

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service) Application No. NUSF-100/PI-193
Commission, on its own motion, to consider)
revisions to the universal service fund)
contribution methodology.)

REPLY BRIEF OF THE RURAL INDEPENDENT COMPANIES
IN RESPONSE TO AUGUST 3, 2016 ORDER SOLICITING REPLY BRIEFS

Dated: August 26, 2016

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AUGUST 3, 2016 ORDER SOLICITING REPLY BRIEFS**

The Nebraska Rural Independent Companies (“RIC”)¹ submit this reply brief to address certain positions set forth in the *CenturyLink Brief*² and in the *CTIA Brief*³ filed in response to the Order Soliciting Reply Briefs issued by the Nebraska Public Service Commission (the “Commission”) in this proceeding on August 3, 2016.⁴ RIC respectfully requests that the

¹ Arlington Telephone Company, Blair Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K & M Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telephone Co., Inc., and Three River Telco.

² Application No. NUSF-100/PI-193, CenturyLink’s Response to Order Soliciting Briefs, filed Aug. 3, 2016 (the “*CenturyLink Brief*”).

³ Application No. NUSF-100/PI-193, Comments of CTIA in Response to the Commission’s July 12, 2016 Order Soliciting Briefs, filed Aug. 3, 2016 (the “*CTIA Brief*”).

⁴ See *Order Soliciting Reply Briefs*, Application No. NUSF-100, PI-193, entered August 3, 2016 (the “*August Reply Briefing Order*”). Prior to issuance of the *August Reply Briefing Order*, the Commission had requested submissions on three (3) legal issues. See *Order Soliciting Briefs*, Application No. NUSF-100, PI-193, entered July 12, 2016 (the “*July Briefing Order*”). In addition to CenturyLink and CTIA, RIC was the only other party who submitted a brief in response to the *July Briefing Order*. The brief filed by RIC will be referred to herein as the “*RIC Brief*”.

Commission address the issues raised in the *July Briefing Order* in a manner consistent with and for the reasons stated in the *RIC Brief*, RIC's prior comments⁵ and herein.

I. ALL FILING PARTIES SUPPORT THE POSITION THAT, AT LEAST AT THIS TIME, THE COMMISSION SHOULD AVOID ASSESSING NEBRASKA UNIVERSAL SERVICE FUND SURCHARGES ON BROADBAND INTERNET ACCESS SERVICE.

The parties filing the three (3) briefs in response to the *July Briefing Order* all agree that the Commission should not, *at least at this time*, assess the Nebraska Universal Service Fund ("NUSF") surcharge on either revenues or connections relating to Broadband Internet Access Service ("BIAS") based upon the Federal Communications Commission ("FCC's") *Open Internet Order* preempting state universal service fund ("SUSF") assessment of BIAS.⁶ Ultimately, should the FCC at some future date address federal universal service fund ("FUSF") contribution reform, the FCC's "preemption" position regarding SUSF assessments of BIAS may change. As a general matter, RIC fully supports a change by the FCC that would allow SUSF assessments on BIAS.

II. NOTHING IN THE *CENTURYLINK BRIEF* OR THE *CTIA BRIEF* SHOULD DISSUADE THE COMMISSION FROM MOVING FORWARD WITH REFORM OF THE NUSF CONTRIBUTION MECHANISM.

RIC will discuss below the most important differences in the CenturyLink, CTIA and RIC positions. In any event, however, nothing proffered by CenturyLink or CTIA in their

⁵ See generally, Comments of Nebraska Rural Independent Companies, Feb. 13, 2015; Reply Comments of Nebraska Rural Independent Companies, April 13, 2015; Comments of Nebraska Rural Independent Companies, June 6, 2016 ("*RIC June 2016 Comments*"); and Reply Comments of Nebraska Rural Independent Companies, July 15, 2016 ("*RIC July 2016 Reply Comments*").

⁶ See, e.g., *CenturyLink Brief* at 4; *CTIA Brief* at 5-6; and *RIC Brief* at 3, 9 (n. 15), 21-22; see also *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 560, para. 490, fn. 1477 (2015) ("*Open Internet Order*").

respective briefs should dissuade the Commission from moving forward with its efforts to reform the NUSF contribution mechanism.

A. RIC's Comments with Regard to the *CenturyLink Brief*.

RIC is concerned that the below-quoted broadly worded statements within the *CenturyLink Brief*, if followed to their logical end, could create legal issues that can and should be avoided. Specifically, CenturyLink states as follows in response to the first question presented in the *July Briefing Order*:

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.⁷

Contrary to CenturyLink's inference, RIC notes that the Commission's NUSF Rules do currently address the treatment of assessable service revenues derived from what could be viewed as "jurisdictionally mixed facilities". RIC is concerned that CenturyLink's above-quoted statements could be interpreted to suggest a framework in which the Commission would be encouraged to consider assessment of the NUSF surcharge on an entire connection even though that connection is used for *interstate* services as well as for intrastate services.⁸

⁷ *CenturyLink Brief* at 3 (emphasis added).

⁸ RIC notes that the Commission's existing NUSF Rules and Regulations already direct that only intrastate aspects of a service – currently intrastate revenues – are assessed. *See* NUSF Rules and Regs., Title 291, Chap. 10, Section 002.01 ("The NUSF surcharge shall be assessed on *all end-user telecommunications provided in Nebraska intrastate commerce*.")(emphasis added); *Id.*, Section 002.01D1 (The rule expressly provides that "[t]he NUSF surcharge *shall not apply* on the interstate portion of telecommunications.") (emphasis added); *Id.*, Section 002.01D1b provides that if the "intrastate portion" associated with "a joint use service charge cannot be determined or if such determination would result in an undue administrative burden, a telecommunications company may request that the Commission approve an allocation factor to determine the intrastate portion of the service or may adopt any relevant [FCC] Commission safe

RIC nonetheless agrees with CenturyLink's ultimate conclusion that "there are no insurmountable intrastate versus interstate jurisdictional issues raised by moving to a connections-based mechanism."⁹ RIC has amply demonstrated that as the Commission transitions the contribution mechanism to a connections-based methodology, it is prudent for the Commission to continue to apply the NUSF assessment *only* to the intrastate usage portion of a connection. RIC emphasizes that jurisdictional issues will only be avoided if the structure of the connections-based mechanism recognizes and applies the interstate-intrastate construct of isolating the jurisdictional uses of connections consistent with the Commission's existing practices relating to the revenues-based contribution mechanism.

RIC notes that it is substantially in agreement with CenturyLink's responses to Commission Questions 2 and 3 as set forth in the *CenturyLink Brief*.¹⁰

B. RIC'S Comments with Regard to the *CTIA Brief*.

CTIA "highlights three legal points" in the *CTIA Brief*: (1) The "NUSF cannot interfere with the federal universal service mechanism;" (2) the "Commission is barred by both federal

harbor provisions.") The Commission confirms this position in its 2015 Annual Report to the Nebraska Legislature, at p. 18, stating: "The Commission, by order and after public hearing, maintained the NUSF surcharge at 6.95% of in-state retail telecommunications revenue through June 30, 2015. *Interstate and Internet services are not subject to the NUSF surcharge.*" (emphasis added).

⁹ See *CenturyLink Brief* at 3.

¹⁰ By way of clarification, CenturyLink states in the last sentence on page 7 of the *CenturyLink Brief* that "one flat charge applies" to interconnected Voice over Internet Protocol ("VoIP"). *CenturyLink Brief* at 7. RIC believes that application of a connections-based mechanism to interconnected VoIP service is subject to application of the interstate/intrastate safe harbor factor that has been approved by the FCC relative to this service. So too, CenturyLink suggests that the Commission's second legal issue relates to a VoIP connection through which voice service is provided. See *id.* at 3. RIC does not believe that the Commission's Question 2 is so limited and its reference to "voice" service being provided (see *July Briefing Order* at 1) relates to any method by which voice service is provided regardless of whether it is a VoIP platform or traditional Time Division Multiplex based local exchange service.

and state law from imposing NUSF contributions on broadband internet access services;” and (3) the “broad range of legal issues swept up in this proceeding” justify delaying this proceeding until the FCC acts on FUSF contribution reform.¹¹ None of these contentions should dissuade the Commission from moving forward with NUSF contribution reform.

With respect to CTIA’s first point, RIC believes the statement by CTIA that the NUSF cannot “interfere” with the FUSF is a short-hand way of referencing the requirements of Section 254(f) of the Communications Act of 1934 as amended (the “Act”). As CTIA later references,¹² Section 254(f) clearly states that the Commission “may adopt regulations not inconsistent with the Commission’s [FCC’s] rules to preserve and advance universal service” and that the Commission may adopt “regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.”¹³ These standards have been shown not to be issues under the RIC proposal.¹⁴

CTIA’s second legal point raises two distinct issues. First, RIC has already noted that agreement exists among CTIA, CenturyLink and RIC that the Commission is currently preempted by FCC pronouncements from assessing the NUSF surcharge on BIAS.¹⁵ However, RIC has also described an approach that isolates an assessable connection’s intrastate usage. As a result, at such future time that the FCC rescinds its prohibition against state assessment of

¹¹ *CTIA Brief* at 2.

¹² *Id.* at 3.

¹³ 47 U.S.C. § 254(f).

¹⁴ *See RIC Brief* at 10-16.

¹⁵ *See* n. 6 *supra*.

BIAS connections as provided in the *Open Internet Order* and establishes the parameters for SUSF assessments of BIAS, this new FCC framework can readily be incorporated into an NUSF connections-based contribution mechanism. Until that time, however, if a connection only provides BIAS, then that connection would not, *at this time*, be subject to the Commission's new NUSF connections-based contribution mechanism.

Second, CTIA's analysis of Nebraska statutes to reach the conclusion that "the Commission is barred by . . . state law from imposing NUSF contributions on broadband internet access services"¹⁶ is flawed. CTIA mistakenly bases such conclusions on definitions of terms contained within the Nebraska Telecommunications Regulation Act (the "NTRA") rather than the Nebraska Legislature's definitions associated with the Nebraska Telecommunications Universal Service Fund Act (the "NTUSFA") that are controlling.

CTIA contends that BIAS is not a telecommunications service under Nebraska law based upon the definition of "advanced telecommunications capability service" set forth in *Neb. Rev. Stat.* § 86-103.01 (Reissue 2014). This is incorrect. Section 86-103.01 is a part of the definitions found in the NTRA.¹⁷ For the purposes of the NTUSFA, "the definitions found in sections 86-319 to 86-322 apply"¹⁸ *not* those found in the NTRA. Consequently, the definition set forth in section 86-103.01 is inapplicable to the NTUSFA, and no definitions of "advanced telecommunications" or "information service" are provided by the Legislature in the NTUSFA.

¹⁶ *CTIA Brief* at 2.

¹⁷ *Neb. Rev. Stat.* §§ 86-101 to 86-165 comprise the NTRA. *See Neb. Rev. Stat.* § 86-101 (Reissue 2014). For the purposes of the NTRA, "unless the context otherwise requires, the definitions found in sections 86-103.01 to 86-121 apply." *Neb. Rev. Stat.* §§ 86-103.

¹⁸ *See Neb. Rev. Stat.* § 86-318 (Reissue 2014).

In any event, RIC respectfully submits that CTIA’s conclusion that BIAS is not a telecommunications service under existing Nebraska law is, at best, premature.¹⁹ Initially, RIC notes that, in the event that a Commission determination of whether BIAS is a telecommunications service in this proceeding is necessary, the Commission is not precluded from issuing a progression order to expand the scope of issues in this docket to include a determination of the appropriateness of NUSF assessments on BIAS should the current FCC pronouncements preempting such SUSF assessment be changed.²⁰

Further, CTIA’s claim that BIAS would not be found to be a “telecommunications service” under Nebraska law²¹ is suspect. Without question, the FCC reached the opposite conclusion when it found BIAS to be a telecommunications service, a finding affirmed by the United States Court of Appeals for the District of Columbia Circuit.²² In addition, CTIA agrees that NUSF assessments can be applied to telecommunications carriers providing

¹⁹ CTIA’s assertion that the Commission’s findings in *In the Matter of Sprint Communications Company L.P., Overland Park, Kansas, Petition for arbitration under the Telecommunications Act*, Application No. C-3429, Findings and Conclusions, paras. 21-28 (Sept 13, 2005) support its conclusion that a company providing BIAS-only service cannot be treated as a telecommunications company and cannot be subject to NUSF obligations is erroneous. Application No. C-3429 involved a petition for arbitration pursuant to 47 U.S.C. § 252 and whether Sprint’s single network user private contract arrangement with Time Warner constituted Sprint as a common carrier and thus a telecommunications carrier eligible for interconnection pursuant to sections 251 and 252 of the Act as amended by the Telecommunications Act of 1996.

²⁰ Procedurally, the issuance of a progression order to seek comment on this issue seems appropriate since, the Commission has made clear that, as of now, “*is not, at this time, considering the assessment of [NUSF on] broadband services.*” *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, Order Opening Docket at 1 (Nov. 13, 2014) (emphasis added).

²¹ See *CTIA Brief* at 8.

²² See, e.g., *Open Internet Order* at paras. 29, 43, 47, 355-356; see also *United States Telecom Association, et al., v. FCC, slip op.*, No. 15-1063 *et al.*, (D.C. Cir. June 14, 2016) at 24-50.

telecommunications services.²³ Accordingly, as CTIA has framed the issue, the question remaining is whether BIAS is provided in Nebraska in some manner different than that service analyzed by the FCC in the *Open Internet Order*.²⁴

For these reasons, the Commission should reject CTIA's conclusion that, assuming the proscriptions of the *Open Internet Order* related to SUSF assessment of BIAS are removed, imposition of NUSF surcharges on BIAS would be found to be statutorily impermissible under Nebraska law.

Finally, RIC also respectfully requests that the Commission reject CTIA's assertion that the Commission should wait for FCC action on contribution reform before the Commission acts in this proceeding.²⁵ Such a result, in RIC's view, is not only bad policy, but is also legally unsound.

Waiting for an indeterminate future FCC action raises a legal issue regarding the Commission compliance, for example, with the Nebraska Legislature's directive to maintain a "sufficient" NUSF.²⁶ Having previously found that the NUSF contribution base is eroding,²⁷ the Commission has the explicit authority from the Nebraska Legislature to proceed with NUSF contribution reform in order to ensure achievement of the Legislature's intent that the Nebraska-

²³ *CTIA Brief* at 7.

²⁴ But again, RIC notes that this analysis needs to await a FCC change in the preemption of SUSF assessments of BIAS.

²⁵ *See CTIA Brief* at 3, 4-5 and 9.

²⁶ *Neb. Rev. Stat.* § 86-323(5) (Reissue 2014) requires that there "should be specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service." (emphasis added).

²⁷ *See In the Matter of the Commission on its own motion to determine the level of the fund . . .*, Application No. NUSF-4, Order Setting Surcharge at 1 (June 7, 2016); *see also RIC July 2016 Comments* at 1-2.

specific universal service mechanism is sufficient.²⁸ In the absence of NUSF contribution reform there is a material likelihood that this statutory directive may not be achieved.

RIC's connections-based proposal more than adequately addresses CTIA's contention that NUSF contribution reform should not proceed. CTIA's concerns about "mixed used" connections²⁹ – those connections carrying interstate and intrastate traffic – are already addressed through RIC's proposed isolation of that portion of the connection that is used for intrastate telecommunications services.³⁰ Thus, while CTIA's warning 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(f)",³¹ could, in the abstract, be correct, RIC's proposal provides a real-world method that avoids the abstract problem that CTIA identifies.

So too, CTIA's concern about the Commission using different mechanisms than the FCC safe harbors or traffic studies³² has also been addressed. RIC's proposal applies the residual percentage determined based upon the calculation of 100% less the applicable FCC-prescribed safe harbor percentage to determine *intrastate usage* regarding a connection. Further, RIC's proposal provides for optional traffic studies if a carrier elects to submit a study to determine the intrastate usage of a connection.³³

CTIA's concerns regarding creation of administrative costs and potential "wasteful" expenditures,³⁴ should the Commission proceed with NUSF contribution reform, can be

²⁸ See *Neb. Rev. Stat.* §§ 86-324 and 86-325 (Reissue 2014).

²⁹ *CTIA Brief* at 6 (footnote omitted).

³⁰ See, e.g., *RIC Brief* at 14-15.

³¹ *CTIA Brief* at 6 (footnote omitted).

³² *Id.* at 3.

³³ See, e.g., *RIC Brief* at 22.

³⁴ *CTIA Brief* at 5.

addressed when and if necessary. CTIA makes unsupported claims that any NUSF contribution reform proposal will require carriers “to make significant changes to their billing and accounting systems more than once – first when the Commission revises its NUSF rules, and again when the FCC revises its rules.”³⁵

RIC acknowledges that changes may occur when and if the FCC acts on FUSF contribution reform to include BIAS. However, when or if the FCC may act cannot be determined at this time, nor can any cost impacts on billing and administrative functions or mechanisms be established. CTIA’s concerns, therefore, do not constitute a basis to delay NUSF contribution reform and should not be regarded as a legal hurdle to be overcome.

Likewise, CTIA’s cite to litigation relating to Kansas Universal Service Fund reforms and that reforms to the NUSF “could result in litigation [in Nebraska], as it did in Kansas”³⁶ is entirely improper and unwarranted. Not only do the facts and circumstances of the Kansas case differ materially from this proceeding, but further, the Kansas case was remanded to the Kansas Corporation Commission (“KCC”) on the joint motion of the carrier-petitioners, and the KCC case cited by CTIA was closed *without an evidentiary hearing or determination on the merits*.³⁷

In any event, if CTIA’s concern is that billing changes will be required because of different FUSF and SUSF regulatory requirements, such changes may occur anytime the FCC or a state commission changes universal service contribution requirements, or if different federal

³⁵ *Id.* at 4.

³⁶ *Id.*

³⁷ *Southwestern Bell Tel. Co., et al. v. Kansas Corporation Commission*, Case No. 2016-CV-006 in the District Court of Shawnee County, Kansas, Third Judicial District, Div. 1, Order Granting Joint Motion to Remand (May 24, 2016). The KCC has opened a new docket, *In the Matter of a General Investigation into the Implementation of Senate Substitute for House Bill 2131*, Docket No. 16-GIMT-517-GIT (June 7, 2016) in which it has requested comments on multiple subjects including KUSF contribution methodologies. Four (4) rounds of comments in this Docket were completed on August 8, 2016 and the matter is under consideration by the KCC.

and state contribution mechanisms and requirements are established. CTIA's assertion of cost increases relating to billing system changes does not address the question as to whether such costs are properly considered a "cost of doing business." If not so considered, RIC knows of no prohibition that would prevent a carrier from seeking individual relief from the Commission should the carrier desire to recover its billing system costs related to compliance with the Commission's NUSF contribution reform framework.³⁸ Regardless, RIC respectfully submits that CTIA cannot justify delay by the Commission to establish and implement NUSF contribution reform until the FCC acts on FUSF contribution reform.

III. CONCLUSION.

The RIC members appreciate the opportunity to provide this reply brief in response to the *August Reply Briefing Order* and respectfully request that the Commission take action on the matters raised in response to such legal issues in a manner consistent with that discussed in RIC's previously filed comments, the *RIC Brief* and in this reply brief. RIC looks forward to continuing its participation in this docket.

³⁸ RIC recognizes that the FCC has issued a series of issues regarding compliance costs associated with its proposed form of connections-based system. *See In the Matter of Universal Service Contribution Methodology, et al., Further Notice of Proposed Rulemaking*, WC Docket No. 06-122 et al., FCC 12-46, released April 30, 2012 at paras. 275-276. It is possible that FCC action on FUSF contribution reform may provide some degree of insight into whether such issues are necessary to be addressed by individual companies.

Dated: August 26, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of August, 2016, an electronic copy of the foregoing Reply Comments was delivered via electronic mail to:

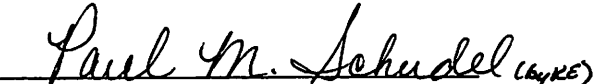
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