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BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION MAY 29 2019

In the Matter of the Nebraska)	Nebraska
Public Service Commission, on)	Public Service Commission
its own motion, to make adjustments to)	Application No. NUSF-108
its high-cost distribution mechanism and)	Progression Order No. 4
make revisions to its reporting)	
requirements.)	

**POST-HEARING COMMENTS OF CHARTER FIBERLINK – NEBRASKA, LLC,
TIME WARNER CABLE INFORMATION SERVICES (NEBRASKA), LLC AND COX
NEBRASKA TELCOM, LLC.**

In accordance with the Hearing Officer's declaration at the hearing in the above-captioned matter held April 30, 2019, Charter Fiberlink – Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC (collectively, "Charter"), and Cox Nebraska Telcom, LLC ("Cox") hereby provide these Post-Hearing Comments for the Nebraska Public Service Commission's ("Commission") consideration.

Application NUSF-108 was opened to examine the Commission's universal service arrangements relating to the distribution of high-cost support to Nebraska's incumbent carriers. As reflected in previously-filed NUSF-108, P.O. 3 Comments, Charter and Cox support the Commission creating a more transparent and open universal service system, including identifying census blocks where support should be targeted, limiting support to out-of-town census blocks, prohibiting the duplication of state support in federally supported census blocks and directing

payments be made upon the completion of projects.¹ In addition, the companies encouraged the open and transparent implementation of the Nebraska Universal Service Fund (“NUSF”).²

Charter and Cox indicated in those comments, as well as in other NUSF dockets that the Commission must ensure high-cost support is used solely for its intended purposes. The public should be able to easily and readily understand where the NUSF is being spent and must have reasonable assurances of no overbuilding, no waste, no fraud and no abuse. The companies reiterate those positions here.

A significant step towards ensuring accountability was made by the Commission in its entry of Order of Findings and Conclusions in NUSF-108, P.O. 3, where it directed that support be provided to rate-of-return companies on a post-project basis:

We find that a revised accountability framework is critical to ensure use of support is appropriate, and in the case of underserved areas, achieving broadband build-out in a timely and efficient matter. Although there were a number of commenters who recommended the Commission adopt a post-deployment reporting mechanism or plan, we believe the proposed framework, which would include a request for support in advance and payment of support upon documentation of deployment, best achieves the Commission’s accountability and transparency goals.³

That decision is consistent with the Commission’s earlier Order in NUSF-99, P.O. 1, in which the Commission concluded that reimbursing providers either at particular milestones or after the project was completed provided “appropriate accounting and control of support.”⁴

¹ *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 NUSF-108, Progression Order No. 3 Findings and Conclusions Order entered Nov. 19, 2018 with the Comments, Reply Comments and Post-Hearing Comments filed by Charter and Cox summarized in said Order.

² *Id.*

³ *Id.* at pgs. 40-41.

⁴ *In the Matter of the Nebraska Public Service Commission, on its own Motion, to Administer the Universal Service Fund High-Cost Program*; Application NUSF-99, Progression Order No. 1, entered Sept. 1, 2015 at pg. 8.

At the April 30th hearing in this proceeding, Commissioner Schram asked Witness Robbins what assurance the Commission has as far as accountability, with Witness Robbins replying the work has to be completed and reported in the HUBB before the state provides support “so that we know that the work has been done and the service being provided is up to the level that we see as broadband capable, which is 25/3” (TR at 20).

Yet despite the conclusions previously reached in NUSF-108, P.O. 3, Witnesses Davis and Pfister testified at the hearing that payments in P.O. 4 must be made upfront (TR at 26-27, 74, 85). The assertion that providing significant up front funding enhances and/or serves to promote accountability defies common sense. In the NUSF, payment reasonably follows performance. Private use of public monies must utilize appropriate metrics, milestones and oversight to ensure meaningful accountability.

Witness Davis suggests that companies could be subject to audit and the Commission could withhold future support if a company fails to deploy as promised. (TR at 29). Any suggestion that the prospect of the Commission withholding funding for future projects will serve as an effective deterrent fails in several respects. First, no causal connection typically exists between the present project and the success or failure of a future project. Moreover, there is no clear procedural vehicle for punishing an applicant’s failures on one project by reducing the funds on a future project.

Even if such an approach were possible, implementation would be impracticable given the Commission’s limited auditing staff and on-going full-time responsibilities of existing staff. Further, the Commission must operate within its present limited budget and ongoing legislative oversight of those funds. Assuming the logical, legal, and procedural challenges of the “pay first, ask questions later” approach could be overcome, the only remaining funding source for auditors, required under this proposal, would be from the NUSF itself. Given the complexity of conducting

such audits, much less dealing with the arguments of how and where monies were spent, a significant administrative and financial drain would result on the program and Commission resources. This would also deplete funds earmarked for delivering needed broadband service to unserved consumers.

Further, in order to ensure procedural and substantive due process under a “pay first, ask questions later” approach, the Commission would need to prove through some formal process that a carrier had not met its deployment obligations (*See* TR at 44.) It is highly unlikely that such a process would be consensual. Rather a contest of facts, experts, and the attending variations of network design, construction and implementation would likely result in a time-consuming administrative undertaking for the Commission Staff. Commissioners would need to determine how many households did not receive the promised speed, whether a lesser speed, say 10/1, was provided instead, and, finally, what financial penalty would be warranted. Moreover, such determinations would have to be made at a census block level.

Contrary to Davis and Pfister, Witness Brigham testified that support should be provided only after broadband has been deployed, saying “the Commission recognized the need for more robust and transparent accountability by adopting the broadband deployment mechanism under Progression Order No. 3 for legacy companies that still have locations to build with fiber facilities. . . . Adopting a similar post-deployment support mechanism in this proceeding would ensure fairness and accountability.” (TR at 48).

Furthermore, as Witness Brigham noted, the idea that carriers cannot deploy without advance support has been disproven by history (TR at 48). Indeed, successful broadband projects have been funded in Nebraska post-deployment for many years. The Commission has a decade-old program in the NUSF Dedicated Wireless Program, under which reimbursement is provided

following project completion.⁵ In addition, for several years in NUSF-77 and NUSF-92, carriers were allowed to file applications for Nebraska Broadband Program (“NEBP”) support with funding (if such was granted) being awarded post-construction.⁶ In November 2014, Great Plains Communications, for example, requested funding in NUSF-92 for fifteen (15) broadband projects, and several other Rural Independent Companies (“RIC”) members applied for NEBP support as well.⁷ This proves that the RLECs have, can, and will construct facilities without receiving upfront payment.

Presently, price cap companies are reimbursed on a post-project basis under NUSF-99. NUSF-99 applications have been, and continue to be filed annually with the Commission by Windstream, Century Link and Citizens d/b/a Frontier. As Witness Brigham testified, the position that projects must be pre-paid to occur is inconsistent with experience (TR at 57), and regardless,

⁵ See *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 NUSF-69; *In the Matter of the Petition of the Nebraska Telecommunications Association for Investigation and Review of Processes and Procedures Regarding the Nebraska Universal Service Fund*, Application NUSF-77, P.O. 8; *In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to administer the Nebraska Universal Service Fund's Broadband Program*, Application NUSF-92.

⁶ In Application NUSF-77, *In the Matter of the Petition of the Nebraska Telecommunications Association for Investigation and Review of Processes and Procedures Regarding the Nebraska Universal Service Fund*, the following RIC members filed applications for support on or about March 1, 2013: Consolidated Telco Inc., Eastern Nebraska Telephone Company, Great Plains Communications, Nebraska Central Telephone Company, Rock County Telephone Company and Three River Telco.

⁷ On or about Nov. 26, 2014 the following Nebraska Broadband Program (“NEBP”) Applications were filed by RIC members in NUSF 92, *In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to administer the Nebraska Universal Service Fund's Broadband Program*: NUSF-92.21 Consolidated Telephone Company seeking money for Whitman, Maxwell, Madrid and Curtis; NUSF-92.23 Eastern Nebraska Telephone Company seeking money for Winnebago and Osmond; NUSF-92.26 Great Plains Communications seeking money for Arnold, Byron, Chester, Cody, Crofton, Culbertson, Deshler, North Bend, Palisade, Red Cloud, Reynolds, Snyder, Wisner North, Wisner South and Wolbach; NUSF-92.27 Hamilton Telephone Company seeking money for Hordville; Nebraska Central Telephone Company seeking money for Ansley, Arcadia, Comstock and Dannebrog, NUSF-92.36 Rock County Telephone Company seeking money for Bassett.

is at odds with the Commission's ability to ensure transparency and compliance in any meaningful practical sense.

Witness Pfister alleges that NUSF-108, P.O. 4 fails to comport with the NUSF Act and legislative aspirations (TR at 75-77). Yet RIC (which includes Great Plains Communications as a member) addressed the creation of a post-project payment structure for price cap companies in NUSF-99 saying:

Utilization of a broadband grant process similar to the NUSF-92 approach may be a reasonable policy to pursue. The approach could be a workable alternative to the current process based upon the filing by PC carriers of NUSF-EARN forms to better achieve the goal of targeting NUSF High-Cost Program support to the most sparsely populated, high-cost PC carrier service areas that are currently unserved or underserved from a broadband access standpoint.⁸

The Legislature's NUSF policy declarations are set forth in § 86-323. In addition, the Legislature delegated authority to the Commission under § 86-325 to determine the standards and procedures reasonably necessary to efficiently develop, implement and operate the fund. Legislation should be read in a way that best achieves the stated legislative purpose, and clearly, the Legislature provided the Commission with broad authority to carry out legislative policy goals.

It is the Commission's responsibility and obligation to ensure public funds are used efficiently, effectively and that they result in actual network deployment. There should be no question as to whether the public's dollars are being used for their intended purposes. The Commission must provide the public with an assurance of openness, accountability, and transparency that networks will be built as promised.

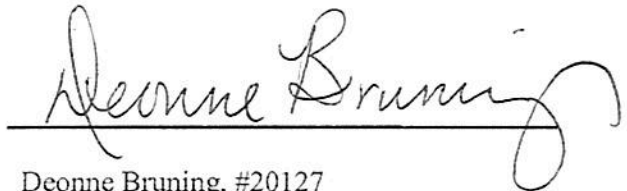
⁸ *In the Matter of the Nebraska Public Service Commission, on its own Motion, to Administer the Universal Service Fund High-Cost Program*; Application NUSF-99, Comments of the Rural Independent Companies, Jan. 14, 2015.

In closing, Charter and Cox would like to thank the Commission for its continued recognition of the need to vigilantly monitor the distribution of federal funds to ensure Nebraska carriers are not 'double-dipping' from the federal and state funds. To that end, Federal Communications Commission ("FCC") decisions awarding federal support must be continually monitored. As stated by Witness Brigham, the FCC recently increased support to the A-CAM companies with an additional \$9.6 million, lowering the number of partially-funded locations from over 14,000 to 9,700 (TR at 50). Ongoing monitoring will be necessary to ensure the NUSF *supplements* federal funding and is not used in locations that would duplicate federal support. It is critical that the Commission have a clear picture of the federal support that is flowing to Nebraska's companies now, and going forward. And finally, persistent monitoring and oversight must take place to ensure NUSF support is not being used by recipient companies to overbuild into areas outside their incumbent exchange area to compete with unsubsidized carriers.

Respectfully submitted this 29th day of May 2019.



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Certificate of Service

The undersigned hereby certifies that on this 29th day of May, 2019, an original and five copies of the Post-Hearing Comments of Charter Fiberlink - Nebraska, LLC, Time Warner Cable Information Services (Nebraska), LLC and Cox Nebraska Telecom, LLC in Application NUSF-108, Progression Order 4 were hand-delivered to the Nebraska Public Service Commission, 300 The Atrium, 1200 N Street, Lincoln NE and a copy of the same was e-mailed to the following:

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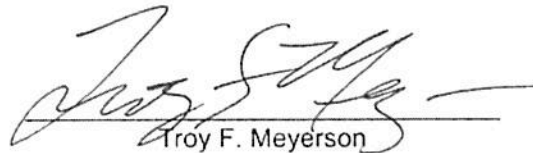
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