

Before the  
**NEBRASKA PUBLIC SERVICE COMMISSION**

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  
)

**REPLY COMMENTS OF CTIA  
IN RESPONSE TO THE COMMISSION'S JULY 12, 2016  
ORDER SOLICITING LEGAL BRIEFS**

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CTIA<sup>1</sup> files this reply in response to other parties’ August 3, 2016 filings in response to the Nebraska Public Service Commission’s (“Commission’s”) July 12, 2016 Order Soliciting Briefs (“July 12 Order”).<sup>2</sup>

**I. INTRODUCTION AND SUMMARY**

The initial briefs in this proceeding reveal broad agreement among commenters with the central principles of CTIA’s initial brief.<sup>3</sup> First, all parties agree that the NUSF contribution mechanism must be consistent with the federal revenue allocation. Second, because no party has

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<sup>1</sup> CTIA – The Wireless Association® (“CTIA”) ([www.ctia.org](http://www.ctia.org)) represents the U.S. wireless communications industry. With members from wireless carriers and their suppliers to providers and manufacturers of wireless data services and products, the association brings together a dynamic group of companies that enable consumers to lead a 21st century connected life. CTIA members benefit from its vigorous advocacy at all levels of government for policies that foster the continued innovation, investment and economic impact of America’s competitive and world-leading mobile ecosystem. The association also coordinates the industry’s voluntary best practices and initiatives and convenes the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

<sup>2</sup> *In the Matter of the Nebraska Public Service Commission, on Its Own Motion, to Consider Revisions to the Universal Service Fund Contribution Methodology*, App. No. NUSF-11/PI-193, Order Soliciting Legal Briefs (July 12, 2016).

<sup>3</sup> *See* Comments of CTIA in Response to the Commission’s July 12, 2016 Order Soliciting Briefs, Application No. NUSF-100/PI-193 (filed Aug. 3, 2016) (“CTIA Comments”).

proposed a manner to devise a legally sustainable connections-based NUSF contribution mechanism structure until the direction of the federal revisions is known, the Commission should reject proposals to adopt a connections-based assessment at this time. Third, the Commission should size the NUSF before deciding on a contribution mechanism, as supported by all commenting parties. Finally, the Commission should consider moving forward with workshops addressing the range of issues involved in NUSF reform, which the record demonstrates would be prudent.

## **II. PARTIES AGREE THAT THE NUSF CONTRIBUTION MECHANISM MUST BE CONSISTENT WITH FEDERAL GUIDELINES ON REVENUE ALLOCATION**

In the initial round of briefs, all participating parties agreed that the NUSF is required to avoid assessing revenues deemed interstate under the federal mechanism. CenturyLink correctly observed that Federal Communications Commission (“FCC”) and court precedent require avoiding “the risk of double assessment resulting from assignment of revenues between jurisdictions.”<sup>4</sup> Similarly, the commenting Rural Independent Companies (“RICs”) correctly observe that “[p]rovided the following two directives are met, as a general matter, conflict with FCC jurisdiction should not exist: (1) The Commission’s rules are consistent with the FCC’s rules on contributions; and (2) Commission relies on intrastate telecommunications services as the basis for its contribution proposal.”<sup>5</sup>

These comments are consistent with CTIA’s observation that a “state mechanism that targets the same revenues or services as the federal mechanism would burden the federal

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<sup>4</sup> CenturyLink’s Response to Order Soliciting Briefs, Application No. NUSF-100/PI-193 (filed Aug. 3, 2016) (“CenturyLink Comments”).

<sup>5</sup> Brief of the Rural Independent Companies in Response to July 12, 2016 Order Soliciting Briefs, Application No. NUSF-100/PI-193, at 9 (filed Aug. 3, 2016) (“RICs Comments”).

mechanism and thus violate Section 254(f).”<sup>6</sup> As CTIA previously explained, wireless carrier contributors currently allocate intrastate revenues from connections that carry both interstate and intrastate traffic based on the inverse of the factor they use for federal USF contributions – and if Nebraska were to adopt a different approach for assessment, there would be significant risk of imposing NUSF-contribution obligations on revenue treated as interstate by the FCC.<sup>7</sup>

Given the unanimity of opinion on this point, it is clear that the Commission may not adopt specific revisions to its mechanism without ensuring that they are consistent with the federal approach.

### **III. NO PARTY HAS PROPOSED A LEGALLY SUSTAINABLE WAY TO STRUCTURE A CONNECTIONS-BASED NUSF CONTRIBUTION MECHANISM BEFORE THE REVISED FEDERAL ALLOCATION MECHANISM IS KNOWN**

While the Commission has contemplated whether to adopt a connections-based NUSF contribution mechanism including broadband connections, as CTIA previously explained such a mechanism (i) is not permissible under the *Open Internet Order*,<sup>8</sup> (ii) is unadoptable based on the Commission’s statutory authority, and (iii) would risk asynchronicity with the federal mechanism, and thereby the imposition of an impermissible burden.<sup>9</sup> Significantly, none of the briefs supporting adoption of a connections-based mechanism have offered an approach that resolves the significant legal problems with adopting such an approach at this time.

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<sup>6</sup> CTIA Comments at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5803-04 ¶¶ 431-32 (2015) (“*Open Internet Order*”).

<sup>9</sup> *Id.* at 5-8.

**A. Commenting Parties' Proposals Fail to Resolve the Asynchronicity Issue.**

In their most recent comments, the RICs and CenturyLink both assert that it is possible for the Commission to adopt a legally sustainable connections-based mechanism, so long as the mechanism is consistent with the federal approach. CenturyLink notes that “state USF contribution rules are not preempted if they are consistent with the FCC’s contribution rules,”<sup>10</sup> while the RICs allege that there “should be no insurmountable jurisdictional issue regarding a decision by the Commission to migrate to a connections-based NUSF contribution mechanism *provided that* the Commission assesses only that part of the connection that is used for ‘intrastate’ traffic.”<sup>11</sup>

Significantly, however, both parties are silent on *how* it would be possible to do so without first knowing what allocation mechanism the FCC will adopt in its reform proceeding. Simply asserting that the Commission should ensure that its approach does not conflict with the federal approach does not explain how this could be accomplished when nobody yet knows the direction of federal reform.

The RICs assert that, “provided the Commission isolates intrastate usage of a proposed connection, Commission action modernizing and updating the NUSF contribution mechanism can and should proceed.”<sup>12</sup> The RICs also refer at length to the FCC’s existing revenue allocators for wireless and interconnected VoIP revenues, and urge the Commission to take “this same opportunity for purposes of the NUSF per-connection methodology.”<sup>13</sup> They fail to

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<sup>10</sup> CenturyLink Comments at 7.

<sup>11</sup> RICs Comments at 5 (emphasis in original).

<sup>12</sup> *Id.* at 15.

<sup>13</sup> *Id.* at 14-15 n.28.

explain, however, how the FCC's existing *revenue* allocators could be used to devise a *connections-based* mechanism for the NUSF.<sup>14</sup> And, even if such a mechanism could be devised, the RICs do not explain how to avoid the need for changes to the NUSF mechanism in the event the FCC's reform proceeding leads to changes in the federal allocators – which changes may occur in the relatively near term.

Similarly, CenturyLink notes the “risk of double assessment” but blithely asserts that a “connections-based mechanism eliminates that risk. If the service is interconnected VoIP, one flat charge applies, and it is the same flat charge as borne by every other provider of a connection providing the capability of connecting calls to or from the public switched telephone network in the state.”<sup>15</sup> CenturyLink fails to explain, however, why this is true.

For example, suppose the Commission adopts a \$1 per-connection charge ostensibly applied against the “intrastate” portion of voice connections. Suppose further that the FCC's reform effort results in retention of revenue-based assessment and an increase in the interconnected VoIP federal safe harbor to 91%. Consider the application of this hypothetical to an interconnected VoIP provider offering a \$10 per month plan. The provider would be subject to an NUSF assessment on that VoIP connection that exceeds its total amount of intrastate revenue as determined by the federal allocation. This results in impermissible double-assessment. Moreover, a USF assessment mechanism that requires a contribution equal to or greater than the contributor's revenues allocated to that jurisdiction is impermissibly inequitable

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<sup>14</sup> Despite the detailed new data collections contemplated in earlier comments, such proposals are structurally unsound in regard to both their failure to address potential double-assessment, and the high burden a new data collection would impose. *See, e.g.*, Comments of the Rural Independent Companies In Response To Order Seeking Further Comments, Application No. NUSF-100, at 23-25 (filed June 6, 2016) (“RICs June 6 Comments”).

<sup>15</sup> CenturyLink Comments at 7.

and discriminatory.<sup>16</sup> The question is not whether this specific hypothetical (or any particular hypothetical) will occur. Rather, the point is that it is impossible to guard against this type of an impermissible outcome without knowing the results of the FCC's reform effort.

Nothing in the briefs proposes an approach for a connections-based NUSF that avoids these problems. Thus, no party refutes the logic of CTIA's observation that "it is important that Nebraska wait to revise its NUSF contribution rules until pending FCC action on federal contribution reform has been completed."<sup>17</sup>

**B. There Is No Data That Would Allow the Commission to Move Forward Without Knowing the Federal Approach.**

Given the above unresolvable information asymmetry, there is no data the Commission could collect that would resolve the problem of not knowing the final result of federal reform efforts. The RICs discuss the legal standard for the Commission to obtain connections data reported on FCC Form 477, apparently suggesting that these data might be used to assess per-connection charges.<sup>18</sup> Data on the number of connections does not address, however, the lack of knowledge as to possible mechanism asynchronicity and likelihood for resultant double assessment. As discussed above, a connections-based NUSF mechanism cannot be adopted while the FCC's reforms remain pending without creating a significant risk of double-assessment.

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<sup>16</sup> *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 434-35 (5th Cir. 1999).

<sup>17</sup> CTIA Comments at 3.

<sup>18</sup> RICs Comments at 18-20.

Similarly, the RICs urge the Commission to seek access to “FCC Form 499-A Nebraska-specific data” for an interim revenue-based assessment on business and special access services,<sup>19</sup> but carriers do not report state-specific revenues on Form 499-A. Rather, the form requires filers to indicate by check-box the states in which they provide service, and provide revenue percentage allocations by NPAC region, but there is no reporting of state-specific revenues. Moreover, even if state-specific revenue data existed, it would not resolve the unknowable solution to the issue of potential unlawful double-assessment.

Finally, the RICs’ proposal that the Commission collect other data<sup>20</sup> similarly does not solve the double assessment problem risked by designing a state approach without knowing the new federal approach. Moreover, this approach would increase the overall burdens on contributors. The RICs seriously underestimate carriers’ costs of complying with a NUSF-specific data collection, and such data collection would either have to be wastefully overbroad to comply with different potential federal approaches, or have to be readjusted an additional time when changes to the federal program are implemented. Further, any subsequent changes to the state approach necessitated by federal adjustments would require carriers to again redesign compliance systems, creating significant waste. Such costs would represent funds carriers could otherwise reinvest in their networks to *actually* further the underlying goal of universal service.

As a result, consistent with CTIA’s initial comments, the Commission should “wait[] for the FCC’s pending decision on reforming the federal USF contribution mechanism” before taking any specific action to modify the existing NUSF contribution mechanism.<sup>21</sup>

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<sup>19</sup> *Id.* at 20-21.

<sup>20</sup> RICs June 6 Comments at 23-24.

<sup>21</sup> CTIA Comments at 2.

#### IV. THE BRIEFS SUPPORT SIZING THE NUSF BEFORE DECIDING ON A CONTRIBUTION MECHANISM

All filing parties observe that sizing the NUSF is a necessary first step in the reform process.<sup>22</sup> In the most recent round of briefs, CenturyLink noted that, “[b]efore the Commission determines the amount of [the] NUSF charge, it must first make a decision on how big the fund needs to be to meet its purposes.”<sup>23</sup> CTIA also urged the Commission to “work towards a strategic plan that studies issues such as the scope of need for funding and the appropriate size of the fund that are not dependent on the federal proceeding.”<sup>24</sup> Even the RICs, in prior comments, acknowledged that it would be unwise to devise a plan without first analyzing the proper sizing of the NUSF.<sup>25</sup>

However, the necessity of waiting before deciding the structure of the future NUSF collection mechanism does not mean that the Commission cannot make progress on NUSF reform, as CTIA has previously outlined.<sup>26</sup> The Commission should lay the best foundation possible and size the NUSF – based on principles that limit the burden on consumers as outlined

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<sup>22</sup> Critically, CTIA notes that this universal observation comes despite disagreement among parties as to appropriate use of the fund. CTIA respectfully maintains that pursuing “ubiquitous fiber deployment” – while admirable – would fail to meet statutory accountability and legitimate purpose requirements.

<sup>23</sup> CenturyLink Comments at 3.

<sup>24</sup> CTIA Comments at 4-5.

<sup>25</sup> RICS July 6 Comments at 12-13 (“Development of the operational aspects of a revised contribution mechanism will need to be accomplished in connection with analysis of the proper sizing of the NUSF ... Once sizing is completed, the process ... can proceed.”)

<sup>26</sup> *See, e.g.*, CTIA Comments at 4-5; *see also* Reply Comments of CTIA to the Further Comments Filed in Response to the Commission’s April 5, 2016 Order, App. No. NUSF-100/PI-193, at 1-2 (filed July 16, 2016) (highlighting “broad support for the Commission to develop a strategic plan before taking other steps to reform the NUSF” and noting that development of such a plan could proceed prior to FCC implementation of reforms to the federal contribution methodology).

in CTIA's previous comments<sup>27</sup> – before starting to build on that foundation by rendering a decision on a contribution mechanism.

## **V. THE RECORD DEMONSTRATES THAT WORKSHOPS WOULD BE PRUDENT**

The level of detail in the latest round of reply comments – alongside the detail in multiple prior rounds of briefing in this proceeding – shows that the issues involved in this matter are of such complexity that the Commission could take input more effectively through workshops than through briefing. With a record comprised of more than 30 filings spanning hundreds of pages demonstrating the nuances inherent in NUSF reform, it is important for the Commission to take input in an effective and responsive manner. CTIA therefore urges the Commission to schedule workshops to address the full range of issues related to NUSF reform.

## **VI. CONCLUSION**

Ultimately, CTIA applauds the Commission for its detailed and careful approach to important NUSF reforms. In keeping with this approach, the Commission should avoid embracing proposals that would ultimately undermine the goals of the NUSF. To do so, CTIA asks the Commission to follow the overriding points emerging from the most recent round of briefs – that (i) all parties agree the NUSF contribution mechanism must be consistent with federal revenue allocation, (ii) no party has proposed a legally sustainable way to structure a constructions-based NUSF contribution mechanism, (iii) the NUSF should be sized before a

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<sup>27</sup> *Id.*

contribution mechanism is decided on, and (iv) the record demonstrates that workshops would be prudent.

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August 25, 2016

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 26<sup>th</sup>, 2016, an electronic copy of the foregoing will be served electronically on the following:

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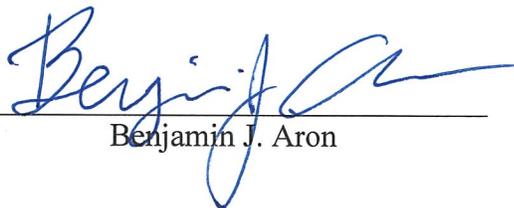
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