BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of a Repository Case in Which To Gather Information About the Lifeline Program and Evaluate the Purposes and Goals of the Missouri Universal Service Fund	))))	Case No. TW-2014-0012

COMMENTS OF THE MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION

COMES NOW the Missouri Cable Telecommunications Association (the "MCTA") and submits these Comments pursuant to the Missouri Public Service Commission's (the "Commission") Invitation to Comment About the Possible Creation of a Missouri Universal Service Fund (the "Invitation to Comment"). The MCTA strongly opposes the creation of a state high-cost fund or any expansion of high-cost funding beyond the constraints imposed by Missouri law. The MCTA's responses to the questions set forth in the Invitation to Comment are as follows:

1. Does Missouri need a state high-cost fund? If no, please explain your position.

No. Although authorized by statute since 1996 to create such a fund, the Commission has not – and should not establish a high-cost fund. No demonstrable need for a state high-cost fund has ever been established, and the Commission itself has proposed repeal of the existing state high-cost rules.[1]

In addition, consideration of such fund at this time is out of step with the Federal Communications Commission's (the "FCC") intercarrier compensation ("ICC") reform and Connect America Fund ("CAF") programs.[2] Pursuant to the FCC's ICC reform program that commenced in 2011, ILECs may charge a monthly Access Recovery Charge ("ARC") to partially offset a decline in

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[1] *See* Docket no. TW-2013-0324

[2] *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*USF/ICC Transformation Order*"), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 18, 2011).

ICC revenue resulting from reductions in intrastate terminating switched access rates.[3] The CAF also provides support to ILECs for any otherwise-eligible revenue not recovered by the ARC.[4] After the ARC, the CAF is intended to be the mechanism by which ILECs are compensated for reductions in intrastate switched access rates. If an ILEC needs additional support, it must petition the FCC and show credible evidence to demonstrate its need, such as through a rate case or other evidentiary hearing.[5]

The CAF remains in "Phase I," pursuant to which price cap ILECs continue to receive the same levels of federal high-cost funding that they received in 2011 and additional amounts for broadband deployment. The FCC is developing the cost model for "Phase II," the five-year program designed to subsidize the price cap ILECs' broadband deployment. Phase II will not commence until later this year. The FCC also has undertaken to ease the effect of its reforms on rate-of-return ILECs, including delaying for an additional year the phase-in of high-cost loop support reductions, rather than making such support reductions fully effective in 2014.

These reforms ensure that state regulators may continue to assess the effects of the FCC's programs on consumers and, when more information becomes available, determine appropriate courses of action with respect to state universal service funding. At this point, these FCC reforms have not had a quantifiable effect on Missouri consumers.

2. What issues need to be addressed by the Public Service Commission in order to establish a high-cost fund?

Missouri law is clear that the purpose of state high-cost universal service is not to fund access charge revenue replacement or to ensure "make-whole" subsidies to replace "lost" federal universal

[3] *USF/ICC Transformation Order*, ¶¶ 36-37.
[4] *Id.*, ¶ 37.
[5] *Id.*, ¶¶ 924-27.

service subsidies. Instead, the purpose of any state high-cost fund created by the Commission is to provide for:

> reasonably comparable essential local telecommunications service, as that definition may be updated by the commission by rule, throughout the state including high-cost areas, at just, reasonable and affordable rates.

Section 392.248.2(1), RSMo. As a preliminary matter, Section 392.248.6(1) RSMo entreats the Commission:

> [i]n determining whether, and to what extent, universal service fund funding is required to facilitate provision of essential local telecommunications service, [to] [d]etermine the definition of essential local telecommunications service.

Defining "essential local telecommunications service" is necessary to determine which service elements should be supported for low-income and disabled consumers in Missouri, as well as to determine the service elements subject to any high-cost fund that may be created. The Commission recently updated its definition of "essential local telecommunications service" to be synonymous with the Commission's definition of "voice telephony service," which, in return, is virtually identical to the FCC's definition of "voice telephony service,"[6] namely:

> voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation services to qualifying Lifeline consumers. Toll limitation service does not need to be offered for any Lifeline service that does not distinguish between toll and nontoll calls in the pricing of the service.[7]

Bearing in mind the limited scope of "essential local telecommunications service," the Commission would need to address the following if a state high-cost fund is to be created.

a. Whether an area qualifies for state high-cost funding:

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[6] *See* 47 CFR 54.101.

[7] *See* Rule 4 CSR 240-31.010, as revised by Final Order of Rulemaking, Docket No. TX-2013-0324 (December 19, 2013).

Section 392.248.6, RSMo, in relevant part, requires that:

> Upon request from an eligible telecommunications company for assistance from the universal service fund for a high-cost area, [the Commission must] determine *if the high-cost area qualifies for assistance* from the universal service fund. (Emphasis added.)

Determining if an area qualifies for high-cost funding is a prerequisite issue, distinct from any other statutory consideration, such as determining appropriate service costs or eligibility requirements.[8] That is, the legislative intent is for the Commission to determine, *before* creating a high-cost fund, whether there is a *compelling financial basis* for ratepayers to support public subsidies benefitting certain companies. The MCTA believes that a compelling financial need for public subsidy cannot exist in any area where a private-sector business already provides a voice service to be supported, and that funding should be considered only where voice service would be practically unavailable without such support. The widespread availability of voice services from an unsubsidized competitor

[8] Section 392.248.6 RSMo provides, in relevant part:

> In determining whether, and to what extent, universal service fund funding is required to facilitate provision of essential local telecommunications service, the commission shall:
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> (1) *Determine the definition of essential local telecommunications service* no later than three months after the adoption of the essential local exchange telecommunications service definition for the federal Universal Service Fund, and consider revision of the definition on a periodic basis not to exceed every three years thereafter, with the goal that every citizen of this state shall have access to a wider range of services, that are reasonably comparable between urban and rural areas, at rates that are reasonably comparable between urban and rural areas;
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> (2) Upon request from an eligible telecommunications company for assistance from the universal service fund for a high-cost area, *determine if the high-cost area qualifies for assistance* from the universal service fund. The commission shall review its determination that a high-cost area qualifies for assistance from the universal service fund no less frequently than once every five years;
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> (3) Determine for each requesting, eligible local exchange telecommunications company, by high-cost area, *the costs of providing essential local telecommunications services* in those high-cost areas and establish support payments necessary to such companies to ensure just, reasonable and affordable rates for essential telecommunications service. The commission shall review such support payments no less frequently than once every five years; provided, however, that if the commission adopts a different definition of essential local telecommunications service, pursuant to subdivision (1) of this subsection, then the commission shall review and adjust accordingly the previously authorized support payments in order to ensure just, reasonable and affordable rates for essential telecommunications service, as revised by commission rule. In determining and reviewing such support payments, the commission shall ensure that no telecommunications company receives more or less support than necessary to further the purposes established in subsection 2 of this section.

is irrefutable evidence that high cost support is not needed in an area.[9] In addition, there should be no high-cost support for business or commercial services, given the widespread availability of such services throughout the state.

b. Determining the costs of providing essential local telecommunications service:

In addition to requiring the Commission to determine if an area should be supported, Section 392.248.6 RSMo requires the Commission to determine:

> [F]or each requesting, eligible local exchange telecommunications company, by high-cost area, *the costs of providing essential local telecommunications services in those high-cost areas* and establish support payments necessary to such companies to ensure just, reasonable and affordable rates for essential telecommunications service. (Emphasis added.)

Telecommunications companies use their local networks to provide, either directly or through one or more affiliates, a variety of competitive, revenue-generating services, some of which are not regulated by the Commission. Such services include Internet access and cable or video services. Any determination of financial need must be premised on the rule that all services provided over shared facilities must bear a reasonable share of the cost of those facilities.

The Commission also would need to identify an appropriate method for determining the costs of essential local telecommunications services – *i.e.*, supported voice services – for an area. The cost model must be appropriate for assessing the true cost of serving an area and consider the costs that should be allocated to data, video and other unregulated services. In addition, any useful cost model must recognize the diminishing scope of carrier of last resort ("COLR") obligations. The "voice telephony service" definition adopted by the Commission in docket no. TX-2013-0324 effectively enables an ILEC to rely on alternative voice services to meet COLR obligations, and Missouri law

[9] By analogy, "the availability of broadband service from an unsupported broadband competitor demonstrates that there is a private sector business case to offer broadband and that high-cost universal service support is not required." ABC Plan, Attachment 1, Framework of Proposal, at 3, available at: http://apps.fcc.gov/ecfs/document/view?id=7021698692.
The MCTA reserves comment at this time on what would constitute a relevant area for state high-cost funding.

essentially allows an ILEC even to "opt out" of those obligations. Moreover, the Legislature's intent, expressed as recently as the enactment of HB 331, is that retail telecommunications service be deregulated in Missouri. Under such circumstances, it appears to make little sense to continue to rely on forward-looking cost models that assume a *new* wireline voice network premised on investments that may never be made and costs that may never be incurred.

c. Determination that a supported carrier is an eligible telecommunications company ("ETC"):

Pursuant to Section 392.248.4(1) RSMo, eligibility for state high-cost funding is limited to those entities that are "eligible telecommunications companies" which: (i) use their own facilities; (ii) are COLRs; and (iii) charge rates for essential local telecommunications service that are not above a benchmark set by the Commission.[10] In addition, Section 392.248.5 RSMo *requires* that:

> [i]n local exchange areas subject to competition for essential local telecommunications service [i.e., where CLECs may be certificated to provide telecommunications service], *the incumbent local exchange telecommunications company shall be designated as a carrier of last resort* for essential local telecommunications service.
> (Emphasis added.)

However, ILECs largely are no longer tightly bound by COLR obligations. For example, section 392.461 RSMo[11] has largely deregulated retail telecommunications services. HB 331,

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[10] Section 392.248.4(1) states as follows:

The telecommunications company [must] offer[] essential local telecommunications service, using its own facilities, in whole or in part, throughout an entire high-cost area *and having carrier of last resort obligations* in that high-cost area; and

The telecommunications company [must] charg[e] *a rate not in excess of that set by the commission* for essential services in a particular geographic area. (Emphasis added.)

[11] 392.461 RSMo A telecommunications company may, upon written notice to the commission, elect to be exempt from certain retail rules relating to:

. . . (2) The installation, provisioning, or termination of retail service.

. . . Notwithstanding other provisions of this chapter or chapter 386, a telecommunications company may, upon written notice to the commission, elect to be exempt from any requirement to file or maintain with the commission any tariff or schedule of rates, rentals, charges, privileges, facilities, rules, regulations, or forms of contract, for telecommunications services offered or provided to residential or business retail end user customers and instead shall

enacted last year but enjoined from taking effect for reasons unrelated to the substance of the legislation's wireline telecommunications-related provisions,[12] further expands section 392.461's deregulatory scope and creates new section 392.611.1, which provides:

> A telecommunications company certified under this chapter or holding a state charter authorizing it to engage in the telephone business shall not be subject to any statute in chapter 386 or this chapter (nor any rule promulgated or order issued under such chapters) that imposes duties, obligations, conditions, or regulations on retail telecommunications services provided to end user customers, except to the extent it elects to remain subject to certain statutes, rules, or orders by notification to the commission.

In sum, the COLR "obligation" is only an ILEC obligation until the ILEC chooses to eliminate it. Moreover, even where an ILEC chooses to retain the COLR obligation, the ILEC may meet its obligations using alternative technologies.

The Commission would need to establish a benchmark rate for essential local telecommunications services. The FCC has established a benchmark rate to ensure that supported rates are not artificially low. That benchmark is based on local end-user rates plus state regulated fees (specifically, state SLCs, state universal service fees, and mandatory extended area service charges). The FCC describes its benchmark rate as an "urban" rate floor representing a national average, which is $14 for the period July 1, 2013 through June 30, 2014. However, as recognized by several states, a higher benchmark may be more appropriate. As examples, the Illinois rate benchmark is $20.39; the Georgia rate benchmark (calculated at 110% times the state weighted average residential rate) is $19.54. The Wyoming rate benchmark, for the twelve-month period ending June 30, 2014, is $31.39 excluding taxes, fees, surcharges, custom calling features and other

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publish generally available retail prices for those services available to the public by posting such prices on a publicly accessible website. . . . .

[12] *City of Liberty v. State of Missouri*, Case No. 13AC-CC00505, Circuit Court of Cole County, October 17, 2013.

optional services, for basic local exchange telephone service.[13] To calculate the rate benchmark, the Commission should collect data from wireless carriers and other alternative providers of services for the limited purpose of determining the statewide average rate for essential services.

d. Other constraints on state high-cost funding:

In addition to the foregoing requirements, sound policy suggests that a cap on funding would be needed, with a phase-down of support over a predetermined period. Any proposal for high-cost funding must recognize the significant financial burdens already imposed on ratepayers at a time when consumers are experiencing substantial add-on fees imposed for federal universal service, 911, telecommunications relay service, taxes, and other programs. For example, the federal universal service surcharge is currently 16.4% of a consumer's monthly interstate telecommunications bill.

Moreover, any receipt of universal service funds by ILECs premised on the absence of competitive alternatives for voice services is contradicted if the ILEC refuses to provide wholesale interconnection and access to their facilities at just and reasonable rates, consistent with 47 U.S.C. §§ 251(b) and (c). It is bad public policy and unfair to require consumers and competitors to subsidize a local service monopoly that wards off its competitors by avoiding its wholesale and interconnection obligations.

Finally, audits and accountings must be frequent and calculated to confirm that support is used in the target areas and for the services to be supported. Oversight should be rigorous and regular assessments of effectiveness should be made.

[13] The Wyoming State Universal Service Fund (the "WUSF") calculates state high-cost support based on "the extent [to which] essential local exchange service prices [i.e., residential and business basic local service], after consideration of any contributions from the federal universal service fund, exceed one hundred thirty percent (130%) of the weighted statewide average essential local exchange service prices." § 37-15-501(d).

3. What service(s) should be supported?

Missouri law currently limits state high-cost funding to subsidizing essential local telecommunications service, *i.e.*, not broadband service. Section 392.248.2(1) RSMo limits subsidies from any state universal service fund to "ensur[ing] the provision of reasonably comparable essential local telecommunications service." Although the definition of such service may be "updated" by the Commission by rulemaking, there is no current statutory authority for expanding the definition to include services, such as broadband, that are not "telecommunications service." In 2005 the FCC's *Wireline Broadband Order*, "established a minimal regulatory environment for wireline broadband Internet access services, classifying telephone companies' Internet access offerings as indivisible "information services" subject only to potential regulation under the doctrine of Title I ancillary authority.[14] Even earlier, in 2002, the FCC classified cable modem offerings as "information services" subject only to the FCC's ancillary authority.[15] By analogy to the federal definitions and federal universal service programs, telecommunications service is not "information service," and broadband is still not a supported service even at the federal level.[16]

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[14] *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).*

[15] *In The Matter Of Inquiry Concerning High-Speed Access To The Internet Over Cable And Other Facilities, and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, 17 FCC Rcd. 4798 (2002), *reversed in part and affirmed in part, Brand X v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *reversed, National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.*, 545 U.S. 967 (2005) (sustaining the FCC's decision).

[16] If legislated as part state broadband funding, state broadband funding should be limited to grants from general appropriations (*e.g.*, the Nebraska pilot program), competitively neutral, administered similar to government procurement programs, and narrowly tailored to targeted areas.

4. What type(s) of providers should be able to receive high-cost support?

a. Should funding be limited to landline providers?

Please see the MCTA's discussion in section 2b. above.

b. Does a provider need to own facilities? If so, what kind of facilities?

The MCTA expresses no opinion at this time regarding the extent to which ETCs must use their own facilities or as to what may constitute "facilities" if a high-cost fund is established.

c. Should wireless or broadband providers be able to draw support?

As discussed in section 3 above, broadband service currently is not a supported service under Missouri law. With respect to wireless service, please see the MCTA's statement in section 2b. above.

5. How should high-cost disbursements be determined? (For example, how will it be determined if an area or provider needs high-cost support, and if so, how much?)

Please see the MCTA's discussion in section 2b. above.

6. What state(s), if any, have a state high-cost fund that Missouri should strive to mirror?

The Commission must abide by the Missouri statues, as discussed in section 2 above. Please also see the MCTA's reference in section 2c. above to other states' benchmark rates.

7. Should an attempt be made to limit the size of the fund? (For example, should the fund's total annual disbursement amount be capped? Should the fund have a sunset provision or a phase-out provision?)

Yes, if a high-cost fund is established, it should be capped. Please see the MCTA's discussion in section 2d. above, which recommends a cap and a phase-down of support in the event a high-cost fund is established.

8. What accountability requirement, if any, should be established to ensure a company is appropriately using state high-cost support?

As discussed in section 2d. above, if a high-cost fund is established audits and accountings must be frequent and calculated to confirm that support is used in the target areas and for the services to be supported.

9. Is there a need to revise how the Missouri USF is funded to accommodate a high-cost fund?

a. Should the base of services assessed to support the MoUSF be expanded?

The MCTA observes that: (a) only *retail* telecommunications services and, as provided by statute, *retail* VoIP services are obligated to contribute; and (b) other IP-enabled, cable, video and other wireline services are not required to contribute to a state high-cost fund. The MCTA also notes that a requirement that cellular providers contribute money to state-run universal service programs is not preempted by federal law, including 47 U.S.C. § 332(c)(3)(A). Section 392.248.2 RSMo provides for the Commission to adopt and enforce rules to be implemented by the universal service board, governing the system of funding and disbursing funds from the universal service fund in a manner that does not grant a preference or competitive advantage to any telecommunications company or subject a telecommunications company to prejudice or disadvantage. Such prejudice or disadvantage may occur when CMRS carriers, which also benefit from the application of universal service, do not contribute to state universal service.

b. What exemptions should exist (e.g., Lifeline, Wholesale)?

Wholesale services are not and should not be required to contribute to state high-cost funding; otherwise, revenues would be assessed twice. In addition, the MCTA recommends that point-to-point, non-switched services not be required to contribute to state universal service funding.

Private line services are not switched voice services and are ineligible for subsidies; however, private line services are required to contribute to state universal service funding. Besides whatever market distortions may be created by subsidies flowing from non-switched data services to switched voice services, Missouri law enjoins the Commission to administer the state universal service fund in a nondiscriminatory manner. Section 392.248.3 RSMo requires that "assessments . . . be based on Missouri jurisdictional telecommunications services revenue and other nondiscriminatory factors as determined by the commission." Section 392.248.2 RSMo prohibits a "system of funding and disbursing funds from the universal service fund in a manner that . . . grant[s] a preference or competitive advantage to any telecommunications company or subject[s] a telecommunications company to prejudice or disadvantage." Accordingly, private line services should be exempt from contributions.

c. Should the MoUSF assessment be based on revenues or the services (connections) provided, or some other measure?

The MCTA takes no position regarding this issue, other than to note that the FCC is still reviewing the issue and, under the circumstances, it is impractical for Missouri to change its contribution mechanism to service connections or some other contribution methodology,

10. What revisions, if any, are needed to Missouri's statutes if the Public Service Commission intends to implement a high-cost fund?

None, assuming that the Commission accepts the MCTA's other recommendations, as described herein.

11. Is there anything else you would like to tell the Missouri Public Service Commission about implementation of a high-cost fund?

The MCTA appreciates the opportunity to comment and to participate in this proceeding. For the reasons stated herein, a state high-cost fund is unnecessary and, in any event, impracticable to implement without the onerous proceedings recommended above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Comments of the Missouri Cable Telecommunications Association were sent to each of the following parties of record via electronic transmission this 14th day of February, 2014:

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