

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

RECEIVED

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

APR 21 2017

Nebraska
Public Service Commission

REPLY TESTIMONY OF DAN DAVIS ON BEHALF OF THE
NEBRASKA RURAL INDEPENDENT COMPANIES

I. INTRODUCTION - WITNESS BACKGROUND

Q: Please state your name, employer, business address and telephone number.

A. My name is Dan Davis. I am employed with Consortia Consulting (“Consortia”). My business address is 233 South 13th Street, Suite 1225, Lincoln, Nebraska, 68508.

Q. On whose behalf are you testifying?

A. I am testifying on behalf of the Rural Independent Companies (“RIC”).¹ Each of the RIC member companies provides local telephone exchange, exchange access and broadband access services in rural areas of Nebraska subject to the jurisdiction of this Commission.

Q. What is your current position?

A. I am the Director of Policy Analysis and Advocacy at Consortia.

Q. Are you the same Dan Davis who filed direct testimony in the above captioned docket on March 24, 2017?

A. Yes, I am.

Q. Have you reviewed the pre-filed direct testimonies filed by other interested parties in this docket on March 24, 2017?

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

A. Yes, but I have primarily focused on those portions of the filed testimonies that address the subjects to which I am responding in this reply testimony.

Q. Have you also reviewed the direct and reply testimonies that have been or are being filed in this docket by Rural Independent Companies' witnesses, Ken Pfister and Edit Kranner?

A. Yes.

Q. Which subjects relating to the Commission's February 22, 2017 Order and Order Seeking Further Comments and Setting Hearing (the "February Order") will you address in this testimony?

A. In the February Order the Commission presented a series of topics on which it invited interested parties to provide comments in the form of pre-filed testimony. I will provide responses on behalf of RIC to the pre-filed testimonies of those parties regarding the Commission's requests for comments on only those requests set forth in Section II of my testimony. Mr. Pfister or Ms. Kranner will be addressing other Commission requests for comments (recognizing that some witness statements may be addressing aspects of multiple Commission requests).

II. COMMISSION REQUESTED COMMENTS IN THE FORM OF PRE-FILED TESTIMONY CONTAINED IN THE FEBRUARY ORDER

Q-II.1 Does RIC have responses to the reactions of interested parties provided in their pre-filed direct testimonies to the Commission's belief as stated on page 18 of the February Order that a flat end-user surcharge on intrastate calling capability can be implemented that will meet federal and state requirements?

Q. On pages 25-27 of the testimony of CTIA's witness, Mr. Price, he challenges that contributions reform is necessary and in support of this claim provides a graph of uncommitted NUSF balances between 3Q14 and 4Q16. Do you agree with this assessment?

A. No, I do not. Mr. Price's assessment fails to take into consideration the impact on the NUSF reserve balance of the Commission's directive set forth in Attachment A to the

Commission's December 20, 2016 Order entered in Application No. NUSF-108.² In that Order the Commission allocated \$4,500,000 from the NUSF reserve to the 2017 budget for the NUSF High Cost Program. This transfer was necessitated by ongoing reductions in the level of remittances to the NUSF from the revenues-based assessment mechanism. Taking the impact of this fund transfer into consideration, the trend line of the NUSF reserve fund balance would be considerably different than that shown by Mr. Price in the graph on page 26 of his pre-filed direct testimony. Taking into account this change to the NUSF reserve balance, the reductions in overall remittances to the NUSF through the revenues-based assessment mechanism³ and the continuing demands for NUSF support, particularly for broadband build-out, it is reasonable to conclude that the viability of the NUSF is indeed threatened if reform of the contributions mechanism is not completed by the Commission. In any event, as Ms. Kranner has demonstrated, implementation of a connections-based assessment mechanism is demonstrably more stable since total voice connections in Nebraska as an assessment base have, during the period of December 2008 through December 2015 not only remained stable but also have somewhat increased (see Attachment One to Ms. Kranner's Direct Testimony).

Q. Charter's witness, Mr. Gillan, states on page 8 of his testimony that "any connections-based system is (potentially) subject to federal challenge." Do you agree with this statement?

² See, *In the Matter of the Nebraska Public Service Commission, on its own Motion, to make adjustments to its high-cost distribution mechanism and make revisions to its reporting requirements*, Application No. NUSF-108, *Order Seeking Further Comment*, at 2 and Attachment A (Dec. 20, 2016).

³ *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 and Order Seeking Further Comments and Setting Hearing*, at 1 (Feb. 22, 2017) (the "February Order").

A. Strictly speaking Mr. Gillan is correct that nearly anything is “potentially” possible. However, that is certainly not the standard that should guide the Commission’s deliberations in this docket. Nowhere in the Commission’s discussion of the February Order do I see a suggestion that the Commission would not address an unforeseen or “potential” consequence that could arise regarding the subject matter of this proceeding. Rather, the Commission has and can be expected to retain flexibility to fine tune its proposed connections-based NUSF contribution regime should such changes be required in the future. The Commission should not be held hostage to the “perfect” solution for contribution reform since time will tell the future issues that will need to be addressed but are currently unknown.

Nor in my view does the Federal Communications Commission’s (“FCC”) Kansas-Nebraska Commission Declaratory Ruling⁴ cited by Mr. Gillan in any respect mention connections-based state universal service fund assessment mechanisms, much less suggest that implementation of such a system would be challenged by the FCC.

Tellingly, Mr. Gillan does not identify any FCC universal service rule that would be violated by migration from the current intrastate revenues-based NUSF contribution mechanism to the Commission’s proposed connections-based NUSF contribution mechanism.

Q. Mr. Gillan also maintains that if the Commission adopts a connections-based mechanism, it would “effectively assess interstate services”. Do you agree with this conclusion?

⁴ *Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess VoIP Intrastate Revenues*, WC Docket No. 06-0122, FCC 10-185, Declaratory Order, para. 11 (Nov. 5, 2010).

A. Again, I do not. The focus of the Commission’s use of the definitions of “assessable service” and “connections” rest solely on the ability of end users to access intrastate voice services, and only those connections that provide *intrastate* assessable service would be subject to the NUSF surcharge under the Commission’s connections-based NUSF contribution regime. Attachment 3 to the Staff’s testimony makes this clear. A further undeniable fact is that the FCC has not approved or implemented a federal universal service fund (“USF”) connections-based assessment mechanism. Thus, an NUSF connections-based assessment mechanism will not rely upon, burden or otherwise infringe the province of interstate services nor could it unless and until the FCC adopts a connections-based USF mechanism in the future. If that eventuality were to occur, the Commission will have ample opportunity to modify its connections-based mechanism to conform to guidance that the FCC can reasonably be expected to provide in order to preserve the federal-state universal service partnership to which the FCC has repeatedly referred with approval.

Q. Are you aware of any FCC precedents that would support Mr. Gillan’s assertion that a connections-based mechanism would “effectively assess interstate services”?

A. I am not aware of any FCC precedent that has ruled that the mere fact that a connection is a shared-use facility that carries both intrastate and interstate services preempts or otherwise prohibits a state commission from implementing a connections-based assessment mechanism. The FCC has applied a 10% contamination theory to jurisdictionalize special access lines as “interstate.” I would note, however, that in the event a special access line is deemed “interstate” it would not be considered a connection used for an “assessable service” as defined by the Commission in this docket since the service would be an interstate service, not an intrastate service. Moreover, because the

Commission has made clear that it does not propose that the new mechanism would apply to broadband-only connections, broadband would not at this time be deemed a connection used for an assessable service under the Commission's proposal.

Q. On pages 14-16, CTIA's witness, Mr. Price, claims that the February Order violates certain aspects of state and federal law. Do these positions stated by Mr. Price have any relationship to implementation and adoption of an NUSF connections-based assessment mechanism by the Commission?

A. No. On these pages of Mr. Price's testimony, he is not objecting to the assessment mechanism proposed by the Commission, but rather, he is effectively reaching back to the Commission's April 5, 2016 Order Seeking Further Comments which on page 5 sets forth, as a part of the Commission's strategic plan roadmap for Nebraska, the aspirational goal of "Deployment of Fiber-based Network Everywhere." In essence, CTIA, through Mr. Price's testimony, is attacking the structure of the Alternative Connect America Cost Model ("A-CAM") that has been approved by the FCC and on which the SBCM is based. As the Commission and the parties are aware, however, the A-CAM and the SBCM are premised upon construction of a fiber-based network in order to accomplish the build-out of a scalable network that will provide broadband at speeds that today and for the foreseeable future will meet consumers' demands. Any arguable relevance of the claims of Mr. Price on pages 14-16 of his testimony relates to the proposed program funding for 2018 that is set forth on Table 4 of the February Order. Mr. Price is focusing on proposed NUSF Program *expenditures, not on the proposed reformed mechanism* through which NUSF surcharges would be imposed and collected. As Mr. Pfister states in his pre-filed reply testimony, NUSF Program budgets or expenditures are not the focus of or within the scope of this docket.

Q-II.2 Does RIC have responses to the reactions of interested parties provided in their pre-filed direct testimonies to the Commission’s proposition that use of a connections-only mechanism will “eliminate the need for the Commission to collect data from carriers that it does not already collect and audit” (February Order p. 20)?

Q. On pages 10-12 of Mr. Gillan’s testimony he discusses whether the Form 477 provides “useful data”. Do you have comments in response to Mr. Gillan’s statements on this subject?

A. Yes. Certainly the Form 477 data is “useful” with regard to implementation of a connections-based NUSF contribution mechanism – in fact, this data is critical. As is evidenced by the “Inputs” numbers set forth on Attachment 3 to the Staff Testimony (Column (A)), the Commission uses aggregate “connections” data that are *publicly* released by the FCC to calculate the amount of surcharges that are yielded by a given rate design for an NUSF connections-based contribution mechanism. Not only does this then address Mr. Gillan’s concern that data be used “at the highest level of aggregation”, but it also addresses Mr. Gillan’s apparent concerns regarding the confidentiality of such data since the FCC *publicly* releases data at this level of aggregation. As such, there is no need for the workshop suggested by Mr. Gillan; such workshop would only effectively delay the adoption of the connections-based NUSF contribution regime that the Commission proposes for adoption. Mr. Gillan next voices a concern as to the availability of Form 477 data to “third party consultants administering the NUSF.” Apparently Mr. Gillan is unaware that throughout the existence of the NUSF since 1998, administration of collections by and disbursements from the NUSF and its various Programs has been solely performed by members of the Commission’s staff and not by third party consultants. Thus, this concern is moot. In short, I am confident that in the event that the Commission determines to avail itself of the FCC’s procedures for access

by state utility commissions to non-public Form 477 data, the Commission and its Staff will carefully observe the terms and conditions of the certifications that it is required to make to the FCC as a condition to receiving such access to non-public data.

Q. Have other parties raised issues with regard to the data that would be used in conjunction with a connections-based contributions mechanism?

A. Yes. Cox raises the issue of confidential information. (*See*, Cox Testimony at 4-5)

While RIC is also sensitive to confidentiality matters, as I have stated above, it is well known that the FCC publicly releases aggregated connections-based information broken down by state. This information will serve as a basis for comparing total Nebraska connections being reported to the FCC via the FCC Form 477 process and those used by the Commission for NUSF contribution purposes. Likewise as stated above, the FCC has adopted a process by which state commissions may be provided FCC Form 477 data that is filed with the FCC on a provider-specific basis. These ongoing FCC processes should address Cox's concerns. Further, RIC is not aware of any reason why the Commission cannot, subject to appropriate measures to preserve confidentiality, ask for the underlying data it may additionally require to establish and properly implement its per-connection NUSF contribution proposal. The fact that similar information regarding Nebraska carriers is provided to the FCC does not, in RIC's view, inhibit the Commission from gathering the *intrastate* information it needs to implement its regulatory programs.

Q-II.3 Does RIC have responses to the reactions of interested parties provided in their pre-filed direct testimonies to the Commission's proposed definition of "wireless channel" in the last paragraph on p. 20 of the February Order?

Q. Mr. Gillan expresses concern on page 9 of his testimony with regard to use of telephone numbers as a proxy for connections. Do you have comments with regard to his expressed concerns?

A. I think that the most straight-forward comment is that in Table 1 of the February Order and in the three “Alternatives” attached to the Staff Testimony, it is clear that the number of identified connections is derived from the most recent publicly-reported aggregate Form 477 data. Thus, Mr. Gillan’s concerns relating to the use of telephone numbers to identify connections is really unwarranted because the connection count on which the Commission apparently will base its connections-based mechanism is derived from the number of assessable connections derived from publicly released, aggregated Nebraska-specific Form 477 data. So, if a provider reports a connection that affords the ability of a user to access an intrastate assessable service, that connection is expected to be assessed the applicable NUSF surcharge. Presumably, in order to audit the accuracy of remittances by particular providers, the Commission will take the necessary steps to obtain provider-specific Form 477 data from the FCC which data will be subject to all of the confidentiality protections required by the FCC, but which data will also allow the Commission to verify the accuracy of remittances reported by a provider based upon such provider’s reported connections.

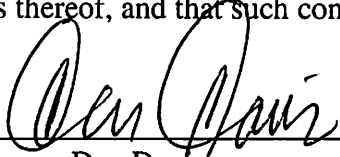
Q. Does this conclude your testimony?

A Yes, it does.

VERIFICATION

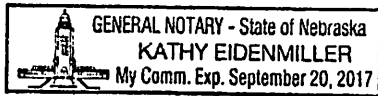
STATE OF NEBRASKA)
) ss.
LANCASTER COUNTY)

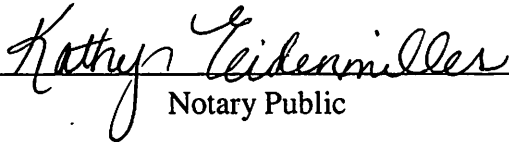
Dan Davis, being first duly sworn on oath, states he has read the foregoing Reply Testimony, is familiar with the contents thereof, and that such contents are true and correct to the best of his information and belief.



Dan Davis

Subscribed and sworn to before me, a Notary Public in and for such State and County, this 21st day of April, 2017.





Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of April, 2017, an electronic copy of the foregoing Pre-Filed Testimony was delivered via electronic mail to:


Nebraska Public Service Commission

Sue.Vanicek@nebraska.gov

Brandy.Zierott@nebraska.gov

psc.nusf-filings@nebraska.gov

All Other Commenting Parties


Paul M. Schudel