

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

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

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**REPLY BRIEF OF THE  
RURAL TELECOMMUNICATIONS COALITION OF NEBRASKA  
Submitted August 26, 2016**

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**I. INTRODUCTION**

The Rural Telecommunications Coalition of Nebraska (“**RTCN**”),<sup>1</sup> by and through its attorneys of record, hereby respectfully submits this *Reply Brief* to the Nebraska Public Service Commission (“**Commission**”) in response to the Commission’s *Order Soliciting Reply Briefs* in the above proceeding, entered August 3, 2016, which was opened to examine reform of the contribution mechanism for the Nebraska Universal Service Fund (“**NUSF**” or the “**Fund**”).

The Commission opened this docket on November 13, 2014, seeking to investigate reform of the mechanism and methodologies used for contributions to the Fund in order “to promote an equitable and sustainable framework in an evolving communications environment.”<sup>2</sup> RTCN has been among several parties that have submitted comments responsive to Commission orders seeking input in this proceeding.

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<sup>1</sup> For purposes of this proceeding, RTCN is made up of the following carriers: Arapahoe Telephone Company d/b/a ATC Communications, Benkelman Telephone Company, Inc., Cozad Telephone Company, Diller Telephone Company, Glenwood Network Services, Inc., The Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hemingford Cooperative Telephone Co., Mainstay Communications, Plainview Telephone Company, Southeast Nebraska Communications, Inc., Wauneta Telephone Company, and WesTel Systems f/k/a Hooper Telephone Company.

<sup>2</sup> In the Matter of the Nebraska Public Service Commission, on its own motion, to consider revisions to the universal service fund contribution methodology, *Order Opening Docket and Seeking Comment*, November 13, 2014 (“*November 2014 Order Opening Docket*”), at p. 1.

On July 12, 2016, the Commission entered an *Order Soliciting Briefs* on legal issues that had arisen during the course of this proceeding. Briefs or comments responsive to the Commission's *Order Soliciting Briefs* were submitted by Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink (collectively, "CenturyLink"), CTIA – The Wireless Association ("CTIA"), and the Nebraska Rural Independent Companies ("RIC").

## II. REPLY TO INITIAL COMMENTS ON ISSUES RAISED

In its *Order Soliciting Briefs*, the Commission asked interested parties to address three primary legal issues that had arisen during the course of this proceeding. In the comments that follow, the RTCN will address the positions taken and arguments addressing those issues in the initial Briefs submitted to the Commission.

### **A. 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 such issue be addressed?**

All three initial briefs addressed this issue in substantial depth. CenturyLink concluded that "there are no insurmountable intrastate versus interstate jurisdictional issues raised by (the Commission's) moving to a connections-based mechanism for assessing an NUSF surcharge."<sup>3</sup> Similarly, RIC said, "There should be no insurmountable jurisdictional issue regarding a decision by the Commission to migrate to a connections-based NUSF contribution mechanism provided that the Commission assesses only that part of the connection that is used for 'intrastate' traffic."<sup>4</sup> CTIA, on the other hand, argued that

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<sup>3</sup> *CenturyLink's Response to Order Soliciting Briefs*, August 3, 2016, at p. 3.

<sup>4</sup> *Brief of the Rural Independent Companies in Response to July 12, 2016 Order Soliciting Briefs*, August 3, 2016 ("RIC Brief"), at pp. 4-5 (emphasis in original).

the Commission should postpone action to reform NUSF contribution until after the Federal Communications Commission (“FCC”) has revised its contribution rules.<sup>5</sup>

Generally, RTCN agrees with and supports the positions taken and arguments made by CenturyLink and RIC with regard to the first legal issue presented by the Commission. The RIC brief methodically walks through the solid legal and jurisdictional basis that will underlie the Commission’s implementation of contribution reform. The RIC group adeptly discusses the precedent established by the FCC in considering nearly identical jurisdictional issues related to universal service assessments on Voice over Internet Protocol (“VoIP”) providers in a proceeding that also involved the Nebraska Commission.<sup>6</sup> In the present proceeding, the Commission wisely recognized the need to address the fundamental question of its jurisdiction *prior to* moving forward with adopting a new contribution mechanism or even developing a particular mechanism.

CTIA’s admonition that the Commission should wait until the FCC has completed its reform, and threats of litigation if the Commission does not, repeat a common theme CTIA has made since the Commission opened this proceeding in late 2014. CTIA has argued throughout that the Commission should stall its work on contribution reform.<sup>7</sup>

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<sup>5</sup> *Comments of CTIA in Response to the Commission’s July 12, 2016 Order Soliciting Briefs*, August 3, 2016 (“**CTIA Brief**”), at p. 4.

<sup>6</sup> *RIC Brief*, at p. 8, citing *Universal Service Contribution Methodology, Declaratory Ruling*, WC Doc. NO. 06-122, 25 FCC Rcd 15651 (2010) (“**Kansas/Nebraska Declaratory Ruling**”). The CTIA has attempted to distinguish the *Kanas/Nebraska Declaratory Ruling*, by saying it addressed a “narrow” petition and the specific issue of nomadic VoIP providers, but failed to explain how the facts or applicable law were different than the present circumstances and question. *Comments of CTIA in Response to the Commission’s April 5, 2016 Order Seeking Further Comments*, June 6, 2016 (“**CTIA April 2015 Comments**”), at p. 7. Indeed, they are not; and the *Kansas/Nebraska Declaratory Ruling* is helpful, if not binding, authority here. In fact, in the *Kansas/Nebraska Declaratory Order*, the FCC addressed a question not merely evolution or reform of the assessment mechanism, but actual extension of the assessment to a new group of providers.

<sup>7</sup> In its initial comments in this proceeding, however, CTIA advocated delay, while at the same time inconsistently recommending that the Commission should adopt a new contribution methodology for prepaid wireless carriers. *Comments of CTIA – the Wireless Association in Response to the Commission’s November 13, 2014 Order Opening Docket and Seeking Comment*, February 3, 2015, a (“**Initial Comments**”), pp. 3-6.

The delays CTIA pushes would present a potential existential threat to the NUSF.<sup>8</sup> From the outset of this proceeding, the Commission has noted concerns about the sustainability of the Fund, given significant declines in contributions in recent years.<sup>9</sup> These concerns necessarily compound the longer it takes for the FCC to act in its own effort to reform federal contributions. The Federal State Joint Board on Universal Service is already more than 16 months late in tendering its reform recommendations to the FCC. Indeed, concerns about the Fund's viability were the very impetus for opening this investigatory proceeding.

Implications made by CTIA aside, the Commission is not getting ahead of itself.<sup>10</sup> Recognizing the question of its jurisdiction, and limitations of that jurisdiction, the Commission prudently stepped back and issued its *Order Soliciting Briefs*, so it could analyze jurisdictional questions not only before implementation of reform, as CTIA itself requested, but even before developing any particular plan for reform. The Commission should be commended for examining its jurisdiction on the threshold of contribution reform development. As RIC said in its Brief:

[A]ddressing any jurisdictional issue is absolutely necessary in an effort to ensure that migration to a new NUSF contribution mechanism and methodology is not unintentionally derailed by after-the-fact claims that the Commission lacks the authority to approve such new mechanism and methodology.<sup>11</sup>

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<sup>8</sup> The CTIA appears to recognize this existential threat. In comments it submitted earlier in this proceeding, it went so far as to advocate that Nebraska transition from carrier assessments to reliance on the state's general fund to ensure affordable and reliable telecommunications services are provided to Nebraska consumers. *See CTIA April 2015 Comments*, at p. 10.

<sup>9</sup> *November 2014 Order Opening Docket*.

<sup>10</sup> The CTIA's delay theme is even more disingenuous, given that the Commission in this proceeding is following the same series of steps advocated by CTIA in comments it submitted to the Commission last month. In those comments, the CTIA said the Commission should *begin* by analyzing its jurisdiction. While the CTIA specifically only mentioned jurisdiction relating broadband, by issuing its *Order Soliciting Briefs*, the Commission officially and seriously undertook an effort to analyze its jurisdiction with regard to contribution reform in the broadest sense and invited input from interested parties, including CTIA, on the question of jurisdiction. *Reply Comments of CTIA to the Further Comments Filed in Response to the Commission's April 5, 2016 Order*, July 15, 2016, at pp. 9-10.

<sup>11</sup> *RIC Brief*, at p. 8.

The Commission is not, contrary to what CTIA appears to suggest, on the brink of implementing contribution reform. Rather, it is in the midst of a deliberative process of methodically and cautiously determining the legal authority for reform, the objectives it will advance, the proper size of the fund, and the timeframe for eventual implementation.<sup>12</sup>

No party has suggested the Commission ignore the limitations on its jurisdiction. Nor has the Commission hinted it might ignore those limitations. The Commission has been careful to recognize the limitations of its authority throughout this proceeding. The RTCN agrees with RIC's suggestion that the Commission should continue to isolate intrastate services for NUSF contribution purposes.<sup>13</sup>

By isolating intrastate services, through alternatives such as a safe harbor, the Commission could move to a connections-based contribution methodology that remains consistent with federal law, just as the current revenue-based methodology is consistent with federal law.<sup>14</sup>

Without any basis for its assertions, CTIA posits that virtually *any* contribution reform will lead to “a significant risk” of imposing NUSF contribution obligations on interstate services.<sup>15</sup> CTIA asserts “that the NUSF cannot impose a burden on interstate universal service assessments.”<sup>16</sup> As stated above, neither the Commission nor any party to this proceeding has advocated assessment of interstate services. The chief purpose of this investigatory proceeding is to ensure that contribution reform will be consistent with state and federal law. The sole basis for the CTIA's demand that the Commission postpone reform is a red herring. The flimsy logic of the CTIA would lead to absurd conclusions,

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<sup>12</sup> See *Order Seeking Further Comments*, April 5, 2016, at pp. 5 and 6.

<sup>13</sup> *Id.*, at p. 13.

<sup>14</sup> See 47 U.S.C. § 254(f), which allows a state to “adopt regulations not inconsistent with the (FCC's) rules to preserve and advance universal service.”

<sup>15</sup> *CTIA Brief*, at p. 3.

<sup>16</sup> *Id.*

conclusions contrary to federal and state law. CTIA argues that the Commission should wait for the FCC to complete its reform before undertaking its own reform to avoid burdening interstate services. If uncertainty about the final action of the FCC is to guide us, then the Nebraska Commission would just as well suspend all collections while it waits for the FCC. Obviously, such an unjustified approach would put the Commission at odds with state law that directs it to carry out the purposes and principles of the NUSF Act, including the assurance that reliable telecommunications services be available to all Nebraskans at affordable rates,<sup>17</sup> as well as the similar dictates of federal law.<sup>18</sup>

The cost of not moving forward with state-level contribution reform would be severe. The basis for undertaking this investigation lies in the Commission's concern for the viability of the Fund due to the rapid decline of the Fund in recent years. With current contribution methodologies in place, the Fund is unsustainable. Ultimately, the stability of the Fund is critical to whether Nebraska consumers have access to affordable and reliable telecommunications services. Barring some legitimate argument that the Commission lacks authority to undertake reform, which has not been proffered, the Commission should and must move forward.

**B. What issues may be presented if a state connections-based USF 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?**

The RTCN agrees with the RIC position that the Commission at this time should not assess broadband services.

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<sup>17</sup> See NEB. REV. STAT. §§ 86-317 and 86-323

<sup>18</sup> See 47 U.S.C. § 254. See also *Reply Comments of the State Members of the Federal State Joint Board on Universal Service*, In the Matter of Universal Service Contribution Methodology, A National Broadband Plan for Our Future, WC Doc. No. 06-122/GN Doc. No. 09-51, Aug. 6, 2012, at p. 3 (“The preservation and future viability of these State-specific USFs and their parallel operation with a reformed federal USF are of critical importance for the advancement of universal service principles contained both in federal and independent State law.”)

**C. 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?**

Through its *Order Soliciting Briefs* and *Order Soliciting Reply Briefs*, the Commission has prudently asked interested parties to address legal issues related to contribution reform so as to avoid challenges and disruptions once implementation of reform has begun. While certainly taking issue with many of the arguments the CTIA has made, the RTCN appreciates that the CTIA has raised those concerns at this juncture and not in the form of a challenge to implementation either while it is being undertaken or after the fact. As discussed above, the issues the CTIA has raised, in their essence, do not go to the Commission's jurisdiction to undertake reform, *provided* the Commission remain true to its policy and practice of assessing only intrastate services. Again, neither the Commission nor any party has suggested that the Commission extend any assessment mechanism to interstate services.

Should the Commission wish for more certainty that jurisdictional challenges not be used to disrupt this proceeding or eventual reform implementation, it could ask interested parties to stipulate that, as a general principle, the Commission possesses the authority and jurisdiction to move to a connections-based assessment mechanism that isolates and applies only to intrastate services.

### **III. CONCLUSION**

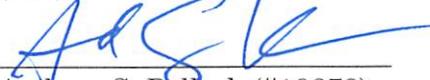
For the above reasons, the RTCN respectfully urges the Commission move forward with the critical task of contribution reform.

**Dated this 26<sup>th</sup> day of August 2016.**

**RURAL TELECOMMUNICATIONS  
COALITION OF NEBRASKA**

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Diller Telephone Company,  
Glenwood Network Services, Inc.  
The Glenwood Telephone Membership  
Corporation,  
Hartman Telephone Exchanges, Inc.,  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that an original and five copies of the foregoing *Reply Brief of the Rural Telecommunications Coalition of Nebraska* were filed with the Public Service Commission on August 26, 2016, and a copy was served via electronic mail on August 26, 2016, addressed as shown below, to the following:

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