BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own Motion, to make adjustments to its high-cost distribution mechanism and to make revisions to its reporting requirements.	))))))	Application No. NUSF-108 Progression Order No. 3

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Nebraska Public Service Commission

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

I. INTRODUCTION.

The Nebraska Rural Independent Companies ("RIC")[1] submit these Reply Comments in response to the Progression Order No. 3 issued by the Nebraska Public Service Commission (the "Commission") in this proceeding on December 19, 2017,[2] and the Hearing Officer's Procedural Order entered on March 19, 2018 granting leave to submit reply comments in the above-captioned proceeding that addresses the Nebraska Universal Service Fund ("NUSF") accountability and distribution framework applicable to Rate of Return ("ROR") carriers. RIC appreciates the opportunity to provide the following Reply Comments to the Commission.

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[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 and Three River Telco. Each of the RIC companies is an Incumbent Local Exchange Carrier as defined under Section 251(h) of the Communications Act of 1934, as amended (the "Federal Act"). *See* 47 U.S.C. § 251(h).

[2] *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, Progression Order No. 3 (Dec. 19, 2017) (the "*December 19 Order*").

II. ADOPTION OF THE RIC PROPOSAL FOR ROR CARRIER ACCOUNTABILITY AND DISTRIBUTION CONCERNING NUSF HIGH COST PROGRAM SUPPORT RESOLVES THE ISSUES IN THIS PROCEEDING.

The scope and purpose of the *December 19 Order,* as stated by the Commission, is "to seek comment on proposed changes to the high-cost distribution mechanism and to consider revisions to our reporting requirements relative to rate of return (ROR) carriers."[3] To this end, the Commission presented a series of questions focusing on: (a) possible reform of the NUSF High Cost Program distribution mechanism for ROR carriers; and (b) accountability of ROR carriers regarding the use of NUSF High Cost Program support.

In the RIC Comments, a detailed description of the RIC Proposal was presented.[4] With the exceptions of RIC and the Rural Telecommunications Coalition of Nebraska ("RTCN"),[5] other commenting parties provided little substance or input regarding the accountability and distribution issues that the Commission presented for comment in the *December 19th Order.*

In its comments, Charter continues its efforts to delay implementation of any NUSF contribution mechanism reform – in this case the NUSF High Cost Program accountability framework – along lines similar to those expressed in comments filed in Application No. NUSF-111.[6] In contrast to Charter's more direct delay tactics, CTIA's effort to delay is more subtle.

CTIA requests that the Commission size the NUSF only to "ensure universal service today."[7] According to CTIA's proposed framework, as universal service standards increase,[8] the

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[3] *Id.*, p. 1.

[4] *See,* RIC Comments, pp. 5-8.

[5] A number of the comments provided by RTCN are generally supportive of the positions taken by RIC. To the extent that material differences exist between the positions of RIC and RTCN, those matters will be addressed below.

[6] *See also*, Section V, *infra.*

[7] *See,* CTIA Comments, pp. 1-2 (footnote omitted).

Commission would need to revisit its decisions relating to the NUSF High Cost Program changes, increasing the potential for additional delay. RIC disagrees with CTIA's proposal for future review of previous decisions regarding the direction and use of then-current NUSF High Cost Program support. Now is the appropriate time for the Commission to pursue an NUSF High Cost Program accountability and distribution framework that encourages the deployment of future-proof, scalable networks to meet universal service objectives within the rural areas of the State of Nebraska served by ROR carriers.[9]

In contrast to the foregoing approaches, RIC has provided a specific accountability framework that addresses the questions raised by the Commission on this subject.[10] Likewise, RIC provided the framework for a new distribution model for ROR carriers based on actual broadband performance standards versus continued application of the Commission's NUSF EARN form to ROR carriers.[11] Adoption of the RIC Proposal is warranted and would advance the public interest in the further deployment and operation of broadband-capable networks in the rural areas of Nebraska.

With respect to the NUSF High Cost Program distribution framework, the RIC members reaffirm their intention to continue development work on a distribution mechanism to replace the

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[8] CTIA has failed to reconcile its contention with the fact that the Federal Act makes clear that the definition of "universal services" is an evolving standard. *See* 47 U.S.C. § 254(c)(1) ("Universal service is an evolving level of telecommunications services. . . .").

[9] *See also*, n. 31, *infra*, and accompanying text.

[10] *See*, RIC Comments, pp. 3-4 and 5-8.

[11] For the reasons stated in RIC's Comments, moving to a "performance-based" demonstration of broadband deployment (*see, id.*, pp. 3-4, 6 (Item 3), and 14 (Response to Commission Question 6)) eliminates the need for the use of the EARN form as suggested by RTCN. *See*, RTCN Comments, pp. 6 and 8.

current Support Allocation Methodology. RIC respectfully submits that the productivity of such effort requires specific Commission guidance in the form of establishing a minimum annual NUSF High Cost Program support level for the next ten years consistent with the Federal Communications Commission's ("FCC") decision to make ten years of support available to ROR model recipients in exchange for those carriers meeting specific buildout requirements.[12]

Broadband capable networks are not deployed or operated in a vacuum. NUSF High Cost Program support has and will continue to be an integral component of the efforts of the RIC member companies to deploy and operate future-proof, broadband-capable networks. Planning for such networks cannot be based on a "snap shot" in time but rather, needs to be based on the assurance of universal service funding over an extended period – recommended to be at least ten years – to allow for the predictability required by the Nebraska Telecommunications Universal Service Fund Act that will facilitate long-term planning of the investments required to deploy and operate such networks.[13] As good stewards of the support provided by the NUSF High Cost Program, Nebraska ROR carriers such as the RIC member companies can and should be provided this assurance so that their respective commitments to serve high-cost, sparsely populated rural areas of Nebraska can be properly planned, implemented and maintained.

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[12] *See,* RIC Comments, pp. 4 and 8-9.

[13] Based on submissions by the RIC members in Application No. NUSF-100, RIC's Comments in this proceeding, and RIC's Comments and Reply Comments filed in Application No. NUSF-111, the significant investment required to deploy and operated broadband networks in Nebraska exceeds $152 Million per year as established through the State Broadband Cost Model ("SBCM") *after deducting* federal Universal Service Fund ("FUSF") monies provided to Nebraska carriers. *See, e.g.,* Comments of the Rural Independent Companies in Response to Order Opening Docket and Seeking Comments, Application No. NUSF-111, filed January 30, 2018, Exhibit One. Because RIC proposes that FUSF dollars be subtracted from the SBCM's cost calculation, CTIA's concern regarding double recovery of network costs has been addressed. *See,* CTIA Comments, pp. 2-3.

Likewise, the level of ROR carrier broadband build out that can be achieved by those ROR carriers that have not yet completed fiber to the home ("FTTH") deployment will be directly proportionate to the level of NUSF High Cost Program support committed to Nebraska ROR carriers.[14] Put another way, with increased NUSF High Cost Program support, ROR carriers will proceed to deploy broadband to currently unserved or underserved areas of the State and will account to the Commission for the use of such support based on the RIC Proposal for accountability.[15]

III. EFFORTS TO BOOTSTRAP CHANGES TO ROR CARRIERS' DISTRIBUTION AND ACCOUNTABILITY FRAMEWORK FOR APPLICATION TO PRICE CAP CARRIERS SHOULD BE REJECTED.

Centurylink's Comments request that the Commission treat all carriers alike – large and small.[16] For the following reasons, RIC urges the Commission to maintain separate regimes for Price Cap ("PC") carriers and the ROR carriers. First, CenturyLink admits at the outset of its comments that ". . . CenturyLink is not directly impacted by the Commission's proposals [in this

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[14] RTCN suggests a minimum definition of broadband of 25/3 Mbps and prioritizing of NUSF High Cost Program funding to carriers currently capable of providing such speeds. *See, e.g.*, RTCN Comments, pp. 3-5. RIC is concerned that such statements suggest that NUSF distributions to any rural ROR Nebraska Eligible Telecommunications Carrier ("NETC") will not occur until such speeds are met, a result contrary to the evolving deployment of broadband networks initially at speeds of 4/1 Mbps to 10/1 Mbps and ultimately to 25/3 Mbps. Funding is required for all rural ROR NETCs in order to provision, upgrade and maintain broadband-capable networks, and thus, to promote ubiquitous broadband network deployment in the rural NETCs' areas.

[15] RTCN states that the Commission's focus should be on consumers. *See,* RTCN Comments at 7-8. RIC agrees. However, RTCN's prioritization of NUSF High Cost Program support to networks already capable of providing consumers with 25/3 Mbps broadband service (*see, id.*, p. 9) will disadvantage consumers whose service is provided by an NETC engaged in on-going deployment of scalable, future-proof fiber-based networks capable of 25/3 Mbps service.

[16] *See,* CenturyLink Comments, p. 1.

proceeding] . . ."[17] This statement is a strikingly candid acknowledgment that the subject matter of this proceeding neither impacts CenturyLink nor should it present an opportunity for CenturyLink to advocate for revisions to the Commission's established distribution and accountability framework that is applicable to PC carriers such as CenturyLink. Contrary to CenturyLink's belief "that the Commission should treat all carriers receiving NUSF support equally when it comes to the calculation and allocation of support,"[18] it is because of Commission concerns with PC carriers' level of investment of NUSF High Cost Program support, while ROR carriers did make appropriate broadband investments, that the Commission instituted separate distribution and accountability requirements for PC carriers and ROR carriers.[19]

Second, CenturyLink's contention that it should be treated the same as ROR carriers with regard to the calculation and allocation of NUSF High Cost Program support is, in effect, an untimely request for reconsideration of the Commission's order that allocates 20% of CenturyLink's NUSF High Cost Program support to ongoing maintenance, and allocates the remaining 80% of such support to "grant based capital construction support."[20] CenturyLink's

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[17] *See,* Qwest Corporation d/b/a CenturyLink, QC and United Telephone Company of the West d/b/a CenturyLink (collectively referred to as "CenturyLink") Comments, p. 1.

[18] *See, id.*

[19] For example, the Commission has previously found that "[o]ur data has indicated a significant decline in investment levels by price cap carriers over the years. Our data further shows an increase in investment made by rate of return carriers." *See,* Application No. NUSF-108, Order Seeking Further Comment and Releasing Proposed 2017 Distribution Calculations, p. 3 (Dec. 20, 2016).

[20] Application No. NUSF-108, Findings and Conclusions, p. 6 (Mar. 28, 2017). RIC notes that in September 2015 the Commission ordered that NUSF High Cost Program support provided to PC carriers should be allocated 50% to ongoing maintenance and 50% to capital expenditures for broadband deployment. *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.

actions in connection with Application No. NUSF-99 (enumerated in footnote 20) amply demonstrate that CenturyLink was well aware of its rights to seek Commission reconsideration of the distribution and accountability framework established for PC carriers, and presumably, to proceed with an appeal the Commission's decision if it so desired. CenturyLink chose not to do so and it should not now be allowed to indirectly accomplish through its comments in this proceeding (which it admits does not directly impact PC carriers) a result that it has already chosen not to pursue directly through the appellate process.

Third, the Commission's PC carrier NUSF High Cost Program support framework – 20% for ongoing maintenance and 80% for capital expenditures to be used for application-based broadband projects[21] – is and should continue to be *inapplicable* to ROR carriers. There is no reasonable basis to question that the RIC members and the other rural ROR carriers have met or are in the process of meeting their public interest obligations regarding the deployment of broad-capable networks in their service areas.[22]

IV. THE ROR CARRIERS THAT HAVE INCURRED DEBT TO DEPLOY BROADBAND WILL RECOVER BORROWING COSTS THROUGH DEPRECIATION EXPENSE AND AUTHORIZED RATE OF RETURN.

NUSF-99, Progression Order No. 1, pp. 5-6 (Sept. 1, 2015). The Commission entered its Order Authorizing Payments of support for calendar year 2016 in this docket on October 20, 2015.

On October 30, 2015, CenturyLink filed a Motion for Rehearing with regard to the Order Authorizing Payments. In response to this Motion, the Commission entered a series of orders culminating in an Order on Reconsideration and Order Releasing Project Checklist issued in Application No. NUSF-99 on July 12, 2016. CenturyLink did not appeal this Order.

[21] *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, Findings and Conclusions, p. 6 (Mar. 28, 2017).

[22] *See,* RIC Comments, pp. 10-12 and RTCN Comments, p. 3.

CenturyLink asserts that ROR carriers that have borrowed for the purpose of completing broadband deployment in their service areas may not recover borrowing costs through NUSF High Cost Program support.[23] CTIA also asserts that the Commission need not "attempt to devise a way to account for loans that ROR carriers have taken out previously . . . [because] [t]hese carriers took out these loans without any apparent expectation of specific recovery from the NUSF."[24]

ROR carriers, or for that matter, any carrier that incurs indebtedness in order to accomplish construction of new plant facilities or to upgrade existing plant facilities for the purpose of providing customers with access to broadband through the use of a FTTH or other network, obviously increase the amount of plant investment on such carrier's books of account. This plant investment is subject to depreciation. Depreciation cost is an element of operating expenses ("OpEx") and, therefore, is properly included in the revenue requirement calculation that ROR carriers make in conjunction with determinations of support to be provided by FUSF programs as well as the NUSF High Cost Program.[25]

Similarly, ROR carriers recover their fixed charges such as interest payments through the authorized rate of return on net plant investment placed in service through the use of debt

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[23] *See,* CenturyLink Comments, pp. 2-3.

[24] *See,* CTIA Comments, p. 4.

[25] OpEx is part of the FCC's CAM and ACAM models, and is also an element of the SBCM. Although the SBCM classifies depreciation expense as an annual CapEx element (*see,* RIC Comments, p. 6, n. 8), depreciation expense, in Part 32 regulatory accounting, is included in OpEx, is properly recoverable from the NUSF High Cost Program and is a part of the "provision[ing], maintenance and upgrading facilities for which the support it intended." (*See, Neb Rev. Stat.* § 86-324(1)) NETCs, the only entities eligible to receive NUSF High Cost Program support, (*see*, Title 291, Nebraska Public Service Commission Rules, Chap. 10, Nebraska Universal Service Fund Rules and Regulations ("NUSF Rules"), § 004.01) cannot provide universal service unless the networks through which universal service is furnished are operational, and such operations incur costs.

financing (or equity).[26] The authorized rate of return is an element of capital expenses and, therefore, is also properly included in the revenue requirement calculation that ROR carriers make in conjunction with determinations of support to be provided by FUSF programs as well as the NUSF High Cost Program.[27]

In short, CenturyLink's contention that there is a statutory impediment to ROR carriers' recovery of costs of FTTH networks constructed through the use of debt financing is without merit and should be rejected. Similarly, CTIA's contentions should also be rejected.[28] Both CenturyLink's and CTIA's contentions relating to the subject matter addressed in this section should be rejected by the Commission.[29]

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[26] Effective for 2017, the Commission found that the authorized rate of return should step down to 11 percent and that such rate of return would be subject to Commission review on an annual basis. *See,* Application No. NUSF-108, Findings and Conclusions, p. 5 (Mar. 28, 2017).

[27] *See,* n. 26 *supra.*

[28] As stated in RIC's Comments, "for any ROR carrier that has constructed FTTH throughout its service area, the carrier shall confirm this capability in its annual filing with the Commission and shall be permitted to utilize up to the full amount of such carrier's NUSF High Cost Program support for costs incurred for broadband deployment or to realize a return on the investment associated with equity funded build-out." *See,* RIC Comments, p. 7.

[29] CTIA's claim that provision of NUSF High Cost Program support for ROR carriers, but declining to do so for wireless carriers (*see,* CTIA Comments, pp. 4-5) incorrectly conflates at least two principles. First, as incumbent local exchange carriers, ROR carriers have been designated as NETCs and are subject to provision of services requirements (*see,* NUSF Rule § 004.02) and are required to provide supported services (*see,* NUSF Rule § 004.02D) and are thus eligible to receive NUSF High Cost Program support. ROR carriers are permitted to use NUSF High Cost Program support "for the provision, maintenance and upgrading of facilities and services . . ." NUSF Rule § 004.02F. Second, the NUSF support provided to wireless carriers is provided from a separate fund known as the Dedicated Wireless Program (*see generally, In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to implement policies and procedures related to providing Dedicated Universal Service Support for Wireless Telecommunications Services,* Application No. NUSF-69 and NUSF Rule 004.05) for which the Commission has established a set of conditions for participation that differ from the Rules applicable to High Cost Program support. For example, NUSF Rule 004.05D specifically provides: "A wireless telecommunications company that receives NUSF funding shall not be

V. CHARTER'S SO-CALLED POLICY GUIDELINES AMOUNT TO NOTHING MORE THAN AN EFFORT TO DELAY ANY NUSF REFORM.

Charter, advances three (3) propositions that it claims should be the "policy guidelines" for the Commission to consider in resolving the issues in this proceeding: (1) some areas cannot support private business cases "based on current (but evolving) technologies" for broadband deployment absent NUSF support; (2) defining with "precision" which areas need NUSF support cannot be done "reliably" by using a "hypothetical cost model"; and (3) NUSF support should be disbursed efficiently to "the lowest-cost proposal."[30] Charter's recommendations do not constitute rational public policy.

First, the logical outgrowth of Charter's technological evolution claim under its initial policy guideline is that it undermines progress being made with current broadband deployment, and it conflicts with current FCC policy that the FUSF should fund scalable, future-proof networks.[31] Moreover, this finding is consistent with the Commission's policy determination

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subject to the same obligations of an NETC receiving high-cost support. Obligations of a wireless carrier receiving NUSF funding may be *determined by the Commission on a case-by-case basis and shall be designated by the Commission in an Order*." (emphasis added) By Order entered September 4, 2013 in Application No. NUSF-69, p. 5 that addressed the combining of the Dedicated Wireless Fund and the Nebraska Broadband Pilot program ("NEBP"), the Commission stated: "The NEBP will be the surviving program *with wireless capital costs being eligible costs under the grant program*." (emphasis added) Thus, the Commission determined by order pursuant to the NUSF Rules that wireless carriers would only receive NUSF Dedicated Wireless Fund grants for capital costs and not for operating costs.

[30] Charter Comments at 1-2. Charter suggestion that any provider should be eligible for NUSF disbursements (*see id.*, pp. 3-4) has not been reconciled with the Commission's authority under 47 U.S.C. § 214 to designate Eligible Telecommunications Carriers.

[31] *See, In the Matter of Connect America Fund, et al.*, *Report and Order*, WC Docket No. 10-90, *et al.*, FCC 14-190, released December 18, 2014 at para. 18 ("We 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.").

that deployment of fiber-based networks everywhere in Nebraska is a key element of the Commission's strategic plan for broadband accessibility.[32]

Second, Charter's claims regarding the cost model's precision are at odds with the years of FCC development and fine-tuning of its cost models which included a model derived for use by states – the SBCM. Further, RIC's accountability proposal would, in any event, require specific reporting of locations to the Commission.[33]

Finally, Charter's claimed reliance on the "lowest-cost proposal" is a re-tread of its first so-called policy proposal in that no demonstration has been made to explain how such contention can be reconciled with the current policy of encouraging scalable, future-proof network deployment.

Accordingly, Charter's "policy guidelines" are, in reality, a delay tactic.[34] At some point (which Charter conveniently fails to define), the concepts of technological evolution and efficiency need to take a back seat to the realities of consumer needs associated with additional

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[32] *See, 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 Seeking Further Comments, p. 5 (April 5, 2016).

[33] *See, e.g.,* RIC Comments, p. 6 (Item 3), 7 (Item 5) and 12. CTIA's positions regarding unsubsidized competitors (*see,* CTIA Comments, p. 3) as well as that offered by RTCN (*see* RTCN Comments at 6-7) are addressed by the RIC Proposal. *See,* RIC Comments, pp. 13-14.

[34] Charter's efforts to delay progression of this Application are exemplified by its suggestion that the Commission should "synchronize" its decision in this proceeding with the FCC's auctions scheduled for this summer. *See,* Charter Comments, pp. 2-3; *see also,* CTIA Comments, pp. 5-6. Charter (as well as CTIA) has not reconciled its contention that, for example, any auction process for PC carrier areas would be appropriate for ROR carrier rural areas or the consumer needs in such areas. Likewise, Charter's contention that no ACAM-supported location in a ROR carrier's service area should receive NUSF High Cost Program support has been addressed by RIC in that federal support has been accounted for in the determination of SCBM's calculation of the residual need for NUSF funding. *See, e.g.,* Comments of the Rural Independent Companies in Response to Order Opening Docket and Seeking Comments, Application No. NUSF-111, filed January 30, 2018, Exhibit One.

broadband deployment in the ROR carriers' service areas. That time is now, and implementation of the Commission's NUSF High Cost Program ROR carrier accountability and distribution framework should not be slowed or placed on hold based upon hypothetical claims that are contrary to the best interests of current consumers.

VI. CONCLUSION.

As stated above, RIC appreciates the opportunity to provide these Comments in response to the questions posed by the Commission, and respectfully requests that the Commission take action in a manner consistent with these Comments. As this proceeding moves forward, RIC looks forward to its continuing participation in this docket and the prompt resolution of the questions posed in the *December 19 Order*.

Dated: April 12, 2018.

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 and Three River Telco (the "Rural Independent Companies")

By: Paul M. Schudel

Paul M. Schudel, NE Bar No. 13723
WOODS & AITKEN LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
Telephone (402) 437-8500
Facsimile (402) 437-8558
pschudel@woodsaitken.com

Thomas J. Moorman
Woods & Aitken LLP
5151 Wisconsin Avenue, N.W., Suite 310
Washington, D.C. 20016
Telephone (202) 944-9502
Facsimile (202) 944-9501
tmoorman@woodaitken.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of April, 2018, an electronic copy of the foregoing pleading was delivered to:

Nebraska Public Service Commission

Cullen.Robbins@nebraska.gov
Brandy.Zierott@nebraska.gov

Other Commenting Parties

Paul M. Schudel

Paul M. Schudel