

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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| In the Matter of a Proposed Rescission |) | |
| and Consolidation of Commission Rules |) | Case No. TX-2018-0120 |
| Relating to Telecommunications |) | |

COMMENTS OF CENTURYLINK

In response to the Missouri Public Service Commission’s (“Commission”) *Notice of Proposed Rulemaking*,¹ CenturyLink² respectfully submits the following comments:

I. INTRODUCTION

CenturyLink is the second largest incumbent local exchange carrier (“ILEC”) in Missouri, and is a large and established competitive local exchange carrier (“CLEC”) and provider of interexchange services through affiliated companies. CenturyLink has a long history and familiarity with the Commission’s rules for telecommunications providers. Consequently, CenturyLink supports the Commission’s efforts to streamline its existing rules to make them more efficient and effective.

CenturyLink is also a member of the Missouri Telecommunications Industry Association (“MTIA”). The MTIA is filing comments on the Commission’s proposed rescissions of rules in Chapters 29, 34, and 36.³ In addition, the MTIA is filing comments on proposed amendments to

¹ MISSOURI REGISTER, Vol. 43, No. 10, May 15, 2018.

² “CenturyLink” includes CenturyTel of Missouri, LLC d/b/a CenturyLink; Spectra Communications Group, LLC d/b/a CenturyLink, Embark Missouri, Inc. d/b/a CenturyLink and CenturyTel of Northwest Arkansas, LLC d/b/a CenturyLink. CenturyLink also operates the following CLECs and IXC: CenturyLink Communications, LLC; Level 3 Communications, LLC, Level 3 Telecom of Kansas City, LLC; Broadwing Communications, LLC; Global Crossing Local Services, Inc.; Global Crossing Telecommunications, Inc.; Telcove Operations, LLC; and Wiltel Communications, LLC.

³ Case No. TX-2018-0188.

rules in Chapter 28. As a member of the MTIA, CenturyLink fully supports the MTIA's comments and will not repeat those comments here or otherwise address the Commission's proposals for those chapters.

II. COMMENTS

The singular focus of CenturyLink's comments is on the Commission's proposals to rescind and replace Chapter 31's rules governing universal service. Specifically, the Commission proposes to:

- In 4 CSR 31.010 Definitions, amend the current definition of "Essential Local Telecommunications Service" ("ELTS") to include retail broadband service,⁴ and then further adding a definition of "Retail Broadband Service;"
- In 4 CSR 31.013⁵ Missouri USF High Cost Support, amend the Purpose statement, and subsections of the current rule more broadly, to allow high cost support for retail broadband service;
- In 4 CSR 31.014⁶ Lifeline and Disabled Programs, amend the current rule in various places to refer to ELTS as the service for which a discount provided.

CenturyLink understands very well the challenges to making broadband available to truly unserved areas. CenturyLink also fully appreciates and understands the need to make broadband available as widely as possible in Missouri, which is why CenturyLink agreed to accept Connect America Fund ("CAF") Phase II support in Missouri. Since the inception of the CAF Phase II program CenturyLink has enabled 69,903 locations in Missouri with broadband access. CenturyLink has over 17,000 miles of fiber in Missouri, and fiber has been extended to all 286

⁴ CenturyLink believes Broadband Internet Access Service ("BIAS") is an appropriate term for the type of "retail broadband service" referred to by the proposed rules, however, CenturyLink will use the generic term "broadband" to refer to BIAS and "retail broadband service."

⁵ Renumbered from existing 4 CSR 31.040.

⁶ Renumbered from existing 4 CSR 31.120.

CenturyLink exchanges, and those are key indicators of CenturyLink's efforts to bring broadband to its Missouri customers.

However, CenturyLink has previously commented that the Commission lacks the authority to expand the Missouri Universal Service Fund ("Missouri USF") to include support for broadband service (including Lifeline discounts).⁷ Similarly, in connection with the Staff's review of the Chapter 28 and Chapter 31 rules, AT&T previously filed very detailed comments on proposals that mirror the rules being proposed in this proceeding.⁸ AT&T's prior comments, which CenturyLink expects will be repeated in this proceeding, detailed the numerous broadband expansion efforts in Missouri that are being supported under the auspices of CAF Phase II and CAF Broadband Loop Support ("BLS").⁹ With an active multi-year effort underway by the FCC and broadband providers to implement the CAF programs, Missouri needs to be extremely careful in developing a State-sanctioned program for increasing broadband availability. It is important to ensure that any such broadband expansion program is necessary, targeted, efficient, and effective. The fact that there are many Missouri statutory constraints to Commission authority over broadband demonstrates the need for a legislative mandate that establishes both clear broadband policy priorities and a clear demarcation between detailed legislative prescriptions and matters delegated to the Commission.

⁷ Comments of CenturyLink, File No. TW-2017-0078 (October 26, 2016, and April 28, 2017).

⁸ AT&T Comments on Proposed Rulemakings, File No. TW-2017-0078, File No. TW-2018-0098 (October 23, 2017) ("AT&T Comments").

⁹ *Id.*, pg. 4.

1. **The Commission does not have the authority to add broadband to the Lifeline and Disabled Programs or the Missouri High Cost Support Program**

The proposal to expand the Missouri USF to support a broadband only service within the Lifeline and Disabled Programs and the Missouri High Cost Support program, by expanding the definition of ELTS to include broadband, exceeds the Commission's authority. The Commission "is a creature of statute," and its "powers are limited to those conferred by its enabling statute," either expressly, or by clear implication, as necessary to carry out the powers specifically granted. *State ex rel. Mogas Pipeline LLC v. Mo. PSC*, 366 S.W.3d 493, 496. If a power is not granted to the Commission by statute, then the Commission does not have that power. *Id.*

The Commission is empowered by Section 392.248.2(1) RSMo. to periodically update the definition of ELTS by rule. The legal question presented is whether the Commission can update the definition of ELTS to include services that are beyond the scope of the Commission's regulatory authority? An examination of the Commission's relevant enabling statutes, Chapters 386 and 392 RSMo., indicates that the Missouri legislature has never expressly, nor by clear implication, given the Commission any authority over broadband service. To the contrary, Section 392.611.2 RSMo. clearly prohibits the Commission from exercising any jurisdiction over broadband service. It follows that if the legislature has expressly denied the Commission any authority over broadband, then the Commission cannot use its rulemaking authority in Section 392.248 to include broadband within the definition of ELTS. If the Commission can add

broadband to the definition of ELTS, then there is nothing to keep the Commission from adding video streaming services, or perhaps even gym memberships, to the definition of ELTS.¹⁰

Moreover, in Section 392.611.1(1) RSMo the legislature has expressly limited the collection and use of a universal service fund surcharge to support only the provision of “local voice service.” Broadband is not a voice service, and the Federal Communications Commission (“FCC”) has classified broadband as an *interstate information* service.¹¹ The FCC has also expressly preempted states from imposing state universal service fund contribution requirements on broadband providers.¹² As AT&T pointed out in its comments in File No. TW-2017-0078, the expansion of the Lifeline and Disabled Program support to include broadband, without a concomitant expansion of the Missouri USF assessment to include broadband providers (more specifically, to broadband service revenues), could financially impair the existing state Lifeline program, which is already suffering declines in the assessment base of wireline voice services.¹³

Notably, and presumably in recognition of the FCC’s preemption, the Commission’s proposed

¹⁰ CenturyLink submits that the fact the Missouri legislature has expressly carved out “interconnected voice over internet protocol service” (“VoIP service”) from the definition of “telecommunications service” in Section 386.020(54)(j) RSMo., as well as limited the Commission’s authority over VoIP service under Section 392.611.2 RSMo., indicates either that the legislature felt it is clear that broadband service is not a telecommunication service or that the legislature did not want to decide the issue in an advance of an FCC determination. The FCC has settled the broadband classification issue for now, and by adopting Section 392.611.2 RSMo. the legislature nevertheless denied the Commission any authority over broadband. It is also important to consider that the legislature decided that VoIP service, which is a broadband-enabled voice service, can not be considered a “telecommunications service” by the Commission, so it is very unlikely that a broadband-only information service, with no voice component, could lawfully be classified by the Commission as an essential local *telecommunications* service. (emphasis added)

¹¹ *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, 33 FCC Rcd 311, para. 199 (Released January 4, 2018).

¹² *Id.*, FN 736.

¹³ AT&T Comments, pg. 3.

new rule governing the Missouri USF assessment, 4 CSR 31.012, does not subject broadband providers or broadband service to the assessment.

2. **The Commission's proposed changes to the Missouri High Cost Support rule do not conform to the requirements of Section 392.248 RSMo.**

The Commission's proposed new rule for Missouri High Cost Support, 4 CSR 31.013, does not conform to, nor comply with, the statutory requirements for high cost support. Section 392.248.4(1) RSMo. requires a "telecommunications company's eligibility to receive support for high cost areas" to "be conditioned upon:"

- (a) The telecommunications company offering essential local telecommunications service, using its own facilities, in whole or in part, throughout the entire high cost area and having carrier of last resort obligations in that high cost area; and
- (b) The telecommunication company charging a rate not in excess of that set by the commission for essential services in a particular geographic area.

The proposed rule does not address any of these elements; it does not establish how high-cost areas will be determined, and it does not establish a methodology for determining a reasonable rate (including the relevant geographic area) for the supported essential services. The proposed rule does not establish that any application will be subject to a hearing. When the Commission first attempted to implement Section 392.248 for high cost support, it conducted multiple phases of a contested case in an effort to define and identify "high-cost" areas and set a reasonable rate.¹⁴

¹⁴ Case No. TO-98-329, *In the Matter of an Investigation into Various Issues Related to the Missouri Universal Service Fund*. Order Establishing Case and Setting Early Prehearing Conference (February 17, 1998) (This Order appears to no longer be available on the Commission's website.) Order Establishing Procedural Schedules and Adopting Protective Order (April 17, 2018) (There would be a number of subsequent orders amending the procedural schedule in this multi-year docket, but this Order is the first to lay out a multi-phase set of proceedings for the various issues, primarily related to high cost support.) Report and Order Establishing Low-Income/Disabled Fund (March 21, 2002) (This appears to be the final substantive order in the docket, with no apparent subsequent order providing a clear explanation for why the Commission decided to not establish a high cost support fund despite multiple evidentiary hearings, testimony, and briefing that addressed the appropriate cost methodology, hundreds of cost model inputs, the

After lengthy proceedings, the Commission decided not to implement a high cost support mechanism and left its pre-existing rules in place.

The Commission's existing rule and prior procedures were clearly based on a determination by the Commission that it should develop uniform and consistent rules for carriers to be eligible to receive high cost support in specific geographic areas. Consequently, the Commission's proposal to simply determine the availability of support on an ad hoc, case-by-case basis is a radical departure from the Commission's prior approach and creates an unreasonable risk of arbitrary and capricious, and inconsistent, rulings. For example, the Commission previously determined that local calling scopes were the appropriate geographic area in which reasonable rates for ELTS should be determined, but now there could be different standards for voice services than for broadband services. The previous rule placed restrictions on duplicative support, but now removes that presumptive restriction (e.g., duplicative support from CAF programs). The Commission does not have the authority to add broadband to the definition of ELTS for the purpose of Missouri USF programs, but there are additional grounds to oppose the Commission's proposed rule for High Cost Support because it is particularly lacking in detail and appears to open the door for determining eligibility for High Cost Support in ways that are inconsistent with the statutory requirements.

Moreover, with the proposed addition of broadband to the definition of ELTS, the statutory requirements for Missouri High Cost support are especially problematic. The Missouri statute requires a recipient of High Cost support to provide ELTS to the entire high-cost area, yet the proposed rule allows for support to either a "customer" or to a "location lacking facilities," neither

geographic area of support, and a reasonable rate for essential local telecommunications service. However, see the Dissenting Opinion of Commissioner Steve Gaw.).

of which seems analogous to an “entire high-cost area.” The proposed rule also does not even suggest that the rates for broadband will be subject to any sort of reasonableness test, as required by statute.

III. CONCLUSION

Universal service has been the fundamental telecommunications policy of the United States and Missouri for decades. It was first achieved primarily through the grant of a *de facto* monopoly, then through a complex series of implicit subsidies that required equally complex rate of return regulation. With the advent of competition in the local exchange market in 1996, the federal government, and the Missouri legislature, created legal frameworks for maintaining reasonable rates in high cost areas by making implicit subsidies explicit, and for providing support to low income consumer. This Commission chose not to implement that framework for telecommunications service in high cost areas, and the Missouri legislature eventually allowed for greater deregulation and reliance on free market principles for reasonable rates.

This policy of universal service has never been applied to *broadband service* in Missouri. The Missouri legislature never granted the Commission the authority to implement universal service programs to support broadband service. As important as broadband is to Missouri consumers and businesses, implementation of a program of public support for broadband must be done lawfully, and it must be done properly. Even if the Commission had the authority to adopt Lifeline or High Cost support mechanisms for broadband, approaching such a task by merely amending existing rules without thoroughly examining the various complexities of the task is unwise. The Commission already established a precedent for how to thoroughly investigate the issues associated with implementing such universal service programs, by requiring multiple

evidentiary hearings with sworn testimony and discovery. All that process, which was so prudent in the case of telecommunications, would be avoided now. The fairness and equity of requiring the customers of one service, telecommunications, which is declining in subscribership and revenues, to subsidize the availability of another service, has not been examined in a meaningful way. Just as importantly, the economic viability of such an approach also does not appear to have been seriously considered.

CenturyLink appreciates the work of the Commission Staff over the past two years on this particular issue of universal service support for broadband. However, the issue of public support for broadband is neither within the scope of the Commission's authority, nor an issue that should be resolved by a rulemaking. To the extent that the State wishes to establish a program to bring broadband to truly unserved areas and low-income consumers, such a program must first be fully explored in the legislative process and then authorized by statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of July, 2018, a copy of the above and foregoing Comments of CenturyLink was served via email to each of the following:

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