

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



**REPLY COMMENTS OF THE RURAL INDEPENDENT COMPANIES
IN RESPONSE TO ORDER SEEKING FURTHER COMMENTS**

I. INTRODUCTION

The Nebraska Rural Independent Companies (“RIC”)¹ submit these reply comments in response to the Order Seeking Further Comments entered by the Nebraska Public Service Commission (the “Commission”) in this proceeding on April 5, 2016 (the “Order”) and the April 20 and June 13, 2016 Commission actions extending the deadlines for the submission of comments and reply comments.

II. RIC SUPPORTS THE COMMISSION’S EFFORTS TO SIZE THE NEBRASKA UNIVERSAL SERVICE FUND AND TO IDENTIFY POTENTIAL LEGAL ISSUES ASSOCIATED WITH IMPLEMENTATION OF A CONNECTIONS-BASED CONTRIBUTIONS MECHANISM.

A. Discrete items can be addressed in parallel in order to efficiently manage the resolution of the issues leading to reform of the Nebraska Universal Service Fund (“NUSF”) contribution mechanism.

Based on available data, no question should exist that the NUSF is unsustainable if the current revenues-based contribution mechanism continues without necessary reforms.²

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 Most recently in the Commission’s Order Setting Surcharge for the period of July 1, 2016 through June 30, 2017, the Director of the NUSF testified that from 2010 through 2013

Consequently, RIC respectfully submits that NUSF contribution reform is necessary to ensure the viability of the NUSF High-Cost Program and other NUSF programs and the benefits that all Nebraskans derive from such programs.

To advance these reforms, RIC has suggested that the Commission address in parallel fashion the primary issues regarding the contribution reform process – namely sizing issues and legal issues.³ As to the former – the NUSF sizing issues – RIC is encouraged that the Commission is moving forward to address various issues in a webinar with respect to the use of the CostQuest Associates, Inc. (“CostQuest”) State Broadband Cost Model (“SBCM”).⁴ Providing an opportunity to have the SBCM explained by CostQuest and for parties to seek answers to any questions they may have regarding the SBCM is, in RIC’s view, a positive step forward in the process of utilizing the SBCM for NUSF sizing purposes. The NUSF sizing effort will establish the level of NUSF contributions that is appropriate on a going-forward basis and will assist with the rate design issues that need to be addressed to establish NUSF connections-based surcharges for the various classes of Nebraska end users.⁵

Further, RIC supports the July 12, 2016 order in which the Commission has specifically requested that briefs be filed on August 3, 2016 regarding identified legal issues.⁶ The issues to

surcharge revenues for the NUSF declined at an annual rate in excess of 2 percent; that 2014 surcharge revenues compared to 2013 revenues declined by “almost 5 percent”; and that 2015 surcharge revenues compared to 2014 revenues declined by “almost 8 percent”. *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 p. 1 (June 7, 2016).

³ See, RIC Comments at pp. 3-5.

⁴ Email notification from J. Brandy Zierott to interested parties dated July 8, 2016 providing notification of webinar to be conducted by CostQuest on July 15, 2016 at 2:00 p.m.

⁵ See, *id.* at pp. 4-5 and 28.

⁶ See, *Order Soliciting Briefs*, Application No. NUSF-100, entered July 12, 2016 (the “July 12 Order”).

be addressed are, as a general matter, associated with fashioning Commission-enacted NUSF contribution reform in a manner that best avoids legal uncertainty.⁷ Based upon the issues stated in the *July 12 Order*, the legal briefing should assist in identifying potential pitfalls (should they exist) with respect to the Commission's plans with respect to contribution reform.⁸

RIC respectfully submits that the continued use of these parallel tracks to address discrete NUSF contribution reform issues is prudent and otherwise advances the objectives outlined by the Commission in the *Order*.⁹ These continued efforts should, in RIC's view, bring a level of greater certainty to two aspects of the contribution reform efforts that will assist in advancing the NUSF programs once such reform is enacted by the Commission.

B. Sizing of the NUSF and review of legal issues attendant to the transition to a connections-based NUSF contribution mechanism should be the immediate focus of the Commission in this docket.

1. Development of the NUSF contribution reform mechanism framework should not (and does not need to be) delayed due to indeterminable timing of federal USF contribution reform.

First, RIC respectfully submits that the Commission should reject suggestions that the Commission delay action to reform the current NUSF contribution mechanism.¹⁰ Based upon

⁷ RIC has provided an NUSF connections based contribution reform proposal that is based on isolating intrastate usage. For efficiency, RIC refers the Commission and parties to the RIC Comments for a full explanation of this proposal coupled with the discussion within these reply comments.

⁸ See, *id.* at pp. 3-4 and 27-28.

⁹ RIC notes that CTIA – The Wireless Association (“CTIA”) suggests that the Commission should initiate a separate docket for consideration of the strategic plan discussed in the *Order* and suspend further consideration of contribution reform pending completion of the new strategic plan docket and presumed action by the Federal Communications Commission (“FCC”) and/or the Federal-State Joint Board on Universal Service (the “Joint Board”). (CTIA Comments at pp. 2-3 and 6-9) RIC opposes these positions of CTIA as more fully discussed in Section II.B.1 below.

¹⁰ See, CTIA Comments at pp. 2-3 and 6-9; Joint Comments of Cox Nebraska Telcom, LLC and Charter Fiberlink – Nebraska, LLC (the “CATV Joint Comments”) at pp. 1-3.

the clear evidence of continuing and accelerating reductions in NUSF surcharge revenues, the Commission must act to reform the contribution mechanism in order to fulfill its statutory mandate to establish and maintain “specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service.”¹¹ The Commission’s efforts on NUSF sizing issues and legal briefings addressed above are a positive step in this process.

Second, suggestions that Commission action on contribution reform should await action by the Federal Communications Commission (“FCC”) should also be rejected.¹² FCC action on contribution reform for the Federal Universal Service Fund (“FUSF”) has been pending for nearly 15 years and there are no indications when or how the FCC may act on this subject.¹³ RIC notes that the FCC has indefinitely postponed the April 2015 due date for the Joint Board’s report to the FCC in response to its referral of FUSF contribution reform issues.¹⁴

Finally, in light of this indeterminable delay in the progress of FUSF reform, a measured approach to NUSF contribution reform can readily accommodate potential future FCC actions when, if and how the FCC may act.¹⁵ Without near-term action by the Commission, however, the viability of all NUSF programs, including the High-Cost Program, will continue to be at risk,

¹¹ *Neb. Rev. Stat.* §§ 86-323(5) and 86-325.

¹² *See*, CTIA Comments at pp. 2-3 and 6-9; Joint Comments of Cox Nebraska Telcom, LLC and Charter Fiberlink – Nebraska, LLC (the “CATV Joint Comments”) at pp. 1-3.

¹³ *See, In the Matter of the Commission, on its own motion, to consider revisions to the universal service fund contribution methodology*, Application No. NUSF-100, *Order Opening Docket and Seeking Comments* at p. 2 (Nov. 13, 2014) (citing various FCC orders relating to federal USF contribution reform dating to 2002).

¹⁴ *In the Matter of Protecting and Promoting the Open Internet*, Report & Order on Remand, Declaratory Ruling and Order, GN Docket No. 14-28, FCC 15-24 at para. 432 (Mar. 12, 2015).

¹⁵ As a specific example of this measured approach, in its Order opening the current docket, the Commission specifically stated that it is not, at this time, considering the expansion of the base of service providers obligated to make NUSF contributions to those providing broadband. *See also*, Comments of NE Colorado Cellular, Inc. d/b/a Viaero Wireless (“Viaero”) at p. 2. This fact rebuts CTIA’s innuendo to the contrary. CTIA Comments at pp. 6-7.

and Commission inaction would not only disregard the Nebraska Legislature's mandate to the Commission, but would be contrary to the FCC's encouragement and endorsement of the Federal-State universal service partnership.¹⁶

2. *Sizing of the NUSF through use of CostQuest's SBCM should proceed expeditiously.*

Based upon review of comments filed in this docket, RIC has identified no rational reason why the analysis required for sizing of the NUSF should be delayed, and with the recent Commission action to hold a webinar to address the SBCM, the Commission appears to agree. While reasonable minds may differ on timing issues, RIC is hopeful that the upcoming Commission-sponsored webinar is the first step in addressing the NUSF sizing issues that RIC has raised.¹⁷ Toward this end, the Commission has already taken the initial steps toward addressing the NUSF sizing mechanism by authorizing licensing of CostQuest's SCBM, which is being made available to all interested parties contributing to the record on NUSF sizing.¹⁸ The NUSF sizing effort is a logical step in achieving NUSF contribution reform, allowing the

¹⁶ As the FCC has stated:

Finally, we note that the promotion of universal service remains a federal-state partnership. We expect and encourage states to maintain their own universal service funds, or to establish them if they have not done so. The expansion of the existing ICLS mechanism to support broadband-only loops and the voluntary path to model-based support should not be viewed as eliminating the role of the states in advancing universal service; far from it. The deployment and maintenance of a modern voice and broadband-capable network in rural and high-cost areas across this nation is a massive undertaking, and the continued efforts of the states to help advance that objective is necessary to advance our shared goals.

March 2016 Connect America Order, para. 184.

¹⁷ See, e.g., RIC Comments at pp. 9-10.

¹⁸ See, *In the Matter of the Nebraska Public Service Commission, on its own motion, to investigate and consider the cost model used by the Federal Communications Commission for Connect America Fund Support, and its corresponding state counterpart*, Application No. NUSF-102/PI-194, Progression Order No. 1 (Aug 18, 2015).

Commission and all interested parties to identify the level of predictable and sustainable NUSF funding that should be established by the reformed NUSF contribution mechanism and shedding light on the various rate design issues regarding levels of end user NUSF surcharges. Consistent with this recently announced webinar, RIC respectfully requests that Commission action in this regard proceeds promptly.

3. ***RIC supports the separate briefing of legal issues as this process should assist to identify issues that may be raised in connection with implementation of the NUSF connections-based contribution reform proposal.***

The *July 12 Order* requesting legal briefing is appropriate and supported by RIC. Potential legal concerns relating to the Commission's implementation of a connections-based contribution mechanism have been raised by various commenters.¹⁹ RIC anticipated such comments and the *July 12 Order* provides a path for the Commission to address such issues while retaining the decisional flexibility to ensure that such legal issues do not unnecessarily undermine implementation of NUSF contribution reform.²⁰ The Commission's measured approach to addressing legal issues provides an opportunity to allow parties to raise concerns (should they exist) as to why action on a reform mechanism – such as the connections-based NUSF proposal outlined in RIC's comments – is not within the Commission's authority to adopt and implement.

Of course, RIC believes that the framework it has outlined within the RIC Comments is within the Commission's authority. For example, RIC has demonstrated a method to isolate intrastate usage either through the use of factors/safe harbors, actual studies of usage if a carrier so elects, reliance on existing (or readily available) data sources to help ensure not only

¹⁹ See, Comments of Rural Telecommunications Coalition of Nebraska ("RTCN") at p. 3; CATV Joint Comments at pp. 2-3; Viaero Comments at pp. 3-4; and CTIA Comments at pp. 6-9.

²⁰ See, e.g., n. 9 above and accompanying text.

accountability/auditability but also to reduce the administrative burden on reporting carriers, and the use of a transitional revenue-based system for certain classes of services until better data can be developed.²¹

So, for example, even if preemption of the Commission's authority is a concern that could adversely impact efforts by the Commission to stabilize the NUSF contribution mechanism, the upcoming legal briefing requested by the *July 12 Order* provides the opportunity for interested parties to raise this issue and the Commission the ability, should it find it necessary, to accommodate FCC action on contribution reform when and if FCC action is completed. Thus, the process outlined by the Commission in the *July 12 Order* should assist the Commission with its deliberations regarding NUSF contribution reform, including the possible future assessment of broadband if and when it becomes permissible for state commissions to make such assessments to support state USFs.

III. THE FOUNDATION FOR THE OVERALL NUSF CONTRIBUTION FRAMEWORK HAS BEEN SHOWN TO BE CONSISTENT WITH THE COMMISSION'S TENTATIVE FINDINGS IN THE ORDER, AND THE ISSUES RAISED THEREIN AS ADVANCED IN THE MODIFICATIONS PROPOSED BY RIC.

A. Backtracking on the aspirational goal of the Commission that encourages ubiquitous fiber deployment is contrary to the public interest relating to the most efficient long-term use of limited NUSF resources.

As the FCC has said, fiber is the only technology that has been shown to be readily scalable and "future proof."²² The FCC uses the Connect America Cost Model ("CACM") for

²¹ See, RIC Comments at pp. 12-16.

²² The FCC has stated that "[w]e encourage recipients of funding to deploy to the extent possible future proof infrastructure that will be capable of meeting evolving broadband performance obligations over the longer term. That will ensure that our policies will continue to support an evolving level of universal service in the future." *Connect America Fund*, WC Docket No. 10-90 et al., FCC 14-190, released December 18, 2014, para. 18; see also *March 2016 Connect America Order*, para. 7; and RIC Comments at 8, n. 12. To be sure, the underlying FCC-based

price cap carriers and the optional Alternate Connect America Cost Model (“A-CAM”) for rate-of-return carriers to determine FUSF disbursement amounts. This model uses Gigabit Passive Optical Network Fiber to the Premises technology as its network topology.²³ In the face of these well-grounded FCC conclusions, CTIA’s suggestion that fiber should not be the driver of the NUSF contribution reform network should be rejected. Differentiations exist regarding price and functionality of wireless versus wireline (fiber) technologies that weigh heavily in favor of the Commission’s aspirational goal of encouraging deployment of fiber.

At the same time, the Commission’s encouragement of fiber deployment complements the FCC’s objectives and thus advances the Federal/State partnership on universal service. Because NUSF resources are limited, RIC respectfully submits that the Commission should focus its High-Cost Program on funding fiber-based terrestrial networks that do not raise the same scalability issues as other technologies.

Price Cap model for the disbursement of FUSF is based on fiber technology (*see, e.g., Connect America Fund, Report and Order*, WC Docket No. 10-90, *et al.*, DA 14-534, released April 22, 2014 at paras. 16, 17, 54, 64) as are certain of the Price Cap performance standards (*see, e.g., Connect America Fund*, WC Docket No. 10-90, DA 13-1125, released October 31, 2013 at para. 16). Thus, consistent with RIC’s suggestion that the Commission action should complement FCC actions (*see* RIC Comments at 6), the encouragement of fiber deployment by NUSF-eligible recipients is entirely appropriate.

²³ *See*, Connect America Cost Model (CACM), Model Methodology, CACM version 4.2, Document version 4.2, rev. 12/22/2014 at Section 4.2.2 (available at <http://www.fcc.gov/encyclopedia/price-cap-resources>). RIC notes that FCC Chairman Wheeler has previously recognized the viability of pursuing fiber-based networks for purposes of the federal USF.

In the end, at this moment, only fiber gives the local cable company a competitive run for its money. Once fiber is in place, its beauty is that throughput increases are largely a matter of upgrading the electronics at both ends, something that costs much less than laying new connections. While LTE and LTE-A offer new potential, consumers have yet to see how these technologies will be used to offer fixed wireless service.

Prepared Remarks of FCC Chairman Tom Wheeler, “The Facts and Future of Broadband Competition”, 1776 Headquarters, Washington, D.C., September 4, 2014 at 5.

B. Processes already exist to address CenturyLink's ("CTL") suggestion that voice obligations be eliminated.

With regard to CTL's recommendation that voice service obligations should be eased or eliminated as NUSF support transitions to support of broadband,²⁴ RIC notes that processes already exist for carriers that desire to seek discontinuation of voice obligations in their service areas. *Neb. Rev. Stat.* § 86-133 provides a process for carrier applications to abandon exchanges and Commission review of such applications. On the Federal level, 47 U.S.C. § 214(e)(4) provides the path for the relief that CTL may see a need to seek. CTL has not explained why these two statutory mechanisms are not sufficient to address its position that, in certain circumstances, voice obligations should be eliminated. If CTL seeks to eliminate its voice obligations, these statutory provisions allow the Commission to develop the full factual and public policy record necessary for finding whether the public interest is served by granting relief from any state-required Carrier of Last Resort obligations as well as applicable Eligible Telecommunications Carrier requirements.

C. As CTL properly notes, the Commission's NUSF contribution reform framework should mirror federal broadband standards.

RIC generally agrees with CTL that the Commission's NUSF reform effort should mirror federal broadband standards.²⁵ Nonetheless, while RIC concurs that the Commission's current definition of "broadband" that envisions minimum speeds of 4/1 Mbps does not meet many consumers' expectations and needs, Commission specification of minimum broadband speeds in order to qualify for NUSF support nevertheless remains necessary and appropriate in order to provide a presumptive minimum baseline broadband speed standard. RIC respectfully submits

²⁴ See, Comments of Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink ("CTL") at p. 4.

²⁵ *Id.* at pp. 2-3.

that the Commission can advance its desire to coordinate its efforts with those of the FCC by adopting broadband speeds consistent with those established by the FCC in the *March 2016 Connect America Order*. Likewise, the Commission can establish a policy baseline for NUSF recipients that requires the demonstration, in some fashion, that aspects of their respective networks have been planned to be scalable regarding broadband speeds.

RIC is also confident that the Commission recognizes that the public policy goals articulated in the *Order* include the reality that NUSF monies must be available not only for the “maintenance and upgrading” of multi-use networks (*e.g.*, voice and broadband services), but also for the “provision” of services over those networks, *i.e.*, the operational expenses *required* by a carrier to provide services to customers.²⁶ Thus, RIC respectfully requests that the Commission specifically acknowledge these necessary uses of NUSF disbursements in accordance with the provisions of relevant statutes and rules. RIC anticipates that such Commission acknowledgment will help ensure that the networks that have been deployed are maintained and operated so as to be available for continued use by consumers.

D. Specific transitional use of a hybrid system as proposed by RIC should be adopted.

Concerns raised regarding the overall use of a hybrid system²⁷ can be readily addressed. RIC’s proposal that the current revenue-based contribution mechanism should be continued to calculate support for only discrete classes of services is reasonable and prudent.²⁸ Development of RIC’s proposed dual assessment system – which continues to utilize revenues-based assessment *solely* on business and special access services until reliable and verifiable data

²⁶ See, *Neb. Rev. Stat.* § 86-323(5) (Reissue 2014) and Neb. Rules and Regs., Tit. 291, Chap. 10, § 4.02(f).

²⁷ See, CTL Comments at p. 9; CTIA Comments at p. 15.

²⁸ See, RIC Comments at 16.

sources on connections can be established – should minimize the cost of creating and maintaining such system under RIC’s proposal.

E. RIC, like Cox/Charter, recognizes that the Commission should adopt reasonable accountability measures to ensure that NUSF is used for its intended purposes.

RIC is not alone in its advocacy that accountability and audit capability based on readily available data advances the notion of a stable and proper NUSF mechanism for Nebraska.²⁹ Cox and Charter have also recognized this objective.³⁰ RIC members have demonstrated the proper use of NUSF by their deployment and quality of service achievements. Thus, RIC respectfully encourages the Commission to establish reasonable measures on a going-forward basis aimed at achieving accountability goals for all NUSF recipients. To the extent possible, RIC continues to believe that the Commission’s reporting requirements should be based upon FCC reporting requirements in order to create administrative efficiencies for both the Commission as well as carriers.³¹

F. CTIA’s assertion that NUSF programs’ funding requirements should be paid from State general funds is based on a false premise and is otherwise ill-conceived.

CTIA’s proposal to use “general funds” to build out broadband to all Nebraska consumers should be rejected outright.³² To avoid any doubt, CTIA’s proposal amounts to an attempt to fund network deployment through taxes on all Nebraskan taxpayers. However, carried to its logical conclusion, CTIA’s proposal to use “general funds” would impose contribution requirements on entities and other consumers through tax payments, including

²⁹ See, *id.* at 22-25.

³⁰ See, CATV Joint Comments at pp. 4-5.

³¹ See, RIC Comments at 22-25.

³² See, CTIA Comments at 10-11.

broadband-only users who are currently exempt from contributing to certain state USFs. Moreover, CTIA's proposal is a transparent effort to undermine Nebraska Supreme Court precedent that the current NUSF regulatory surcharge is not only part of the constitutionally-valid NUSF Act but also that the NUSF surcharge *is not a tax*.³³

The Nebraska Legislature vested the Commission with the authority and jurisdiction to establish the NUSF and maintain its viability as necessary.³⁴ The Commission's NUSF contribution reform efforts are a result of consequences that have occurred as the telecommunications marketplace continues to evolve. Implementation of NUSF contribution reform is fully within the Commission's authority.

For all of these reasons, therefore, CTIA's proposed use of a general funds framework to fund universal service in this State disserves the continuation of the NUSF that has been found to be constitutional by the courts. RIC respectfully suggests that the Commission should reject CTIA's proposal.

IV. CONCLUSION

The RIC members appreciate the opportunity to provide these reply comments and respectfully request that the Commission take action on the matters raised in the *Order* in a manner consistent with that discussed in RIC's previously filed comments and in these reply comments. RIC looks forward to continuing its participation in this docket.

³³ See, *Schumacher v. Johanns* 272 Neb. 346 (2006).

³⁴ See n. 11 above.

Dated: July 15, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of July, 2016, an electronic copy of the foregoing Reply Comments was delivered via electronic mail to:

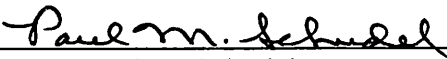
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