GETTMAN & MILLS LLP
ATTORNEYS

April 18, 2019

VIA HAND-DELIVERY AND EMAIL

John Monroe
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Nebraska Public Service Commission
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Re: Rule and Regulation No. 202

Messrs. Monroe and Robbins:

Pursuant to the Commission's March 12, 2019 Order Opening Docket, Releasing Proposed Rules, Seeking Comment, and Setting Hearing, enclosed for filing is the original plus five paper copies of the Comments of Qwest Corporation d/b/a/ CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink with regard to the above-referenced docket.

Also enclosed is an extra copy for your use in returning a file-stamped copy in the enclosed self-addressed and stamped envelope. Please let me know if you have any questions. Thank you.

Sincerely,

Michael J. Mills

Enclosures

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the 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

COMMENTS OF QWEST CORPORATION d/b/a/ CENTURYLINK QC AND UNITED TELEPHONE COMPANY OF THE WEST d/b/a CENTURYLINK

On April 11, 2018, the Nebraska Legislature passed Legislative Bill 994, which was signed by Governor Ricketts on April 18, 2018. That legislation requires the Nebraska Public Service Commission ("Commission") to, among other things, "adopt and promulgate rules and regulations *that establish standards* governing the withholding of funding from the Nebraska Telecommunications Universal Service Fund from any recipient."[1] The legislation further allows the Commission to "use the funding that is withdrawn to implement and operate a reverse auction program."[2] On March 12, 2019, the Commission issued an Order Opening Docket, Releasing Proposed Rules, Seeking Comment, and Setting Hearing, in which it issued the proposed rules for the implementation of Legislative Bill 994. Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink (collectively, "CenturyLink") respectfully provide these comments in response to the Commission's request.

[1] Neb. Rev. Stat. § 86-330 (emphasis added)
[2] *Ibid*

WITHHOLDING OF SUPPORT

Many rural areas of Nebraska currently do not have access to broadband service.[3] Unfortunately, these rural areas have low population densities, which makes it uneconomic for broadband carriers to deploy service in these areas. The significant cost associated with deploying broadband in these rural areas, as well as the ongoing costs associated with maintaining and operating the broadband network, makes reliable and consistent support from the Nebraska Universal Service Fund ("NUSF") crucial.[4] If carriers perceive any threat to their NUSF distributions, they may choose to delay significant investment projects, including broadband deployment projects. Therefore, while well intentioned, the Commission's proposed rules may actually work to slow down broadband deployment.

The amount of NUSF support that is available is not nearly enough (even when combined with Federal Universal Service support) to cover the massive cost of deploying terrestrial broadband[5] in all the unserved areas of the state. Companies must make difficult and critical decisions regarding when and where to use the funding. All residents of Nebraska are deserving of having access to reliable and fast broadband service; moreover, all residents want and need that reliable broadband service now. However, it will take many years and many millions of

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[3] LB994 states that "it is the intent of the Legislature that the residents of this state should have access to broadband telecommunications service at a minimum download speed of twenty-five megabits per second and a minimum upload speed of three megabits per second."

[4] "Certainty and predictability in the context of NUSF High Cost Program support is no less necessary than it is for the FUSF. This is particularly true in the rural, higher-cost-to-serve areas of the RIC members, some of which will necessarily be required to utilize NUSF support to defray maintenance and other operating costs incurred to accomplish the network build-outs required for the provision of ubiquitous access to voice and broadband services." Comments of the Rural Independent Companies In Response to Order Seeking Comments, Application No. NUSF-108, Progression Order #3, filed March 5, 2018, p.9. It does not matter whether a rural customer is served by a price cap carrier or a rate of return carrier. The costs of deploying, as well as maintaining and operating, a broadband capable network in rural areas of the state are significant and makes predictable support from the NUSF vital.

[5] "Terrestrial broadband" refers to wireline and fixed wireless broadband. Unless the context clearly indicates otherwise, all references herein to "broadband" mean "terrestrial broadband."

dollars to deploy broadband to all living units in the state. Unfortunately, it is impossible to build out a broadband capable network quickly. It took decades to complete the telephone network and make universal telephone service possible. Even if unlimited financial support was available there would still be logistical and resource challenges to extending broadband to all Nebraska residents. Consequently, it will take many years to build a broadband capable network to all living units in Nebraska at sufficient speeds. Even after that deployment is complete, significant funds will be required in sparsely populated areas for ongoing maintenance and for upgrades to the system to meet future needs.

With all of this in mind, the Commission should consider the withholding a portion of NUSF support only in cases where it is obvious that the carrier has no intention of building out its broadband network in any area. It would be illogical to withdraw support from a carrier because it has not deployed broadband to a specific rural location but the carrier has been deploying, or has plans to deploy, broadband to other rural locations. However, the Commission's proposed rules for the withholding of NUSF support provide little to no details on how and when the Commission would withhold support and how it would determine the amount to withhold. CenturyLink recommends the Commission develop detailed rules that provide specificity regarding how and when the Commission would open an investigation and withhold portions of NUSF support. As the second paragraph of Neb. Rev. Stat. § 86-330 states, in part, the Commission is required by the Legislature to "adopt rules and regulations that establish *standards* governing the withholding" of NUSF support. (emphasis added). CenturyLink respectfully submits that the Commission's proposed standards for withholding of support are not sufficiently detailed to provide eligible telecommunication carriers with the kind of certainty they need or that the Legislature presumably intended.

For example, Neb. Rev. Stat. § 330 allows the Commission to withhold NUSF support to a carrier that has not "served, to the commission's satisfaction, those areas with service that meets the criteria for successful investment of funding from the Nebraska Telecommunications Universal Service Fund." However, neither the statute, nor the proposed rules, provide guidance regarding what "service that meets the successful investment of funding" means. It is critical that the Commission's rules provide a clear definition of that phrase because it constitutes the only statutory basis for the Commission to withhold NUSF support.

Proposed Rule 001.03(A)(i)

Under the Commission's first of four proposed "standards" for when NUSF support may be withdrawn, Proposed Rule 001.03(A)(i), the Commission can conceivably decide to withhold support based solely on the receipt of a single customer complaint regarding the availability, quality, or affordability of broadband service. However, the proposed rule provides no standards for when the "availability, quality, or affordability" of service would constitute successful investment of funding. Or, put another way, the proposed rule provides no standards for when the "availability, quality, or affordability" of service would be considered "lacking." There are no proposed standards for what percentage of an exchange (or different geographic area) needs to be served for the "availability" of broadband to be considered "lacking" or "successful investment of funding." Similarly, there are no proposed standards for "quality" such as speed or latency, and none for affordability such as a reasonable price for different speed tiers. Vague and ad hoc criteria such as "availability, quality, and affordability" are not reliable "standards" that will allow carriers to understand their obligations when they accept NUSF support to invest in broadband deployment and operate their networks. Furthermore, the Commission should not

act and withhold NUSF support based only on the receipt of a single customer complaint. Only when the Commission has received multiple complaints from customers in an exchange alleging some shortcoming in their broadband service and a failure of the carrier to address the complaints, then the Commission should open a docket to investigate.

The Commission should establish in the rules the standards that it will use for investigating the customers' complaints regarding the availability of broadband service, including the information that the Commission will need to decide that a telecommunications company is not meeting the "criteria for successful investment." The Commission should define the "criteria for successful investment of funding" as part of the rulemaking process. Without guidance as to what the Commission considers successful investment of funding, recipients will have no idea which of their proposed investments would meet the Commission's criteria and will be reluctant to move forward with any network investment. Further, the Commission's rules should explicitly consider the carrier's plans for broadband deployment as part of its criteria. Should the Commission ignore future investment plans and decide to withhold support, the carrier may decide to cancel or delay investment, which could end up harming other subscribers.

The Commission's proposed rules also state that the Commission can make a finding in any of the following additional situations to withhold NUSF support:

- That an ETC has not provided broadband in a manner consistent with Neb. Rev. Stat. § 86-1101; or
- That an ETC has not used NUSF support for its intended purpose; or
- Pursuant to Neb. Rev. Stat. § 86-324.

CenturyLink will address each of these situations separately.

Proposed Rule 001.03(A)(ii)

Under Proposed Rule 001.03(A)(i) the Commission can withhold NUSF support to a carrier if it finds that the carrier has not provided broadband in a manner consistent with Neb. Rev. Stat. § 86-1101. This statute simply provides a separate statement of legislative intent regarding broadband:

> "It is the intent of the Legislature that broadband telecommunications service in rural areas of the state should be comparable in download and upload speed and price to urban areas in the state where possible and that state resources should be utilized to ensure that the rural residents of the state should not be penalized simply because of their rural residence. It is further the intent of the Legislature that the residents of this state should have access to broadband telecommunications service at a minimum download speed of twenty-five megabits per second and a minimum upload speed of three megabits per second."

It is unclear from the proposed rules how the Commission will decide that an ETC is not providing broadband consistent with Neb. Rev. Stat. § 86-1101 given that this statute only indicates the intent of the Legislature and does not provide the Commission with the authority to withhold NUSF support under any condition. Furthermore, Neb. Rev. Stat. § 86-1101 does not provide any criteria for determining the comparability of speed and price between rural and urban areas (do both the speed <u>and</u> the price need to be identical in rural and urban areas?) and the comparability goal itself seems aspirational ("where possible") rather than a statutory mandate for the Commission to implement through other statutory provisions like Neb. Rev. Stat. § 86-330. The legislative intent is also that public funds should be used to accomplish these goals, which indicates a prospective application of policy towards future use of NUSF support but not a backwards-looking application of these goals that is used to punish carriers for the current state of their broadband service. Should the Commission move forward with this proposal, it should define in the rules how it intends to make a finding that an ETC has not

provided broadband consistent with Neb. Rev. Statute § 86-1101 such that NUSF support should be withdrawn.

In addition, Neb. Rev. Stat. § 86-1101 sets the definition of broadband for the state of Nebraska at 25 Mbps download and 3 Mbps upload. Price cap carriers, through the CAF II and NUSF programs, have been required to build out broadband at minimum speeds of 10 Mbps download and 1 Mbps upload. Because broadband speeds of 10 Mbps download and 1 Mbps upload have been deemed acceptable speeds under the NUSF program to date, it would be inconsistent to now deem those speeds as failing to meet the criteria for successful investing of NUSF support. If the Commission wants to prospectively require higher speeds for future disbursements of NUSF support for broadband deployment, the Commission should allow price cap carriers sufficient time and funding to build out at the now higher required speeds. It would be inappropriate for the Commission to now "punish" price cap carriers that have built out to these required lower speeds in many areas by withholding NUSF support for not having built out broadband networks to provide higher speeds.

Proposed Rule 001.03(A)(iii)

Proposed Rule 001.03(A)(iii) provides the third standard that could result in a Commission finding to withhold NUSF support, which is when an ETC has not used NUSF support for its intended purpose. The legislative intent of the NUSF, as stated in Neb. Rev. Stat. § 86-324, is that "[a] telecommunications company that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." The NUSF was originally created to support high cost voice service, and over the years the Commission has transitioned the fund to also support broadband service as well. The Commission should define within its rules the criteria it will use to determine that a

carrier is not using its NUSF support for its intended purpose relative to broadband. Further, a carrier should not be penalized with the loss of NUSF support simply because it has utilized its available support for the maintenance, provision, or upgrade of service in a manner the Commission feels was not appropriate if the Commission has not given the ETC any prior notice of a specific requirement for the use of NUSF support.

Proposed Rule 001.03(A)(iv)

The proposed rules' fourth and final situation for a finding from the Commission that support should be withdrawn from a carrier is simply defined as "pursuant to Neb. Rev. Stat. § 86-324." This statute simply states that the Commission "[m]ay withhold all or a portion of the funds to be distributed from any telecommunications company failing to continue compliance with the commission's orders or regulations." The proposed rule is extremely vague and provides no guidance, to either the Commission or carriers, of how the Commission intends to apply Neb. Rev. Stat. § 86-324 to a decision that the Commission should withhold support.

Proposed Rule 001.03(B)

In all situations where the Commission contemplates the withholding of NUSF support, the proposed rule states that notice will be sent to the carrier and the carrier will be provided the opportunity for a hearing. This proposed rule provides no additional details, or rights, beyond what is found in the statute. The proposed rule should prescribe a more preliminary process whereby the Commission notifies a carrier about the Commission's intent to investigative the carrier's provision of broadband in a particular area. Such notice should also inform the carrier of any allegations or complaints that form any part of the Commission's basis for starting an investigation. Any such investigation, if it is to be fair and reasonable, should gather information from the carrier *before* the Commission decides that an evidentiary hearing is warranted on

whether NUSF support should be withheld. Accordingly, additional details are needed in the rules regarding the investigation process, the nature of the proceeding (presumably these proceedings will follow the normal procedures for contested cases before the Commission), and the types of evidence that the Commission expects a carrier to produce to show that its broadband service meets the criteria for successful investment of NUSF support.

Just as important as the process the Commission will use to make a finding that NUSF support should be withheld is the determination of the amount of support to that is subject to withholding. Nev. Rev. Stat. § 86-330 states that withheld funding must be used in the exchange where funding was originally granted, however nothing in the statutes or the proposed rules mention the methodology the Commission is to use to determine the amount of funding available for that exchange or census block and how much of that support is subject to withholding. The Commission's methodology for determining the amount of support to be withheld should be transparent and reflected in the rules. In addition, the Commission should set out in the rules what support is subject to withholding. Most recipients of NUSF support have their support bifurcated between support for ongoing maintenance and operating expenses and support for broadband deployment. The Commission should not withhold support for the ongoing maintenance and operating costs based on the lack of broadband in an area. Further, if broadband is available in part of an exchange, the Commission should not withhold all NUSF support for that exchange. The Commission must also clearly define the time period over which support should be withheld or if the loss of support will be permanent. Finally, it would be inappropriate for the Commission to withhold support that has already been approved, but not yet distributed, for a price cap company's broadband grant application, even if that project is in a different exchange.

REVERSE AUCTION

The proposed rules for reverse auction have more detail than the proposed rules regarding the withholding of support; however, that additional detail does not necessarily provide all the answers to some very complicated issues. For example, the proposed rules include the filing expectations and requirements related to reverse auctions, but many basic and fundamental aspects of reverse auctions are not addressed. Some of the issues that the Commission should address as part of the rules include which services would be the focus of the auctions, the geographical areas may be part of the auctions, and how the auction will be run. The Commission must also identify when and how the reverse auctions will be conducted, for example only if and when the Commission chooses to withhold NUSF support from a carrier or if the Commission chooses to make other NUSF support available for a reverse auction. As with the rules for the withholding of NUSF support, the Commission should provide specific details within its rules regarding how the reverse auction process will work to reduce confusion and ensure a successful result.

Nowhere in the Rule 001.04, Reverse Auctions, are the specific services that a bidder must provide explicitly stated. There are a couple of general references to "voice and broadband services," which implies that a bidder must provide both types of services, but that requirement should certainly be spelled out in more detail, including the various standards for availability, quality, and affordability that the Commission proposes that current NUSF recipients should comply with. The Commission should spell out within the rules how long the winner will be obligated to provide the required services.

The Commission should also include rules that discuss the steps the Commission will take should no carrier choose to submit a bid for a geographic area in the reverse auction or if the

Commission does not declare a winner because all of the bids exceeded the amount of funding available. It is important that the Commission have these contingency plans in place prior to the start of the reverse auction process.

WIRELESS REGISTRATION

CenturyLink has no comment regarding the rules for wireless registration.

CONCLUSION

No portion of a broadband network is built, maintained, and operated with exclusively public or subsidized funding. Current ETCs always have to invest their own resources. Carriers need to be able to plan their investment and deployment of their resources sometimes years in advance, as networks are incrementally built. In order to plan and invest in a manner that benefits both end users and shareholders, carriers need consistent and reliable support from the NUSF to continue making significant investment in broadband deployment, and any threat of loss of support based on uncertain standards will result in a delay in investment. The withholding of NUSF support and the implementation of reverse auctions are significant issues as they relate to the provision of broadband services in the state of Nebraska. It is vitally important that the Commission's rules regarding these issues provide the necessary detail to ensure all parties know and understand the Commission's expectations and so that carriers' past investment decisions are not penalized and their future investment decisions can be prudent and beneficial. Vagueness and ambiguity in the rules will only serve to add confusion to the process and will result in delays in the provision of broadband service to areas of the state that so desperately need it.

Dated April 18, 2019

Respectfully submitted,

By: _____

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