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

CENTURYLINK'S REPLY BRIEF IN RESPONSE TO ORDER SOLICITING REPLY BRIEFS

I. SUMMARY OF CENTURYLINK'S POSITION IN RESPONSE TO THE COMMISSION'S SOLICITATION FOR LEGAL BRIEFS

CenturyLink advances the following positions and legal propositions in support of a connections-based NUSF funding mechanism:

1. CenturyLink's concept of a connections-based NUSF funding mechanism is that a flat charge be assessed on every subscriber to a service which provides the capability to make intrastate voice calls, whether that service is provided by a traditional telephone provider, a wireless provider, or by an interconnected VoIP provider. It is not assessed on a per-call basis, a calls-made basis, or on revenues whether such revenues are intrastate, interstate, or total revenue for service.

2. The charge would not be assessed on Broadband Internet Access Service ("BIAS") without VoIP, in light of the FCC's current forbearance from subjecting BIAS from federal USF contributions, and imposition of the same requirement on states.

3. Because a connections-based surcharge is determined solely on intrastate calling capability, without reference to revenues for services, it does not conflict with the federal USF funding surcharges which are based on revenues for interstate service. A connections-based intrastate mechanism does not interfere with the federal methodology since interstate revenues can still be calculated using the federal method.

4. A connections-based mechanism applied equally to all providers' offerings of local calling capability is competitively neutral at both the intrastate and interstate level. Every provider entering the Nebraska intrastate voice calling business pays the same. Providers of interstate services are assessed under the FCC's USF system as they are today.

5. The Commission should move with all deliberate speed in this docket to reform NUSF funding mechanism. Waiting for the FCC to address USF reform is not necessary or wise.

II. DISCUSSION

A. <u>While a *revenue-based* state USF surcharge should use the federal safe harbor framework for allocating revenues between federal and state jurisdictions, *a connections-based state flat surcharge does not rely on revenues and does not burden or conflict with the federal mechanism.*</u>

1. RIC and CTIA Comments.

CenturyLink agrees with the statement by the Rural Independent Companies ("RIC") at page 5 of their initial brief filed on August 3, 2016, that there is no insurmountable jurisdictional issue regarding a decision by the Commission to migrate to a connections-based NUSF contribution mechanism provided that the Commission assess only that part of the connection that is used for "intrastate" traffic. In order to eliminate or minimize jurisdictional conflict, the NUSF contribution reform must, as RIC stated on page 6, focus on the "intrastate" nature of the connection. CenturyLink agrees with RIC's observation that the course the Commission has set should be consistent with the directive from Section 254()f) that "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service," and that "nothing in Part 54 precludes a state commission from adopting its own state universal service policies and mechanisms provided the directives as illustrated in the *Kansa/Nebraska Declaratory Ruling* are met." *RIC Initial Brief*, p. 12. However, CenturyLink respectfully disagrees with RIC's conclusion that the Commission should rely on actual usage or the FCC's safe harbors to isolate intrastate usage. As discussed in CenturyLink's initial brief in response to the Commission's Order Soliciting Briefs and below, a flat intrastate connections charge does not conflict with the federal mechanism or unduly rely upon or burden Federal universal service support mechanisms.

In response to the Commission's first question regarding jurisdictional issues that may be raised when both interstate and intrastate traffic is carried over a given connection, CTIA – The Wireless Association ("CTIA") states in its initial brief that a state mechanism that targets the same revenues or services as the federal mechanism would burden the federal mechanism and thus violate Section 254. *CTIA Initial Brief*, p. 3. CTIA then declares that Section 254(f) would be violated by any approach to assessing interstate-intrastate connections not based on either a traffic study or the safe harbor revenue allocations. CenturyLink disagrees, for the reasons stated in its initial brief and as explained below.

In response to the Commission's second question regarding a surcharge on a connection through which only broadband Internet access service access is provided versus a connection where both broadband and voice is provided, all of the commenting parties appear to agree that in view of the FCC's *Open Internet Order*, pending further determinations from the FCC or courts, Nebraska may not impose the NUSF surcharge on broadband internet access service ("BIAS"). That is, however, distinctly different from the imposition of the NUSF contributions mechanism on interconnected VoIP.

However, CTIA claims in its brief that another allocation must be made if voice is provided on the same connection as BIAS, to distinguish between the assessable voice service and the unassessable BIAS service, in the manner that the FCC currently provides for federal USF contribution to allocate packages that include both telecommunications and non-telecommunications components. CTIA's comment serves to shine light on one of the most significant problems with a revenue-based USF funding mechanism. When interconnected VoIP is offered with BIAS, often the interconnected VoIP service is offered for little or no additional charge to the price for the Internet service. The FCC noted, "Most interconnected VoIP providers offer packages of services to consumers for a single price that include telecommunications, as discussed above, along with CPE and/or features that may be information services." *Interim Contribution Methodology Order, 21 FCC Rcd 7518, para. 51*. Even though interconnected VoIP can provide the same intrastate functionality as traditional telephony, it contributes little to USF in comparison.

2. A state USF assessment on the capability for intrastate calling is within the jurisdiction of the state. Neither the *Constitution of the United States* nor the *Communications Act* compels that non-traffic sensitive telephone plant be allocated by a rigid formula. The manner and degree of allocation must be considered in the context of each regulatory endeavor. A flat USF state assessment on intrastate calling capability does not risk double recovery of costs or rely on interstate service or revenues, is not inconsistent with the federal contribution rules governing interconnected VoIP service, does not "rely on or burden" the mechanism for collecting federal USF Fees, and, it is equitable and nondiscriminatory.

Section 254(f) specifically contemplates that states should create their own USFs and impose state USF surcharges on telecommunications carriers who provide intrastate services, provided that those surcharges are "equitable and nondiscriminatory" and that they do not "rely on or burden" the mechanism for collecting federal USF Fees. As the U.S. District Court for the Southern District of New York observed, Section 254 does not delineate the revenue base against which federal or state USF surcharges may be assessed, aside from those conditions. *Telstar Res. Group, Inc. v. MCI, Inc., 476 F. Supp. 2d 261, 268 (2007).* Courts have invalidated state USF charges assessed against telecommunications carriers because they found that those charge were imposed in part *on revenues from interstate services and thus were preempted by the conditions imposed by Section 254(f). See, AT&T Corp. v. PUC, 373 F.3d 641 (5th Cir. 2004)* (holding that Section 254(f) preempts the state from assessing state USF fees against combined intra and interstate carriers versus pure interstate carriers), and *AT&T Communs., Inc. v. Eachus, 174 F.Supp.2d 1119 (D. Or. 2001)* (holding that Section 254(f) preempts the state from assessing state USF fees against interstate telecommunications services because such assessments improperly "rely on" the same revenues against which federal USF fees are assessed). If the connections-based charge CenturyLink advocates were to be assessed on revenues from interstate services, or against interstate services, it would run afoul of Section 254(f) under these cases. But, the connections-based charge CenturyLink advocates is assessed on services which provide the capability for intrastate calling—and will not be based on interstate service or interstate revenue. A state's USF mechanism does not have to be based on an allocation of non-traffic sensitive plant, an allocation of revenues, or jurisdictional usage factors, for the reasons discussed herein.

In *Smith v. Ill. Bell Tel. Co., 282 U.S. 133, 149, 51 S. Ct. 65 (1930)*, the Supreme Court held that a state regulatory agency could not set rates for a local telephone company whose equipment was used for both local and interstate service without attempting to segregate the revenue and expenses attributable to local service from that which is attributable to interstate service. Subsequently, the *Communications Act of 1934* established the FCC to oversee federal regulation of interstate telephone communications. Section 221(c) of the Act empowers the FCC to delineate the appropriate jurisdictions for itself and for state regulators, "aimed primarily at determining the portions of communications companies' equipment costs that 'should be allocated to the interstate and intrastate jurisdictions for ratemaking purposes." *MCI Telecommunications v. FCC, 750 F.2d 135, 137(D.C. Cir. 1984)*. The *MCI* Court deflected MCI's claim that the *Constitution* forbids any separations process not based on relative use, holding that "MCI's claim must only be considered in the context of the regulation that is actually being challenged." The *Constitution* and the *Communications Act* allow for solutions that are reasonably tailored for the accomplishment of a variety of regulatory objectives.

In the instant docket, the Nebraska Commission's regulatory objective is not traditional cost of service rate setting for each provider—rather it is the accomplishment of the purposes chartered by the Legislature for Universal Service. Neither the

Constitution nor the *Communications Act* compels that non-traffic sensitive telephone plant be allocated by a rigid formula. The manner and degree of allocation must be considered in the context of each regulatory endeavor, as was made clear in *MCI.*

The *MCI* Court held, in construing *Smith,* that the Constitution does not compel use of a particular formula. *Smith* compels "only reasonable measures," because the "allocation of costs is not a matter for the slide-rule," but "involves judgment on a myriad of facts." Cost allocation is not purely an economic issue -- it necessarily involves policy choices that are not constitutionally prescribed. States' universal service programs are a part of a larger regulatory system that advances public interests that are fundamentally different than traditional ratemaking—and that justify a departure from the jurisdictional separations of revenues and costs that are employed in ratemaking. As noted, the jurisdictional separations procedures "are designed primarily for the allocation of property costs, revenues, expenses, taxes, and reserves between state and interstate jurisdictions." *47 C.F.R. § 36.1(b).* "'Jurisdictional separation' is a procedure that determines what proportion of jointly used plant should be allocated to the interstate and intrastate jurisdictions for ratemaking purposes." *MCI Telecomm. Corp. v. FCC,* 242 U.S. App. D.C. 287, 750 F.2d 135, 137 (D.C. Cir. 1984). In 2001, the FCC similarly explained that:

> Jurisdictional separations is the process by which incumbent local exchange carriers (ILECs) *apportion regulated costs between the intrastate and interstate jurisdictions.* Historically, one of the primary purposes of the separations process has been to prevent ILECs from recovering the same costs in both the interstate and intrastate jurisdictions. Jurisdictional separations is the third step in a four-step regulatory process that begins with an ILEC's accounting system and *ends with the establishment of rates* for the ILEC's interstate and intrastate regulated services. First, carriers record their costs, including investments and expenses, into various accounts . . . . Second, carriers assign the costs in these accounts to regulated and nonregulated activities . . . . Third, carriers separate the regulated costs between the intrastate and interstate jurisdictions in accordance with the Commission's Part 36 separations rules. Finally, carriers apportion the interstate regulated costs among the interexchange services and rate elements that form the cost basis for their interstate access tariffs.

In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Bd., 16 F.C.C.R. 11382, at 11384-85, para.P3, (2001) (footnotes omitted) (emphases added). The jurisdictional separations process is part of the regulatory process for rate regulation. *See, Qwest Corp. v. Scott, 380 F.3d 367, 372 (8th Cir. Minn. 2004).*

In contrast to the historical and familiar regulatory process for ratemaking for telecom service providers, the mechanism for state universal service support is not cost-of-service based. Stated simply, the Nebraska Public Service Commission makes a determination of how much revenue it needs for the NUSF to accomplish its mission, and then assesses carriers doing intrastate business, who pass the assessments through to subscribers by way of a surcharge. There is no risk of carriers recovering the same costs in both the intrastate and interstate jurisdictions.

Equitable extension of universal service support obligations to interconnected VoIP is fast becoming critical to the the mission of universal service. The FCC's *Report and Order in the Matter of Universal Service Contribution Methodology, FCC 06-94, June 27, 2006* (the *"Interconnected VoIP Order"*) extends federal universal service support obligations to "interconnected VoIP" services. The FCC found that VoIP was increasingly used as a substitute for voice connections to the PSTN:

> "[W]e recognize that interconnected VoIP service "is increasingly used to replace analog voice service." We expect that trend to continue. If we do not require interconnected VoIP providers to contribute, the revenue base that supports the Fund will continue to shrink, while these providers continue to benefit from their interconnection to the PSTN. We believe that this trend threatens the stability of the Fund and our action to extend contributions obligations to interconnected VoIP providers is "reasonably ancillary to the effective performance of [our] responsibilities" under section 254. Thus, we determine, as required, that the approach we adopt today "will 'further the achievement of long-established regulatory goals'" to preserve and advance universal service through specific, predictable, and sufficient contribution mechanisms.*" Interconnected VoIP Order, para. 48.*

As it decided to require interconnected VoIP providers to contribute to the federal USF, the Commission admitted that its jurisdictional revenue separations safe harbor determination "is necessarily the product of line drawing" *(Id., para 53)*, the reasonableness of which was helped by the interim nature of the action pending the completion of the NPRM seeking comment on whether to change *or eliminate all of the safe harbors*. *Id., para. 54*. The risk of relying on the arbitrary lines drawn however, is that at the state level safe harbor formulae can work to the detriment of the universal service goals. Fortunately, the FCC has not dictated that result.

As has been stated in the earlier briefs, following upon the *Interconnected VoIP Order*, in the *Nebraska/Kansas Declaratory Ruling, FCC 10-185, November 5, 2010*, the FCC found no basis to preempt states from imposing universal service contribution obligations on providers of nomadic interconnected VoIP service, so long as state contribution requirements are *not inconsistent* with the federal contribution rules and policies governing interconnected VoIP service. To be sure, the FCC stated in the *Nebraska/Kansas Declaratory Ruling* that a state must ensure that state contribution requirements will not be imposed on the same revenue on which an interconnected VoIP provider is basing its calculation of federal contributions, and can do so by allowing providers to treat as intrastate for state universal service purposes the same revenues that they treat as intrastate under the Commission's universal service contribution rules. However, the FCC does not preclude other contribution mechanisms.

The flat charge connections-based mechanism advocated by CenturyLink does not depend on revenue allocations, or upon traffic studies or usage. It is premised on the capability of making intrastate calls. A non-usage based criteria avoids the need for difficult, and arbitrary, allocations. The capability for intrastate calling provides the jurisdictional basis for the state to exercise its authority.

The connections-based proposal is not the mathematical inverse of the FCC's interstate percentage safe harbor, but it is not inconsistent with the federal contribution rules governing interconnected VoIP service, and it does not "rely on or burden" the mechanism for collecting federal USF Fees, and, it is equitable and nondiscriminatory, for the following reasons:

First, the implementation of the proposed flat intrastate connection charge does not preclude compliance with the federal contributions mechanism. Providers can still calculate the federal revenue allocation by the safe harbor.

Second, a flat intrastate connection charge does not rely on interstate services or interstate revenues, because it is calculated without reference to interstate service and interstate revenue. For the same reason, it does not "burden" the federal mechanism.

Third, it is not inequitable to assess a flat charge for an intrastate connection without regard to usage or intrastate revenue, because every such connection has the capability of intrastate calling. There are other examples of such charges in telecommunications. Emergency 9-1-1 charges are but one such example. Every month, customers are billed the 9-1-1 charge but may never use the service. However, the capability is there. Whether called minimum service charges or connection charges, charges for the capability for usage are a common concept in utility regulation. In the context of state universal service support, it is fair that a connection which has the capability for intrastate calling should bear the obligation for universal service support. The FCC stated, *"Such providers benefit from state universal service funds, just as they benefit from the federal Universal Service Fund, because their customers value the ability to place calls to and receive calls from users of the PSTN." Nebraska/Kansas Declaratory Ruling, para. 16.* (Emphasis added).

Last, a flat state universal service charge for an intrastate connection, without regard to usage or revenues is nondiscriminatory, because it assesses the same amount to every connection having the capability for intrastate calling. Some may object that their service is used less for intrastate calling than some other service, but in view of the numerous conceivable scenarios for technology platforms, service offerings, rates, and usage patterns, a single flat charge for the capability levels the playing field.

Among the examples of why a connections-based charge is the most fair, CenturyLink offers one such scenario as an example of how a revenue-based funding mechanism leads to inequitable results. With the advent of competition to traditional landline telephony, CenturyLink has many landline local telephony customers who subscribe to landline service, but primarily use their wireless service for virtually all voice calls. However, under a revenues-based contribution methodology, despite little intrastate usage, all of the local landline service charges are assessed the NUSF surcharges. That result is not competitively neutral. A connections-based surcharge would, however, meet the competitively neutral mandate.

B. <u>CenturyLink urges all deliberate speed for NUSF contribution reform.</u>

CenturyLink has echoed the comments of others that workshops would be useful in the development of NUSF contribution reform, and has endorsed calls for development of an NUSF strategic plan. These proposals are offered as a means to accomplish the much-needed objective of completing reform with all deliberate speed, not as a way to delay of the important work of this docket. Contrary to CTIA's assertion in its August 3 comments in footnote 32, CenturyLink emphatically does not ask the Commission to delay acting on NUSF contribution reform until the FCC acts. CenturyLink's comments in response to the proposal by CTIA and others that the Commission should await FCC action on contributions reform was stated as follows:

> The Commission can continue with contributions methodology reform for the NUSF and provide a glide path that the FCC can follow. The commission should not delay progress on contributions methodology reform because the FCC might implement something different in the future, which may or may not be complementary to Nebraska's methodology. The Commission should not be distracted from the important public policy issue of ensuring the NUSF is stable and adequately funded. *Reply Comments of Qwest Corporation d/b/a CenturyLink QC and United Telephone Company Of The West d/b/a CenturyLink,* July 16, 2016, at p. 4.

Dated this 26th day of August, 2016

Respectfully submitted,

By:______________________________

Scott E. Daniel #10901
Jill Vinjamuri Gettman #20763
Gettman & Mills LLP
10250 Regency Circle, Suite 105
Omaha, Nebraska 68114
(402) 320-6000
(402) 391-6500 (fax)
jgettman@gettmanmills.com

Norman G. Curtright
CenturyLink
20 E. Thomas Road
Phoenix, Arizona 85012
(602) 620-2187
norm.curtright@centurylink.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of August, 2016, a true and correct copy of the foregoing was to the following:

Via email and hand delivery: Mr. Gene Hand Director of Communications Brandy Zierott and Sue Vanicek Nebraska Public Service Commission 300 The Atrium 1200 "N" Street Lincoln, NE 68509 Brandy.zierott@nebraska.gov suevanicek@nebraska.gov psc.nusf-filings@nebraska.gov gene.hand@nebraska.gov	Via email: Shana L. Knutson Legal Counsel Nebraska Public Service Commission 300 The Atrium Building 1200 "N" Street, Suite 300 Lincoln, NE 68509 Shana.knutson@nebraska.gov
Via email: CTIA Benjamin J. Aron/Matt DeTura 1400 16th Street, NW, Suite 600 Washington, DC 20036 Telephone Contact Information: Benjamin Aron: (202) 736-3683 Matt DeTura: (202) 736-3228 baron@ctia.org mdetura@ctia.org	Via email: Charles Hudak Kennard Woods Friend, Hudak & Harris, LLP 3 Ravinia Drive, Suite 1700 Atlanta, GA 30346 (770) 399-9500 Kwoods@fh2.com And Michael Moore Charter Communications, Inc. 12405 Powerscourt Drive St. Louis, MO 63131 (314) 543-2414 Michael.moor@charter.com
Via email: Deonne Bruning Deonne Bruning, P.C. LLO 2901 Bonacum Drive Lincoln, NE 68502 (402) 421-6405 Deonnebruning@neb.rr.com	Via email: Paul M. Schudel Woods & Aitken, LLP 301 South 13th Street, Suite 500 Lincoln, NE 68508 (402) 437-8500 Pschudel@woodsaitken.com

Via email: Troy Kirk Rembolt Ludtke Law Offices 1128 Lincoln Mall, Suite 300 Lincoln NE 68508 (402) 475-5100 tkirk@remboltlawfirm.com	Via email: Nicholas Niemann Matthew Ottemann McGrath North Mullin & Kratz PC LLO 1601 Dodge Street, #3700 Omaha, NE 68102 nniemann@mcgrathnorth.com mottemann@mcgrathnorth.com
Via email: Matthew Fell Windstream 1201 West Peachtree Street, Suite 610 Atlanta, GA 30309 (678) 420-3878 Matthew.fell@windstream.com	

By: ______________________
Scott E. Daniel