdiction or, for that matter, other questions relating to the possible revision of the contribution mechanism of the NUSF. The perceived need for the Commission to obtain this data, and if it does, how it would be utilized needs to be carefully considered and understood by all interested parties. A workshop setting would give parties the opportunity to both understand exactly how the Commission intends to use this highly competitively sensitive and confidential data and to provide input to the Commission on the subject.

Second, FCC Form 477 data is highly confidential, competitively sensitive information that reveals in granular detail, broadband and voice service providers' market penetration in subscribership, service connections and facilities deployment. And obviously service providers have a compelling interest in safeguarding the release of this information to competitors. RIC is correct that the Commission can follow FCC procedures for obtaining Form 477 data. However, it is imperative that if the Commission acquires this highly confidential information, it not be accessible to third parties. The Commission's routinely utilized protection orders are generally accompanied with a Non-Disclosure Agreement providing signing parties access to the confidential information. Such cannot be the case with the Form 477 data. Whether or not the FCC Form 477 and the FCC Form 499-A data is even necessary should be explored, but an even



more critical issue that must be resolved is prohibiting the release of this highly-confidential data to third parties.

The FCC has long recognized “the potential for competitive harm that release of the gathered [Form 477] data could cause” and, in particular, “the ability of competitors to take the data submitted and tailor market strategies to quash nascent competition, protect areas that are being subjected to increased competition, or deploy facilities to defend strongholds.”<sup>1</sup> As a result, the FCC does not publish Form 477 subscribership and connections data, and it strictly limits the circumstances under which such information may be disclosed.<sup>2</sup> The FCC will release Form 477 data to a state commission, but only if the commission “has protections in place that would preclude disclosure of any confidential information.”<sup>3</sup> Furthermore, the state commission must also “formally declare to [the FCC] that [it is] willing and able to treat submitted information subject to restrictions on data release that are at least as stringent as federal requirements”<sup>4</sup> and agree that the data “will not be shared with any individuals who are not direct employees of the state commission.”<sup>5</sup>

The FCC’s limitations on state commissions’ disclosure of Form 477 data are strictly enforced. For example, the United States District Court for the Northern District of California recently issued a preliminary injunction barring the California Public Utilities Commission from compelling parties to share non-public Form 477 data with other parties.<sup>6</sup> The fact that the

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<sup>1</sup> *Local Competition and Broadband Reporting*, 15 FCC Rcd. 7717, ¶ 87 (2000).

<sup>2</sup> See 47 C.F.R. §§ 0.457, 0.459, 0.461, 1.7001(d); see generally *In the Matter of Modernizing the FCC Form 477 Data Program*, 28 FCC Rcd. 9887 (2013) (“2013 Form 477 Order”).

<sup>3</sup> 47 C.F.R. § 1.7001(d).

<sup>4</sup> *In the Matter of Local Telephone Competition and Broadband Reporting*, 19 FCC Rcd. 22340 (“2004 Form 477 Order”), at ¶ 26; see also *Form 477 Data-Sharing Agreement with State Regulatory Commission* (“Letter of Agreement”), available at <https://transition.fcc.gov/form477/letter-of-agreement-format-2009.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *New Cingular Wireless PCS LLC v. Picker*, No. 16-cv-2461-VC (N.D. Calif. May 20, 2016) (order granting motion for preliminary injunction) (attached here as Exhibit A).

California commission had issued a protective order intended to prevent any misuse of the FCC data was insufficient to resolve the matter in the California commission's favor. Notably, the court's preliminary injunction also prevents the California commission from sharing the data in its possession with *any* persons who are not direct employees of the commission, including its own outside experts.<sup>7</sup>

Form 499-A data also contains competitively sensitive information – in particular, information concerning a carrier's revenues.<sup>8</sup> The FCC allows a carrier to designate their revenue information as confidential.<sup>9</sup> Revenue data designated as confidential is treated as such and excepted from public disclosure, even in response to a federal FOIA request.<sup>10</sup>

Therefore, to the extent that the RIC suggests that a protective order issued by the Commission would be sufficient to comply with federal law or to protect the confidentiality of the parties' data, the Joint Commenters strongly disagree. The issuance of a protective order would be to augment the protections of federal law, not to replace them or allow third parties or other entities to obtain the data. A perceived administrative convenience related to use of this highly sensitive carrier data does not outweigh the significant competitive harm that could result if the data is not sufficiently protected.

Finally, as the Joint Commenters have suggested in previously filed comments, workshops could also be utilized to establish NUSF goals, create accountability measurements for those receiving high-cost support, and improve the overall transparency of the NUSF. The development

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<sup>7</sup> *New Cingular Wireless PCS LLC v. Picker*, No. 16-cv-2461-VC (N.D. Calif. August 3, 2016)(order granting motion to enforce or clarify injunction)(attached here as Exhibit B).

<sup>8</sup> See *2016 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A)*, available at <http://www.usac.org/res/documents/cont/pdf/forms/2016/2016-FCC-Form-499A-Form-Instructions.pdf>.

<sup>9</sup> See *id.*, at 46.

<sup>10</sup> See *In the Matter of the Consumer Law Group*, 28 FCC Rcd. 684 (2013)(affirming non-disclosure of Form 499-A data in response to FOIA request); *In the Matter of John E. Wall, Jr.*, 22 FCC Rcd. 2561 (2007)(same).

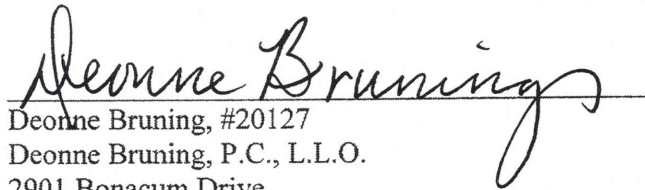


and vetting of all these issues should not be left for analysis and development through written comments or briefs.

In conclusion, the Joint Commenters reiterate and encourage the Commission to gather input through workshops where issues can be presented and evaluated openly by all interested stakeholders, including the merits of obtaining the FCC Form 477 and/or the FCC Form 499-A, and critically important, prohibiting the release of such information to third parties.

Respectfully submitted this 26<sup>th</sup> of August, 2016.

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### **Certificate of Service**

The undersigned hereby certifies that on this 26<sup>th</sup> day of August, 2016 five (5) copies of Cox Nebraska Telcom, LLC's and Charter Fiberlink – Nebraska, LLC's Reply Brief 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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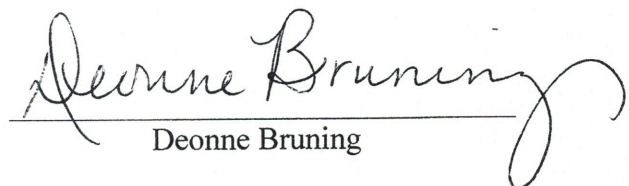
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**EXHIBIT A**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NEW CINGULAR WIRELESS PCS LLC,  
et al.,

Plaintiffs,

v.

MICHAEL PICKER, et al.,

Defendants.

Case No. 16-cv-02461-VC

**ORDER GRANTING MOTION FOR A  
PRELIMINARY INJUNCTION**

Re: Dkt. Nos. 8, 18

The plaintiffs' motion for a preliminary injunction is granted. The CPUC defendants are enjoined from enforcing the Commission's May 3, 2016 ruling compelling the plaintiffs to disclose the subscription data to TURN (or other third parties) until cross-motions for summary judgment are adjudicated. A hearing on the cross-motions for summary judgment will take place on August 4, 2016 at 10 am, and the parties can expect a ruling shortly after that date.<sup>1</sup>

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Arc of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). Courts in the Ninth Circuit "evaluate these factors via a sliding scale approach, such that serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the

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<sup>1</sup> If the parties are unavailable August 4th, they may stipulate to a hearing on the Court's regular civil law and motion calendar in the latter half of July or in the latter half of September.



public interest." *Arc of Cal.*, 757 F.3d at 983 (quoting *All. for the Wild Rockies*, 632 F.3d at 1131, 1135) (internal quotation marks omitted).

On the merits, at a minimum there is a serious preemption question. Indeed, considering the parties' submissions thus far, the plaintiffs have shown a likelihood of success. Although the FCC materials cited by the plaintiffs are not crystal clear on whether federal law allows a state commission to disclose this kind of data to a third party pursuant to a protective order, those materials suggest the answer is "no." For example, one regulation states that the FCC may only provide this kind of data to a state commission if the commission "has protections in place that would preclude disclosure of any confidential information." 47 C.F.R. § 1.7001(d)(4)(i). And the FCC's form agreement regarding 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. FCC Form 477 Data-Sharing Agreement with State Regulatory Commission (2009).<sup>2</sup> These provisions seem to stand for the proposition that federal law precludes state commissions from sharing this kind of data with third parties under any circumstances. If that's right, the CPUC's decision to require the plaintiffs to disclose the data to TURN and other third parties would conflict with federal law and therefore be preempted.

The defendants respond primarily by citing FCC materials that describe the important role state commissions play in regulating the telecommunications industry. These materials emphasize that state commissions, to effectively perform their roles in this federal-state regulatory scheme, need access to the kind of data at issue here. *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Auth. to Collect Broadband Data*, 25 FCC Rcd. 5051, ¶¶ 9, 10 & n.30 (2010). But that's beside the point. Nobody disputes that the state commissions themselves need this kind of data. The issue presented by this preliminary injunction motion is whether the state commissions may require the data to be disclosed to third parties.

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<sup>2</sup><https://transition.fcc.gov/form477/letter-of-agreement-format-2009.pdf>.

The defendants also argue that because the CPUC has obtained the data directly from the regulated parties rather than from the FCC, the FCC provisions relied upon by the plaintiffs don't apply. In other words, the FCC provisions by their terms merely speak to the transfer of data directly from the FCC to the state commissions, and condition that transfer on nondisclosure. Therefore, according to the defendants, the same condition doesn't apply where a state commission uses its regulatory power to obtain the data directly from regulated parties. That argument can't be right. It would make no sense for the FCC to impose serious confidentiality restrictions on data it shares with state commissions if those state commissions could readily avoid the restrictions by forcing regulated parties to provide the data directly.

None of this is to say the preemption question is easy. Perhaps, for example, the word "disclosure" in section 1.7001(d)(4)(i) merely means disclosure to the general public, in which case it might be permissible for a state commission to provide this kind of data to certain third parties subject to a protective order. Or perhaps the disclosure of the data by a state commission to certain third parties subject to a protective order would be appropriate if federal law permitted the FCC to make a similar disclosure under similar circumstances. *See* § 1.7001(d)(4)(iii); *Local Competition & Broadband Reporting*, 15 FCC Rcd. 7717, ¶ 95 (2000).<sup>3</sup> There is also a question whether some of the materials relied on by the plaintiffs — such as the FCC's form agreement governing data sharing with state commissions — have the force of law, and if not, how that affects the preemption analysis. *Cf. Wyeth v. Levine*, 555 U.S. 555, 576 (2009). But the defendants, in their response to the preliminary injunction motion, did not meaningfully address these issues, so the Court must conclude that the plaintiffs have met their burden with respect to the merits at this early stage in the process.

The remaining three factors in the preliminary injunction analysis overwhelmingly favor the plaintiffs. First, if federal law indeed precludes the CPUC from requiring this disclosure, the plaintiffs will suffer irreparable harm absent injunctive relief — the disclosure cannot be undone.

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<sup>3</sup> Perhaps there are even past examples of the FCC disclosing this kind of data (or similarly sensitive information) to third parties under a protective order.



*Cf. CBS Corp. v. FCC*, 785 F.3d 699, 708 (D.C. Cir. 2015).

Second, regarding the balance of hardships, the defendants will suffer virtually no harm if disclosure of the data to TURN and any other parties is delayed for two or three months while cross-motions for summary judgment are adjudicated. The CPUC already has the data, and can continue to use it in furtherance of its investigation. As for TURN's role in the investigation, counsel acknowledged at argument that TURN can still meaningfully participate in the proceeding, even without receiving the underlying data, by advocating to the CPUC about how the CPUC itself should analyze the data. And counsel for CPUC acknowledged at argument that it has experts on staff who are capable of digesting and analyzing the data themselves. The investigation can therefore continue while the preemption issue is adjudicated (and the investigation can be supplemented with TURN's own analysis of the data if the defendants ultimately prevail and the plaintiffs are required to disclose it).

Third, the public interest weighs in favor of interim relief. California residents have an interest in ensuring the CPUC conducts its investigations in a manner that does not conflict with federal law. The public has an interest in ensuring thorough judicial review before government disclosure of sensitive information. And the CPUC has been unable to articulate how its investigation would be rendered less effective by the short delay in disclosure of the data to TURN and other third parties, pending adjudication of the merits of the plaintiffs' claims.

**IT IS SO ORDERED.**

Dated: May 20, 2016



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VINCE CHHABRIA  
United States District Judge

**EXHIBIT B**



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NEW CINGULAR WIRELESS PCS LLC,  
et al.,

Plaintiffs,

v.

MICHAEL PICKER, et al.,

Defendants.

Case No. 16-cv-02461-VC

**ORDER GRANTING MOTION TO  
ENFORCE OR CLARIFY INJUNCTION**

Re: Dkt. No. 79

The motion to enforce or clarify the preliminary injunction is granted. As long as the injunction remains in place, the CPUC may not allow anyone other than a direct employee to possess the data that are the subject of the injunction. Accordingly, the preliminary injunction is clarified as follows: The CPUC must retrieve any of the data in Dr. Selwyn's possession immediately. If the CPUC has provided the data to any other person or entity who is not a direct employee, it must get that data back immediately. In addition, the CPUC is ordered to instruct all employees involved in the investigation (including people from the Office of Ratepayer Advocates, which is part of the CPUC) not to share the data with people who are not direct employees of the CPUC. Counsel for the CPUC is ordered to immediately email a copy of this ruling, as well as the Court's original preliminary injunction ruling from May 20, 2016, to all employees involved in the investigation. *See A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002) ("A district court has inherent authority to modify a preliminary injunction in consideration of new facts.").

The CPUC must file a status report, seven days from today, detailing all the efforts it has made to ensure compliance with this ruling.

It's difficult to understand how anyone at the CPUC could have failed to realize it was inappropriate for Dr. Selwyn, who is not a direct employee, to retain the data after the injunction was issued. It's even more difficult to understand why the CPUC's lawyers, upon learning that Dr. Selwyn continued to possess the data, did not immediately take steps to correct the problem. In the event of similar conduct going forward, the Court will consider holding the responsible parties in contempt, and will entertain any appropriate motion for sanctions.

The remaining requests by the plaintiffs are denied as overbroad, unripe, or unnecessary.

**IT IS SO ORDERED.**

Dated: August 3, 2016



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VINCE CHHABRIA  
United States District Judge