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Public Service Commission

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission,) Rule and Regulation No. 202
on its own motion, seeking to)
establish Title 291, Chapter 16,) ORDER RELEASING PROPOSED
to adopt Reverse Auction and) RULES AND SEEKING COMMENT
Wireless Registry rules and)
regulations in accordance with)
Nebraska Legislative Bill 994)
[2018].)

REPLY COMMENTS OF WINDSTREAM

Comes now Windstream Nebraska, Inc., and for its Reply Comments to the Nebraska Public Service Commission’s (“Commission”) Title 291, Chapter 16, Reverse Auction and Wireless Registry Rules and Regulations, states:

I. BACKGROUND AND INTRODUCTION

On December 6, 2019, Windstream filed comments in response to the Commission’s October 8, 2019 release of its Second Set of Proposed Rules and Request for Comments. Also filing comments were the Rural Telecommunications Coalition of Nebraska¹ (“RTCN”); Qwest Corporation d/b/a/ CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink (“CenturyLink”); the Nebraska Rural Independent Companies² (“RIC”); and Citizens Telecommunications Company of Nebraska d/b/a Frontier Communications of Nebraska

¹ 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.

² Arlington Telephone Company; Blair Telephone Company; Clarks Telecommunications Co.; Consolidated Telephone Company; Consolidate 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.; The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company; Rock County Telephone Company; and Three River Telco.

(“Frontier”). These groups comprise the incumbent local exchange carriers and primary recipients of the High Cost Program (“Program”). When autonomous groups such as these independently reach the same conclusion, the Commission should take notice that a problem may exist and re-examine its rules.

II. A MAJORITY OF COMMENTERS AGREE THAT THE COMMISSION’S PROPOSED RULES ARE OVERLY VAGUE AND CONFUSING.

As Windstream pointed out in its Comments, the *Void for Vagueness Doctrine* requires that, to be constitutional, a regulation or statute must provide sufficient notice to parties so they know what is required of them and may act accordingly, and so that those enforcing the law do not act in an arbitrary or discriminatory way. The majority of commenters have informed the Commission that they do not know what is required by the rules because they are too vague.

In its Comments, Windstream acknowledged the Commission’s desire to make the process easier and less restrictive for itself but pointed out that the rules do not govern the conduct of the Commission, but rather that of the regulated entities.³ Frontier echoed Windstream’s statement in its comments: “Frontier understands the Commission’s desire to limit the expanse of the proposed rules, but is concerned that if or when the Commission undertakes a docket to evaluate a decision to withhold Support there will be confusion or misunderstanding regarding the basic framework of the process.”⁴ Frontier further elaborated:

It is important that the Commission make clear what it means by these terms so that recipients of Support will know what is expected of them, and what the Commission’s requirements are for that Support. The possible withholding of anticipated Support is a weighty matter for providers, and there must be a clear and complete description in the proposed rules to avoid any uncertainty and misunderstanding.⁵

³ Comments of Windstream, p. 3.

⁴ Comments of Frontier, p. 2.

⁵ Comments of Frontier, p. 4.

CenturyLink offered an almost identical observation: “[W]hile CenturyLink appreciates the Commission’s desire for flexibility, the proposed rules, as amended, lack the clarity and specificity required to fulfill the legislative mandate and the universal service principles, including, but not limited to the need for ‘. . . specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service.’”⁶ CenturyLink also echoed Windstream’s description of the *ad hoc* nature of the criteria: “[T]he lack of clarity accompanied by vague and ad hoc criteria to determine when funding may be withheld may cause unnecessary procedural difficulties and possible legal challenges that ultimately frustrate and delay the overall process of awarding NUSF support.”⁷

The opinion that the rules are too vague is shared not just by the three large incumbent local exchange carriers (“ILECs”), but also by RTCN which represents the Nebraska rural independent telecommunications carriers:

While the version of the rules released October 8 with regard to withholding criteria is clearer than the original version, it still lacks sufficient specificity. As the RTCN said in comments filed April 18, 2019, in this proceeding, the rules should be sufficiently detailed to ensure a transparent and judicious process for making decisions as important as withholding support. Criteria should ensure that withholding decisions are not arbitrary or capricious.⁸

When all but one commenter states that the rules are vague, and the other commenter is silent on the issue, the rules are probably vague.

As evidence of the vagueness proscribed by the courts, Windstream’s Comments raised some issues with the definitions included in and excluded from the proposed rules. All other commenters also pointed out vague definitions contained in or missing definitions from the

⁶ Comments of Centurylink, p. 2, Paragraph 4, citing Neb. Rev. Stat. § 86-325(5).

⁷ Comments of Windstream, pp. 5-6.

⁸ Comments of RTCN, p. 2.

proposed rules including those for “unserved/underserved area”⁹; “consumer complaints”¹⁰; “docket”¹¹; “support”¹²; “affordable services”¹³; “incumbent local exchange carrier”¹⁴; and “quality services.”¹⁵ Here, Windstream does not address the individual definitions proposed by the other commenters, but does agree with their statements that the rules are vague and should be revised.

III. THE PROPOSAL TO ALLOW COMMUNITY-BASED REDIRECTION OF SUPPORT IS VAGUE AND UNSUPPORTED BY THE ENABLING STATUTE.

Windstream agrees with CenturyLink that the Commission’s stated intention to use the proposed community-based redirection plans as guidelines is vague. Furthermore, the legislation enabling these rules does not mention this mechanism.¹⁶ Because of the latter, Windstream shares the concerns of both RIC and CenturyLink that the provisions fall outside the rulemaking authority delegated to Commission by the Legislature in NEB. REV. STAT. § 86-330 which authorizes only one mechanism for the redirection of support – that of a reverse auction program. Although RTCN advocated for these community-based plans,¹⁷ the Commission was not clear in the execution, so Windstream cannot provide a definitive response.

Even if the plans were allowable, Windstream shares CenturyLink’s concerns that the rules appear to allow coverage of an entire exchange, not just those areas which are unserved or underserved. As CenturyLink stated, “[N]o such justification, public policy or otherwise, exists to

⁹ Comments of Windstream, pp. 4-5 and Comments of CenturyLink, p. 3.

¹⁰ Comments of RIC, p. 2.

¹¹ *Id.*

¹² Comments of Frontier, p. 2.

¹³ Comments of RTCN, p. 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Comments of CenturyLink, p. 6.

¹⁷ RIC’s Comments provide a detailed explanation of its interpretation of the way the community-based plans are to work.

provide taxpayer funded assistance to locations where broadband is currently available.”¹⁸ Windstream also shares CenturyLink’s concerns that, if allowed, the community-based plans should include “steps and safeguards to ensure the incumbent and all other providers have equal and non-discriminatory access to poles, rights of way, easements, and leasing arrangements” along with a prohibition that public power companies use revenues from public power to subsidize their broadband participation.¹⁹

IV. CONCLUSION

The Commission has proposed rules and standards which the ILECs, the group of telecommunication providers that the rules will be applied to, state are too vague. If terms are not defined with enough specificity to be understood by the regulated entities, how are those entities to know what behavior is proscribed? Without clear standards, how will the Commission avoid discriminatory enforcement? The community-based redirection of support approach for which the Commission advocates is also vague, and the Commission may be exceeding its statutory authority in proposing this approach. If the Commission has not exceeded its authority, what remains are rules which are too vague regarding scope and access. The Commission’s use of the Program to fund areas where broadband is currently available goes beyond the purpose of the Program, which is to provide internet access to unserved and underserved areas of the state. Finally, the rules do not address fundamental safeguards for the ILECs and other providers. As such, Windstream reiterates its recommendation that the Commission withdraw the proposed rulemaking but continue to investigate the reverse auction process until after the deployment of the federal Rural Digital Opportunity Fund reverse auction is complete and lessons can be learned from its example. Once those lessons are learned, the rulemaking should be revisited.

¹⁸ CenturyLink Comments, p. 7.

¹⁹ *Id.*

Respectfully submitted on this the 18th day of December, 2019,

By: 
Blake E. Johnson, #24158
Bruning Law Group
1201 Lincoln Mall, Suite 100
Lincoln, NE 68508
blake@bruninglawgroup.com

and

Brad Hedrick
Trent Fellers
Windstream Nebraska, Inc.
1440 M Street
Lincoln, NE 68508
Brad.Hedrick@windstream.com
Trent.Fellers@windstream.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 18, 2019, one paper original, five paper copies, and an electronic copy of the foregoing Reply Comments on behalf of Windstream Nebraska, Inc. in Rule and Regulation No. 202 were delivered to:

Nebraska Public Service Commission
1200 N Street, Suite 300
Lincoln, NE 68508

Cullen Robbins
Cullen.Robbins@nebraska.gov

John Monroe
John.Monroe@nebraska.gov



Blake E. Johnson