

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

In the Matter of the Nebraska Public ) Application No. NUSF-99  
Service Commission, on its Own Motion, to ) Progression Order 2  
Administer the Universal Service Fund )  
High-Cost Program )  
)

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**REPLY COMMENTS OF THE  
RURAL TELECOMMUNICATIONS COALITION OF NEBRASKA**

The Rural Telecommunications Coalition of Nebraska ("RTCN"),<sup>1</sup> by and through its attorneys of record, submits these Reply Comments ("Reply Comments"), as allowed by the Order Seeking Comment ("Progression Order No. 2"), entered by the Public Service Commission ("Commission") in the proceeding docketed NUSF-99 on November 13, 2019.

On or about December 13, 2019, the following parties submitted comments in this proceeding, pursuant to Progression Order No. 2:

- Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink (collectively, "CenturyLink");
- Charter Communications, Inc. ("Charter");
- Citizens Telecommunications Company of Nebraska, Inc. ("Frontier");
- Cox Nebraska Telecom, LLC ("Cox");
- Nebraska Rural Independent Companies ("RIC");
- The RTCN; and
- Windstream Nebraska, Inc. ("Windstream").

The RTCN's Reply Comments below address the comments submitted by other parties. The RTCN will address those comments on an issue-by-issue basis, following the

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<sup>1</sup> For purposes of this proceeding, the RTCN is made up of the following carriers: Arapahoe Telephone Company d/b/a ATC Communications, Benkelman Telephone Company, Inc., Cambridge Telephone Company, Cozad Telephone Company, Diller Telephone Company, Glenwood Network Services, Inc., The Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hemingford Cooperative Telephone Co., Mainstay Communications, Pierce Telephone Company, Plainview Telephone Company, Southeast Nebraska Communications, Inc., Stanton Telecom, Inc., Wauneta Telephone Company, and WesTel Systems f/k/a Hooper Telephone Company.

same outline the RTCN used in its initial Comments, which tracked the issues presented by the Commission in Progression Order No. 2.

### **1. Broadband Standards**

#### **Should the Commission align the minimum speed requirements with a 25/3 Mbps standard?**

With the exception of Frontier/Citizens, all parties made clear statements of support for the Commission's proposed 25/3 Mbps standard for locations in areas currently served by price cap carriers. Frontier refrained from saying it disagreed with the Commission's proposal, but said it was meeting federal CAFII deployment requirements.

In light of this near unanimity of opinion, the Commission should establish the proposed 25/3 Mbps standard for support to locations in current price cap areas.

### **2. Deployment Support**

#### **Should the Commission make the broadband deployment support available utilizing a mechanism similar to that adopted in NUSF-108?**

The responses by all three price cap carriers were strikingly different from one another. CenturyLink advocated for no change in the method for providing deployment support to price cap carriers or, alternatively, use of broadband mapping with an enhanced challenge process. Frontier said a more prescriptive approach would not be beneficial. Windstream asserted that the Commission should adopt the same review process it is using for rate-of-return carriers.

In its Comments, the RIC raised many of the same concerns the RTCN did about the inadequacy of price cap carriers' investment to provide service to ratepayers in rural areas of their service territories. The RIC recommended that the Commission modify its budget allocation to price cap carriers and re-allocate that support to rate-of-return carriers, presumably for investment in the rate-of-return carriers' existing service territories.

While the RTCN agrees with the RIC's critique of inadequate investment by price cap carriers in rural areas, the RTCN maintains that its approach represents more sound public policy. The Commission should not penalize ratepayers in price cap areas by re-allocating support to other carriers' serving other territories and ratepayers, as the RIC recommends. Rather, support allocated for areas served by price cap areas should remain dedicated to those areas. Allocated support should be recognized as support for the ratepayers in a particular area.

As the RTCN said in its Comments, the Commission should make support allocated to underserved and unserved areas available to the eligible telecommunications carrier ("ETC") that is most capable and best positioned to utilize the support to provide quality voice and advanced information services to consumers in the particular area. The process for allocated support should be similar to the community-based approach currently proposed and being considered by the Commission in its rulemaking regarding redirection of support.<sup>2</sup>

**2(a) Consistent with the process for rate-of-return carriers, should the Commission designate eligible census blocks?**

Again, the price cap carriers' responses to this question varied. CenturyLink and Frontier appear not to favor an approach by which the Commission designate census blocks as being eligible or ineligible for support. Windstream, on the other hand, supported the Commission designating census blocks as eligible or ineligible to make the application process more efficient. Cox and Charter advocated for using Form 477 data to determine census block eligibility until better data is available. The RIC expressed its concern about redundant (federal and state) support and essentially argued that price cap carriers should

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<sup>2</sup> In the matter of the Nebraska Public Service Commission, on its own motion, seeking to establish Title 291, Chapter 16, to adopt Reverse Auction and Wireless Registry rules and regulations in accordance with Nebraska Legislative Bill 994 [2018], Rule and Regulation No. 202, *Order Releasing Proposed Rules and Seeking Comment* (October 8, 2019), p. 6.



bear the burden of demonstrating that support will be used to serve areas that will remain underserved after CAFII and Rural Digital Opportunity Fund (“RDOF”) funding.

The RTCN agrees with Cox and Charter. Until data is available to allocate support on a location-by-location basis, the Commission should continue to allocate on a census block basis, which requires a determination by the Commission as to what census blocks are eligible for ongoing or deployment support. The approach should be consistent with that established for rate-of-return carriers in NUSF-108.

**Elaborate on how the Commission can complement support received from the federal universal service program to extend existing broadband-based networks to rural unserved areas.**

See response to Issue No. 5 below.

**2(b) Should the Commission prioritize certain areas for broadband deployment? What criteria should be used to do so.**

Most of the parties’ Comments on this question were similar to those of the RTCN. The RTCN agrees with CenturyLink and Frontier in stating that the Commission should exercise caution and not impose unduly prescriptive priorities. As the RTCN said in its initial Comments, the Commission should take a ground-up approach to prioritizing projects, driven by community-based proposals for support to address local needs. This is not to suggest, however, as Windstream argues, that the Commission has no business ensuring that rate-payer subsidies are used to construct infrastructure that will provide reliable voice and advanced information services to all rate-payers, including those in rural areas.

Windstream’s response to the Commission’s inquiry deserves attention. Windstream begins by admitting it “is fully aware of the areas in its footprint and network which need

broadband improvements.”<sup>3</sup> In challenging the scope of the Commission’s authority, Windstream then cites a 1975 Nebraska Supreme Court decision in which the Court analyzed the limitations of the Commission’s authority.<sup>4</sup> The appeal in that matter was brought by a local exchange carrier that argued the Commission had exceeded its authority by ordering the carrier to reduce certain rates, complete installation of a particular service, and comply with post-installation reporting requirements. The carrier appealed, arguing the Commission had exceeded its authority. The first sign that the case does not say what Windstream claims it says is that the Court upheld the Commission’s decision on all counts and concluded the Commission had not exceeded its authority.

By quoting from the decision, Windstream clearly implies that the Court found the Commission’s authority in that instance limited. Windstream has selectively quoted the Court. By doing so, Windstream mischaracterizes what the Supreme Court said. A comparison of the quotes Windstream pulled from the case and modified with the full context and complete language of the pertinent part of the decision demonstrates what Windstream has done. Windstream prefaces its quotation by saying:

Any business operates at the discretion of its owners and managers. However, it has long been understood that in exchange for certain treatment, a regulated utility agrees to exchange some, but not all, of its discretionary independence. The law in this area is also well established.<sup>5</sup>

The following is the exact language used by Windstream compared with that used by the Court and demonstrates the law that is, in fact, *well established*:

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<sup>3</sup> *Comments of Windstream*, In the matter of the Nebraska Public Service Commission, on its own Motion, to Administer the Universal Service Fund High-Cost Program, NUSF-99, Progression Order No. 2 (Dec. 13, 2019) (“*Windstream Comments*”), p. 4.

<sup>4</sup> *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975).

<sup>5</sup> *Windstream Comments*, p. 4.

Windstream's modified quotes	Nebraska Supreme Court Opinion
<p>[T]he power of the commission to regulate and control telephone companies is limited by the consideration that it is not the owner of the property of the utility or clothed with the general power of management incident to ownership.... [T]he commission has no authority to supplant the managers or directors of public utilities or to substitute its discretion for theirs.<sup>6</sup></p>	<p>Thirdly, the company argues that the power of the commission to regulate and control telephone companies is limited by the consideration that it is not the owner of the property of the utility or clothed with the general power of management incident to ownership. <i>True</i>, the commission has no authority to supplant the managers or directors of public utilities or to substitute its discretion for theirs. <i>However</i>, the commission is empowered to, and was created with the intention that it would, regulate public utilities insofar as the powers and operations of such utility affect the public interest and welfare. <i>Consequently</i>, it does have authority to supervise the operation of a utility to the extent of seeing that the utility provides the service for which it is exacting payment. (Emphasis added.)<sup>7</sup></p>

By changing a few words – effectively putting words in the mouth of the Nebraska Supreme Court by removing words – Windstream altered the meaning of the Court's decision, especially as it relates to the inquiry at hand. Windstream further neglects to acknowledge that the decision was rendered *two decades before* the Nebraska Universal Service Fund Act ("Act") was established. The Act clearly states that the Commission "[s]hall have authority and power to subject eligible telecommunications companies to service quality, customer service, and billing regulations."<sup>8</sup>

As the Nebraska Supreme Court said, the Commission has authority to supervise the operations of a telecommunications carrier to the extent of ensuring the carrier provides the service for which it is exacting payment. Moreover, under current law, the carrier is not only

<sup>6</sup> *Id.*

<sup>7</sup> *Myers*, 194 Neb. at 61, 230 N.W.2d at 195.

<sup>8</sup> NEB. REV. STAT. § 86-324(2)(1).



exacting payment from its customers but also receiving subsidies through the Nebraska Universal Service Fund.

While the context today is different, it is different (and more apposite) because the Commission has enhanced oversight when hundreds of millions of public subsidies have been provided to carriers like Windstream:

It is the duty of the commission to see that the utility is not unjustly enriched by actions inimicable to public interest. As the United States Supreme Court said almost 60 years ago: 'Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render.' We paraphrase by saying they may not continue to exact rates set for reasonably adequate service for service that wholly fails to meet that standard.<sup>9</sup>

**2(c) Consistent with its past strategic plan principles, should the Commission design the process around support preferences for fiber-based projects?**

The price cap carriers argue that the Commission should give no preference to fiber. Both the RIC and RTCN argue it should. While the RTCN does not discount the place for fixed wireless as a transitional service, for reasons explained more fully in its RTCN's initial Comments and explained well in the RIC's Comments, when it comes to directing support, preference should be given to the technology that best accomplishes the purposes of the Act, notably to ensure reliable and affordable services for rural rate-payers that are comparable to services in urban areas. Most often, fiber fills that bill.

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<sup>9</sup> *Myers*, 194 Neb. at 61, 230 N.W.2d at 195 (citation omitted).

## **2(d) Why is state support necessary to deploy low-cost fixed wireless technology?**

All parties appear to agree that fixed wireless is a less expensive technology than fiber. For this reason, consistent with the positions of the RIC and RTCN in their initial Comments, deployment support should be based on actual cost.

**How should carrier of last resort (COLR) obligations be treated if alternative technologies such as fixed wireless deployed as next generation replacing copper plant? How should it impact NUSF support?**

Windstream alone boldly asserts that “the deployment of VoIP over fixed wireless *will satisfy* the carrier of last resort (COLR) obligations.”<sup>10</sup> Both the RIC and RTCN assert that deployment of fixed wireless systems do not relieve an incumbent carrier of its COLR and ETC responsibilities. If an incumbent provision of services does not comply with those responsibilities, then ETC status must be revoked, regardless of technology.

RTCN supports the following statements made by CenturyLink in its Comments:

If the Commission provides NUSF support to a company, regardless of the technology supported, the resulting COLR obligations must lie with the company receiving such support. If a non-incumbent carrier is awarded NUSF support, any COLR obligations must follow the support.

... In other words, the Commission should award NUSF support to only one carrier in any given area. P. 5

## **3. Deployment Time Frames**

**Consistent with the requirements for rate-of-return carriers, should the Commission adopt specific timeframes both for requesting allocated support and for buildout once projects are approved.**

With the exception of CenturyLink, all parties supported adoption of specific timeframes. The RTCN supports the two-step approach proposed by the RIC. Windstream’s

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<sup>10</sup> *Windstream Comments*, p. 6 (emphasis added).



Comments appear to support the same approach, at least in general principle. Under this approach, the carrier would have one year from the date of allocation of support by the Commission request support for particular projects and then two years from the date of approval by the Commission of those requests to complete the projects. The RTCN also supports the RIC proposal that a one-year extension should be allowed for project completion, upon a showing of good cause.

#### **4. Accountability**

**How can the Commission better ensure ongoing support is being used to maintain quality voice and broadband service as intended? Should the Commission tie ongoing support to census blocks where the carrier is providing quality voice and 25/3 broadband? How should the Commission treat areas that are not receiving adequate voice and broadband service?**

Most of the carriers' Comments addressing the above questions spoke to the general issue presented by those questions. The RTCN's Reply Comments will address the general issue, as well. The price cap carriers opposed conditioning ongoing support on the provision of 25/3 services to an area. The RTCN said ongoing support should be conditioned upon the provision of both voice and 25/3 services, as it was in NUSF-108 for rate-of-return carriers.<sup>11</sup> The RIC argued even more rigorous standards would be appropriate given the track record of price cap carriers.

The Act supports the precedent established by the Commission in NUSF-108. Section 86-324 requires that an ETC "that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which support is intended. Any such support should be explicit and sufficient to achieve the purpose of the

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<sup>11</sup> 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 requirement, NUSF-108, Progression Order No. 3, *Findings and Conclusions* (Nov. 19, 2018), and 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 requirement, NUSF-108, Progression Order No. 4, *Order* (Oct. 29, 2019).

act.”<sup>12</sup> The purpose of the Act is to ensure that quality telecommunications and information services should be available in all regions of the state at affordable rates.<sup>13</sup>

While the Act does not permit support solely for information services, it clearly intends that funds support information services coupled with voice services. The Commission has established precedent that recognizes the importance in today’s world of both voice and information services. The Commission has prudently sought to maximize scarce resources by tying voice and information services. In applying for tens of millions of dollars in past NUSF-99 deployment support for broadband projects, price cap carriers have acknowledged this approach and acquiesced to it. Windstream’s focus on fixed wireless projects, for which voice is at best an incidental service, highlights this fact.

**Should Commission require earnings test verified by annual EARN form filings to ensure operational expenses are being used for the purpose of maintaining and improving the network facilities in Nebraska specific high-cost exchanges for which they were intended and in support of services offered to Nebraska consumers in high-cost exchanges?**

The parties had wide-ranging opinions in response to the Commission’s question about the EARN form. Just over a month after entering Progression Order No. 2 in NUSF-99, the Commission opened Progression Order No. 5 in NUSF-108, undertaking a re-examination of the EARN form as it pertains to rate-of-return carriers.

Since the differences of opinion as to whether to make the EARN form more robust are applicable to accountability reporting for all carriers, the RTCN would respectfully request the Commission take up the general reporting issues it has correctly raised in NUSF-99 with its consideration of more specific questions posited in NUSF-108. The questions will be similar enough they should be considered as part of one combined docket. The Commission

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<sup>12</sup> NEB. REV. STAT. § 86-324(1).

<sup>13</sup> NEB. REV. STAT. § 86-323(1) and (2).

would not impair consideration of these questions, as they apply to either price cap or rate-of-return carriers, by combining the inquiries about EARN form and other reporting issues.

## **5. Complementing Federal Support**

**Make any changes to account for possible future changes in federal support for price cap areas. CAFII support will likely transition to auction-based support. Is there a way to better leverage federal and state support? Explain.**

CenturyLink said it “agrees that the CAFII model is likely to be transitioned for CAFIII, or the (RDOF),” correctly noting also that the methodology, requirements, and obligations associated with RDOF remain undefined.<sup>14</sup> Frontier struck no different tone, stating, “there may be changes in the federal support available to price cap carriers. However, exactly what those changes may be and when they may be implemented is unknown.”<sup>15</sup> <sup>16</sup> The RTCN agrees. There is both uncertainty and urgency.

Contrary to the recommendations of either CenturyLink or Frontier, however, the Commission should not delay this investigation. Rather, the Commission should redouble its efforts to coordinate with the FCC.

The RIC said the Commission should “closely monitor developments relating to the RDOF in order that deployment of NUSF in PC (price cap) carrier-served areas can be accomplished in a manner that results in the most efficient utilization of available NUSF support for all Nebraska consumers and avoids duplication of federal universal service support.”<sup>17</sup> Right, and then some.

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<sup>14</sup> *Comments of Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink*, In the matter of the Nebraska Public Service Commission, on its own Motion, to Administer the Universal Service Fund High-Cost Program, NUSF-99, Progression Order No. 2 (Dec. 13, 2019), p. 8.

<sup>15</sup> *Comments of Citizens Telecommunications Company of Nebraska d/b/a Frontier Communications of Nebraska*, In the matter of the Nebraska Public Service Commission, on its own Motion, to Administer the Universal Service Fund High-Cost Program, NUSF-99, Progression Order No. 2 (Dec. 13, 2019), p. 5.

<sup>16</sup> Apparently possessed of a crystal ball, Windstream said, “[I]t should be very easy to modify the current price cap application process at the same time.” *Windstream Comments*, p. 7.

<sup>17</sup> *Comments of the Rural Independent Companies in Response to Order Seeking Comments*, In the matter of the Nebraska Public Service Commission, on its own Motion, to Administer the Universal Service Fund High-Cost Program, NUSF-99, Progression Order No. 2 (Dec. 13, 2019), p. 16.



The RTCN also encourages the Commission to take a lead role in ensuring efficient utilization of federal and state support. We look at it only slightly differently than the RIC. We additionally encourage the Commission to take lead in ensuring federal support complements the intensely considered and tested local approach the Commission is in the process of implementing to accelerate broadband deployment throughout rural Nebraska. The issues CenturyLink justly raises in its Comments about duplicative support apply not only at the state level, but also at the federal. The State's right to guide the destiny of rural broadband connectivity is at issue, and all parties with legitimate interests should be at both tables with policymakers and regulators.

The Commission has already publicly demonstrated its intentions to cooperate with federal regulators and to coordinate with stakeholders to understand where broadband has been deployed or planned.<sup>18</sup> The RTCN agrees the Commission should act quickly to build on its efforts to coordinate with the FCC wherever possible. The FCC set an ambitious timeline to complete the RDOF auction by the end of 2020, which means it likely must establish its rules in the next 45 to 60 days.

**DATED:** January 10, 2020.

**RURAL TELECOMMUNICATIONS  
COALITION OF NEBRASKA**

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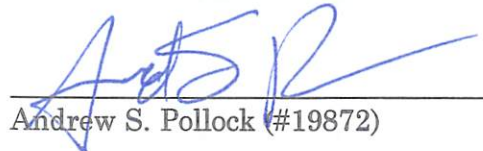
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<sup>18</sup> *Comments of the Nebraska Public Service Commission*, Rural Digital Opportunities Fund WC Docket No. 19-126, Connect America Fund, WC Docket No. 10-90 (Sept. 19, 2019), at pp. 4-5.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that an original and electronic copy of the above ***Reply Comments*** of the Rural Telecommunications Coalition of Nebraska were filed with the Public Service Commission on January 9, 2020, and a copy was served via electronic mail, to the following:

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