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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

APR 21 2017

Nebraska Public Service Commission

RESPONSE OF THE RURAL INDEPENDENT COMPANIES IN OPPOSITION TO CTIA’S MOTION SEEKING PROCEDURAL ORDER

I. Introduction

On April 5, 2017, CTIA-The Wireless Association (“CTIA”) filed a Motion Seeking Procedural Order (the “Motion”) in which CTIA seeks leave to conduct discovery, requests that cross-examination of witnesses be allowed at the hearing of this matter and asks for revisions in the schedule that has been established by the Commission setting such hearing for May 23-24, 2017. A Hearing Officer Order was entered on April 11, 2017 advising interested parties that responses to the Motion should be submitted to the Commission no later than April 21, 2017. For the reasons stated herein, the Rural Independent Companies (“RIC”)¹ oppose the Motion and respectfully request that the Motion be denied in its entirety.

II. Application Background

This application was opened on November 13, 2014, on the Commission’s own motion and pursuant to the Commission’s Order Opening Docket and Seeking Comment (the “November 13, 2014 Order”) for the purpose of considering “revisions to the contribution

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.

mechanism of the Nebraska Universal Service Fund (“NUSF”).”² Notice of the commencement of the docket was published by the Commission on November 17, 2014 (the “*November 17, 2014 Notice*”) stating the same purpose and scope of this proceeding.

This docket is an investigatory proceeding commenced pursuant to the Commission Rules of Administration, § 003.01(5)³ and does not present a “contested case” as defined in *Neb. Rev. Stat.* § 84-901(3).⁴ In fact, in all respects, this docket has been conducted as an investigation and not as a contested case (*e.g.*, filing of a protest or formal intervention has not been required to establish party status).

Since the opening of this docket, the Commission has requested and received from interested parties four (4) sets of written comments (filings have been made on February 13, 2015, on April 13, 2015, on June 6, 2016 and on July 15, 2016). Moreover, the Commission permitted parties to submit two (2) written legal briefs (on August 3, 2016 and on August 26, 2016). Direct testimonies were pre-filed on March 24, 2017 and reply testimonies are scheduled to be filed on or before April 21, 2017. A two-day hearing has been scheduled for May 23-24, 2017.

CTIA has submitted comments, legal briefs and pre-filed testimony at every stage of the development of the record in this proceeding and on the dates set forth in the preceding paragraph. At no time prior to the filing of the Motion on April 5, 2017 has CTIA ever requested

² *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 and Seeking Comment*, at 1 (Nov. 13, 2014).

³ “The Commission will act only on the following initial pleadings: . . . (5) A petition for investigation which may be filed by any person or upon the Commission’s own motion.” *Neb. Admin. R. & Regs.*, tit. 291, ch. 1, § 003.01.

⁴ “Contested case shall mean a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.” *Neb. Rev. Stat.* § 94-901(3).

discovery or a procedural conference in this docket. Further, at no time prior to the filing of the Motion has CTIA requested that cross-examination of witnesses be allowed in this proceeding.

III. CTIA's Contentions

Now, after this proceeding has been pending for nearly two and one-half years, CTIA has first surfaced its contentions that conducting discovery and the right to cross-examine witnesses are, in CTIA's view, "necessary to permit development of an adequate record and enable meaningful participation by parties." (Motion at p. 1)

In paragraph 9 of the Motion, CTIA contends that "there are a great number of evidentiary questions that cannot be adequately analyzed without the ability to engage in discovery." These claimed evidentiary questions apparently relate to the rate design proposal attached to the February 22, 2017 Order and Order Seeking Further Comments and Setting Hearing (the "February Order"), the three (3) alternative rate design proposals attached to the pre-filed direct testimony of Commission Staff member, Mr. Robbins, and "new proposals" made by unnamed "other parties." (Motion at p. 3) Further, CTIA claims that the Nebraska Rules of Civil Procedure apply to this proceeding and assert that the fifty (50) interrogatory limit provided by such Rules should be suspended.

CTIA asserts that absent discovery and cross-examination being allowed by the Commission, "not only would the parties be deprived of their rights, but all Nebraskans would suffer the consequences." (*Id.*) No facts or specifics are provided to support these general allegations.

For the reasons set forth below, the Motion should be denied in its entirety and the current schedule for the filing of pre-filed reply testimonies and for the hearing should proceed without change.

IV. Argument

First, the subjects on which CTIA claims to need discovery are beyond the scope of this proceeding as set forth in the *November 13, 2014 Order* or the *November 17, 2014 Notice*. The Commission unequivocally stated that it will consider *revisions to the universal service fund contribution methodology* in this docket and not, as CTIA effectively contends at page 3 of the Motion, the specific surcharge levels arising from that methodology nor the NUSF program funding levels for 2018. Although the Commission and its Staff have offered four (4) alternative rate designs for consideration, such rate design frameworks are just that – frameworks to determine how a connections-based NUSF contribution program would best serve the interests of all Nebraska consumers who make and receive Nebraska intrastate calls.

Conspicuously absent from the Motion is any recognition of the process specified by the Legislature for the Commission to set NUSF program funding levels. In its adoption of the Nebraska Telecommunications Universal Service Fund Act (“NTUSFA”), the Legislature required the Commission to annually set the level of funding needed to carry out the purposes of the NTUSFA. Specifically, Section 86-328(1) of the NTUSFA provides:

Annually the commission shall hold a public hearing to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act. The commission shall publish notice of the hearing in at least one newspaper of general circulation in the state at least once each week for two consecutive weeks before the hearing. After the hearing, the commission shall determine the amount of the fund for the following year, including a reasonable reserve.

Historically and in compliance with the foregoing directives, the Commission has annually determined the NUSF funding level after publication of notice of hearing, conducting a public

hearing and entering an order in Application No. NUSF-4.⁵ Neither the *November 13, 2014 Order* nor the *November 17, 2014 Notice* reference determination of the level of the NUSF for 2018 as a part of the scope or purpose of this docket. CTIA's request for leave to conduct discovery relates to issues beyond the scope of this docket which is to consider revisions to the contribution mechanism of the NUSF, and therefore such discovery is improper.⁶

Second, historically, the Commission has received evidence and has established new NUSF Programs or funding levels for NUSF Programs in separate dockets (*e.g.*, regarding the High-Cost Program in Applications NUSF-50, NUSF-99 and NUSF-108; regarding wireless tower construction grants in Application NUSF-69; and regarding Low Income Voice support (NTAP) in Application NUSF-2, Progression Order No. 7). Once again, as described in paragraph 9 of the Motion, CTIA seeks leave to conduct discovery relating to the funding levels of existing NUSF Programs which is a subject outside of the scope of this proceeding that was established in the *November 13, 2014 Order* and confirmed in the *November 17, 2014 Notice*.

While the Commission invited interested parties to file testimonies in response to questions presented in the February Order relating to rate design and NUSF program funding for 2018, that invitation cannot properly be viewed as expanding the original scope of this proceeding. This proceeding is about policy-making in the form of reforming the NUSF contributions mechanism. It is an *investigatory proceeding*, not a contested case. The response

⁵ *In the Matter of the Commission, on its own motion, seeking to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act effective fiscal year beginning [insert applicable date], Application NUSF-4.* The most recent NUSF-4 Order Setting Surcharge was entered on June 7, 2016 for the year July 1, 2016 through June 30, 2017.

⁶ In making the point that CTIA's request for leave to conduct discovery is beyond the scope of this docket, RIC in no way concedes that discovery would be appropriately requested by CTIA in the NUSF-4 docket or in any docket relating to the funding level for an existing or new NUSF program.

of the Commission Staff to CTIA that “neither discovery nor cross-examination is permitted in the instant docket” (Motion at p. 2) is entirely consistent with the nature of this docket.⁷

Third, CTIA has not demonstrated in its Motion that a need for discovery exists relative to matters that are within the scope of this proceeding as enunciated by the Commission. CTIA has participated in this docket for over two (2) years and has to date made six (6) filings in this docket without the need for discovery. CTIA should not now be permitted to delay the Commission’s final determination of reforming the current revenues-based contribution mechanism to a connections-based contribution mechanism through the use of unwarranted discovery tactics.

Finally, CTIA’s request for cross-examination of witnesses in this investigatory proceeding commenced on the Commission’s own motion should also be denied. This docket does not present a contested case and thus, cross-examination is not warranted or proper.

For all of the above-stated reasons, discovery and cross-examination as requested by CTIA are unnecessary and inappropriate in this proceeding.

V. Conclusion

Due process and the Commission’s procedural rules do not require the conduct of pre-hearing discovery or cross-examination at the hearing of this matter. This proceeding is a policy-

⁷ It is reasonably clear from the terms of the Motion that CTIA intends to seek discovery from the Commission Staff if the Motion is granted. In paragraph 9 of the Motion, CTIA states that “there are no fewer than four (4) proposals tendered by the Commission and its staff that rely on data from uncertain sources, make calculation that can only be guessed at, and are underpinned by assumptions that are never explained.” (Motion at pp. 2-3) The Commission has recently ruled that the Commission Staff is not a party to for the purpose of discovery and cannot be compelled to respond to interrogatories. *See, In the Matter of the Nebraska Public Service Commission, on its Own Motion, to Administer the Universal Service Fund High-Cost Program*, Application No. NUSF-99, Order Denying Motions and Ruling on Discovery at pp. 2-3 (Dec. 15, 2015).

making investigation and is not a contested case. The relief sought by CTIA in the Motion is unwarranted and unnecessary. Thus, the Commission should deny the Motion in its entirety.

Dated: April 21, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

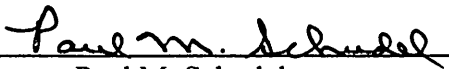
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