Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting Telehealth in Rural America	)	WC Docket No. 17-310
	)	

SUPPLEMENTAL COMMENTS OF ALASKA COMMUNICATIONS

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TABLE OF CONTENTS

EXECUTIVE SUMMARY……………………………………………………………………………ii

INTRODUCTION……………………………………………………………………………….1

ARGUMENT

I. CALCULATION OF THE RURAL RATE BY COMPARISON TO OTHER AVAILABLE RATES ………………………………………………………………………………..2

A. Cost-Based Justification Has No Place In Calculating RHC Support…………3

B. Telehealth Services Have Outgrown the Commission's Rural Rate Rule……..4

C. An Efficient Approach to Approving Rural Rates…...………………………..5

II. CALCULATION OF THE URBAN RATE………………………………………...15

III. ADMINISTRATIVE REFORMS MUST ACCOMPANY SUBSTANTIVE PROGRAM CHANGES…………………………………………………………………………17

CONCLUSION…………………………………………………………………………..…24

Executive Summary

Under Section 254(h)(1)(A) of the Communications Act, healthcare providers (HCPs) are entitled to the telecommunications services they need to deliver health care in rural areas, at rates that are reasonably comparable to the rates charged for similar services in urban areas of the same state, and service providers are entitled to the urban-rural rate difference to the extent they fulfill these needs. In the past two funding years, however, many service providers were denied rural health care (RHC) program funding, or saw their support substantially reduced, while support that was awarded was delayed by months and even more than a year in some cases. As a result, some HCPs have dropped out of the RHC program, which directly impacts rural customers who rely on these services for emergency, diagnostic, palliative and preventative care. The uncertainty shrouding the program diminishes the quality and quantity of care overall, and undermines the substantial cost savings (typically realized from early interventions, regular treatments, and avoided travel costs) that otherwise would flow from rural telehealth services. In short, the benefits to rural Americans made possible by the RHC program are at risk.

The recent unpredictability of RHC program funding has several causes. First, the FCC rules governing the program have become outdated over two decades in light of regulatory changes, technology improvements, and market developments. It is often unclear how the rules ought to apply to modern telehealth services. Second, in recent years the Universal Service Administrative Company (USAC) has sometimes administered the Commission's rules in inconsistent or unduly narrow ways, casting doubt on funding for the types of telehealth services that were reliably supported in earlier years. Third, demand for RHC support has considerably grown, with HCPs requiring more sophisticated services and greater bandwidth to fulfill rural telehealth needs, without sufficient corresponding adjustments to the program budget (a recent adjustment for inflation, while welcome, did not close the gap between demand and budgeted support). Thus, the Commission's RHC rules no longer satisfy the RHC mandate of Section 254(h)(1)(A).

In its initial comments in this proceeding, Alaska Communications advocated a number of substantive reforms to the RHC program, including raising the budget cap to account for increased demand by rural HCPs for more advanced services, as well as updating the rural rate definition and other FCC rules that have become outmoded. Significant procedural improvements also were proposed.

Alaska Communications files these supplemental comments, drawing on its experience serving rural HCPs in the context of significant Telecom Program funding delays, reductions and denials, which have greatly compounded the challenges of providing rural telehealth services, and undermined HCP confidence in the program. In these comments, Alaska Communications discusses several proposals related to the calculation of the rural rate and the urban rate for determining Telecom Program support. Each of these proposals can be implemented using an administratively simple, lowest corresponding price rule, or a convenient rate matrix, which would serve as a ceiling in the case of rural rates, and a floor in the case of urban rates, to ensure that support remains predictable and the size of the RHC program remains reasonable.

In addition, Alaska Communications offers a number of examples where the existing FCC rules have either inappropriately constrained USAC from granting a funding commitment, or caused USAC to be uncertain about the standard for approval. These examples underscore the urgent need for FCC action on RHC program rules before the January 1, 2020, when activity related to the 2020 RHC funding year will begin. In addition to providing USAC, HCPs and service providers with substantive guidance that reflects current market conditions, the Commission should exercise greater oversight over USAC's administration of the RHC program to ensure that support is timely, sufficient and predictable.

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Alaska Communications[1] hereby offers these comments on the Commission's proposals for reform of the Rural Health Care ("RHC") universal service program, specifically in response to the request for supplemental comments released December 4, 2018 in a Wireline Competition Bureau ("Bureau") public notice.[2]

INTRODUCTION

The Public Notice seeks to refresh the record created in response to the December 2017 RHC Notice and Order,[3] with specific emphasis on the rules governing determination of the rural and urban rates used to calculate support in the RHC Telecommunications Program.[4] The Bureau notes that since the close of the comment cycle on the RHC Notice and Order, several companies requested that the Bureau approve their rural rates pursuant to cost justification, as permitted under Section 54.607(b) of the Commission's rules.[5] The Bureau recognizes that this

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1 In these supplemental comments, "Alaska Communications" represents the following wholly-owned subsidiaries of Alaska Communications Systems Group, Inc.: ACS of Alaska, LLC, ACS of Anchorage, LLC, ACS of Fairbanks, LLC, ACS of the Northland, LLC, and Alaska Communications Internet, LLC, all of which participate in the provision of services to rural health care providers in Alaska.

2 Public Notice, *Wireline Competition Bureau Seeks Additional Comment on Determining Urban and Rural Rates in the Rural Healthcare Program,* WC Docket No. 17-310, DA 18-1226 (WCB rel. Dec. 4, 2018) (the "Public Notice").

3 *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Notice of Proposed Rulemaking and Order, FCC 17-164 (rel. Dec. 18, 2017) (the "RHC Notice and Order").

4 Public Notice at 1.

5 47 C.F.R. §54.607(b).

process consumed substantial resources of the service providers, their healthcare provider ("HCP") customers, and FCC staff, and requested targeted feedback on the existing rural rate rule as well as the proposed changes suggested by the Commission in the RHC Notice and Order.[6]

I. <u>CALCULATION OF THE RURAL RATE BY COMPARISON TO OTHER AVAILABLE RATES</u>

The Commission has proposed expanding the available data to be used for comparison purposes to facilitate approval of the rural rate in any RHC contract submitted for reimbursement under the Telecom Program. Under this proposal, the "rural rate" submitted in a request for RHC funding may be approved by comparison to an average of all publicly-available rates (those of the service provider seeking funding as well as those of other service providers) for similar services in the rural area where funding is sought (*i.e.,* the location where the HCP is being served under the contract in question).[7] In the expectation that this change would significantly reduce the likelihood that there would be no publicly available rate to compare to the rate submitted for reimbursement, the Commission also proposed to eliminate that portion of Section 54.607(b) that currently permits FCC approval of the rural rate by cost justification in the absence of both rates of the submitting service provider being charged to commercial customers other than HCPs for similar services in the same area (satisfying Section 54.607(a)) and publicly available rates of another service provider for similar services in the same area (satisfying Section 54.607(b)).[8]

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6 Public Notice at 2.

7 RHC Notice and Order, ¶¶63-64. *See also* Public Notice at 2.

8 47 C.F.R. §§54.607(a), (b).

A. Cost-Based Justification Has No Place In Calculating RHC Support

Alaska Communications supports the elimination of the cost-based justification as an option under Section 54.607(b) for several reasons. First, this process has been employed only in a small handful of cases, and has to date yielded almost nothing (such as Bureau or Commission orders, policy statements or advisory letters) to guide future rural rate justifications.[9] Therefore, a cost-based rural rate justification is of limited utility to USAC or program participants.

Second, any attempt at cost-based justification of rural rates is an extremely burdensome process. Service providers have not been required to track the cost of providing RHC-related services separately from the costs of other services of the same type that they provide to other customers. Many of the costs of providing Telecom Program-supported services are shared network costs and thus difficult to allocate on an economically efficient or cost causative basis.[10] Generating a detailed account of such costs, and allocating joint and common costs, requires considerable time and effort and is fraught with uncertainties surrounding a host of issues requiring somewhat arbitrary judgements. Indeed, many services routinely provided to HCPs under the Telecommunications Program (such as multi-protocol label switching or "MPLS" service) are offered exclusively on a non-common carrier basis, so no cost information is required to be maintained for this type of service at all. Similarly, Bureau staff must devote considerable time and effort to analyze the many types of data submitted and the cost allocations supporting this *post hoc* cost justification.

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9 *Cf.*, Letter from E. Drogula, Deputy Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, to J. Nakahata and J. Bragg, Counsel to GCI (Oct. 10, 2018).

10 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Report and Order, FCC 96-325, 11 FCC Rcd 15499 (1996), at ¶ 678 (observing that "it is difficult for regulators to determine an economically-optimal allocation of any such joint and common costs") (subsequent history omitted).

In short, the cost-based justification set forth in Section 54.607(b) of the Commission's rules no longer can be considered a reasonable approach to fulfilling the statute's requirements, in light of the considerable costs of performing this type of analysis, and the inherent limits of the results.

B. Telehealth Services Have Outgrown the Commission's Rural Rate Rule

The first opportunity to perform cost-based evaluations of rural rates under the Telecom Program did not occur until 2018, two decades into the program,[11] in part due to changes in the market and the regulatory environment over time. In the first years of the program, HCPs typically ordered DS-1 or similar services,[12] and their needs typically consisted of basic high-speed data transfer, but latency and large file sizes were not major concerns.

The past ten years, however, have seen a significant increase in HCP customer demands on bandwidth and performance in telehealth services, due to technological advances as well as regulatory changes. Demand for higher transmission speeds have skyrocketed, and concerns about service quality and network reliability have increased, as HCPs have greatly increased the size and number of files being transmitted, and added two-way, interactive telemedicine applications, such as remote imaging and live video-conferencing, telestroke, eICU, and other real-time services, to the typical range of services at rural healthcare facilities. Under HIPAA, secure transmission of ever-larger electronic patient records has become a requirement for all HCPs. RHC-supported services are regularly used to send and receive files across state lines, to cloud-based storage systems and medical facilities or practitioners in other states. Service

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11 *See* Public Notice at 2.

12 *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd 8776 (1997) ("*Universal Service Order*"), at ¶ 620 (limiting rural HCP eligibility for support to 1.544 mbps, or the equivalent of one T-1 connection), *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

providers compete for HCP contracts based not only on price and transmission speed but also on route redundancy, quality-of-service, and real-time routing management, all to maximize performance and minimize disruption in vital rural healthcare services.

As a consequence of the evolutions in technology, the market and the regulatory environment, the services most often demanded by rural HCPs are no longer traditional TDM-based telecommunications transmission services such as DS-1s, but advanced, high-speed IP-based services such as MPLS (as well as Internet access and information-rich content) classified – appropriately – as non-common carrier services. Although rates for TDM-based services have proved useful for comparison, in recent years USAC sometimes has rejected attempted comparisons between TDM-based services and IP-based services, for purposes of establishing the lawfulness of the rural rate for a Telecom Program service. For the IP-based services, there may be no tariffed or "publicly available" rates in some areas for purposes of comparison to rural rates submitted for reimbursement under the Telecom Program.[13]

C. An Efficient Approach to Approving Rural Rates

Alaska Communications has advocated that the Commission rely on market prices rather than cost justification to ensure that rural rates are not excessive. Further to that concept, the company proposes below a state-specific mechanism that would make use of all relevant and available market data yet simplify the process of rural rate approval for USAC and program participants alike.

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[13] *See Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, Report and Order, FCC 17-43, 32 FCC Rcd 3459 (2017), at ¶¶ 155, 160 (forbearing from the tariffing requirements of Section 203 of the Communications Act of 1934, as amended, for packet-based business data services and most circuit-based (TDM) business data services), *aff'd in part, vacated and remanded in part sub. nom Citizens Telecomms. of Minn., LLC v. FCC*, 901 F.3d 991 (8th Cir. 2018).

In its previously-filed comments and reply comments in this proceeding, Alaska Communications advocated a market-based approach to the rural and urban rates used to determine compensation under the Telecom Program, with the back-stop of a "lowest corresponding price" rule (similar to that used in the Commission's "E-rate" program for schools and libraries). A lowest corresponding price approach would ensure that service providers would not receive reimbursement for a rural rate that exceeds the lowest (available) price for corresponding services they offer in similar areas, unless the Commission makes an affirmative finding that the lowest corresponding price would not be compensatory in any individual case.[14] With appropriate FCC guidance, USAC and submitting parties would have greater clarity not only as to the permissible limits on rural rates for any particular type of service, but also as to the areas within which rates should be compared, and the services that may be deemed similar for this purpose.

In the event that the Commission chooses not to rely on a lowest corresponding price rule, Alaska Communications recommends an alternative proposal for revising Section 54.607. This proposal would help ensure that rural rates are no higher than market levels, would give greater clarity and certainty to program participants, and would accelerate processing of requests for Telecom Program funding. The concepts are explained below, followed by a sample maximum rural rate matrix.

First, as discussed in Alaska Communications' initial comments,[15] after USAC has issued a Funding Commitment Letter, USAC should promptly publish certain details of the service selected by each HCP submitting the service contract for support under the Telecom Program, on

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[14] *See, e.g.,* Comments of Alaska Communications in WC Docket No. 17-310 (filed Feb. 2, 2018) (Alaska Communications Comments) at 26, *citing* 47 C.F.R. §54.511(b).

[15] Alaska Communications Comments at 20.

a state-by-state basis.[16] The combined database of this information within a given state will provide a useful overview of rural healthcare telecom service price data, an important reference point for service providers and HCPs alike, as well as helpful to USAC's determining that the rural rate for a Telecom Program service for which funding is sought in a future funding year should be approved, using a comparatively-derived rate ceiling matrix, as further discussed below.

Second, the Commission must expand the scope of permissible rates within any state to be drawn on by USAC for comparison purposes, under a revised rural rate rule. This rural rate pool should include all rates for reasonably similar services (defined below) that the service provider provided under contracts signed with any HCP or any commercial customer in reasonably comparable areas of the state (again, as defined below) during the most recent complete calendar year preceding the start of the funding year for which the rural HCP is seeking support.[17]

Alaska Communications does not recommend making public competitively sensitive commercial pricing information. Rather, the Commission should require that entities providing facilities-based broadband services to end-user premises[18] submit this rural telecommunications

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[16] For each winning bid, these details specifically should include whether the offering involves customer-managed routing or carrier-managed routing (commonly known as Layer 2 or Layer 3 services, respectively), the service location, bandwidth, price, contract term, as well as any additional features that affected to the HCP's selection.

[17] For example, the rate in a contract signed by a rural HCP for service starting in Funding Year 2020, regardless of the length of the HCP's contract term, would be compared to rates in the matrix prepared by USAC based on all rates for similar services being provided in comparable areas of the state in calendar year 2019.

[18] Alaska Communications suggests that a reasonable way to gather statewide rural rate information on broadband services that are reasonably similar to the services purchased by rural HCPs would be to gather such information from those facilities-based providers of broadband services to end-user premises required annually to file broadband and telecommunications service information on FCC Form 477. *See* FCC Form 477, Local Telephone Competition and Broadband Reporting, Instructions (last updated Dec. 5, 2016), *available at*: https://transition.fcc.gov/form477/477inst.pdf. As the Commission has noted,

rate information to USAC annually on a confidential basis, for use by USAC to develop a rate matrix (described below) which *would* be made available to all HCPs and Telecom Program service providers. The rates in this matrix would provide notice to all service providers and HCPs of the maximum permissible rural rate for each type of service in each area. By drawing from statewide rural rate data, USAC would identify a larger pool of rural rates from which to create a maximum rate, from examples of services that are reasonably similar to the Telecom Program-supported services offered to rural HCPs in similar areas in the state. From those rates, USAC would develop a maximum rural rate for each service type, location type, and bandwidth in the matrix, averaging the rate inputs for each. This matrix would increase predictability and speed the processing of funding requests, so service providers and HCPs alike will know at the time they submit Telecom Program funding requests whether the rural rate will be acceptable to USAC and the Commission.

Third, the Commission should expand the concept of the "same rural area" used for comparison purposes under Section 54.607. In the *RHC Notice and Order*, the Commission proposes to compare the rural rate for which funding is sought to an average of all publicly-available rates (those of the service provider seeking funding as well as those of other service providers) for similar services in the rural area where the HCP seeking funding is located, but if the only relevant rates in that rural area are the applicable service provider's own rates, the Commission proposes use of an average of publicly-available rates in *all comparable rural areas*

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the obligation to file end-user broadband deployment information with the Commission derives from statutory obligations that require the FCC to determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion and, if not, to take immediate action to accelerate deployment of such capability. *Modernizing the FCC Form 477 Data Program*, Report and Order, WC Docket No. 11-10 (rel. June 27, 2013), ¶15, *citing* 47 U.S.C. §1302(b).

in the same state where at least one other service provider offers functionally similar services.[19] Alaska Communications asks the Commission to adopt this proposal in conjunction with the rate matrix discussed in this section. With a greater pool of publicly available rates on which to draw in each state, and a wider area from which to draw them, both USAC and service providers would be better able to develop an average of publicly-available rural rates, and make a meaningful comparison between the rates they propose to charge and commercial rates being charged for similar services in reasonably comparable rural areas in a state.[20]

In defining "comparable rural areas" for this purpose, the Commission should rely on those characteristics of a geographic area *that are relevant to network economics*. Alaska Communications has considerable experience analyzing the cost differences associated with serving HCPs in different types of rural locations in Alaska. For example, two rural villages in Alaska may be of similar size, but if one is on the road system and the other is not, their network costs may be very different, and their rates should not be averaged, for they are not "comparable" in any sense relevant to delivering RHC services (even if they happen to be located in the same Borough or other politically defined geographic area). Factors relevant to network economics include: accessibility of the community via road and the existing power grid, distance of the community (or its RHC facility) from the statewide power grid or existing long-haul telecom network facilities, whether such facilities are satellite or terrestrial-based, capacity of those existing facilities, availability of third-party telecom inputs, as well as size and density of the community.[21]

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19 RHC Notice and Order, ¶¶63-64. *See also* Public Notice at 2.

20 *See* RHC Notice & Order, ¶70.

21 *See* Alaska Communications Comments at 25. Conversely, the Commission should take care to avoid adopting arbitrary location boundaries– such as county-by-county or based on other geo-political definitions – for rate evaluation purposes because local conditions vary greatly among the states (for example, there are no counties in Alaska – only a handful of organized borough and the "unorganized borough" that comprises much of rural Alaska).

In the proposed matrix, Alaska Communications suggests that these different location types be reduced to three categories: on-road, off-road, and satellite-only. HCPs are in the best position to identify whether the facility where they seek supported service is on the road system or off-road. They may be required to identify this at the time they file FCC Form 465 with USAC. Whether a location is served only by satellite or by terrestrial middle mile facilities as well would be known to the service provider, who may be required to indicate this information when filing FCC Form 466.

With additional rate information becoming publicly available from a more broadly defined market, and a reasonably broad understanding of what makes a rural area comparable, service providers, HCPs and USAC all should have sufficient information to develop average rural rates that may serve as reasonable ceilings under a revised Section 54.607.

Fourth, because another important aspect of verifying the reasonableness of the rural rate under Section 54.607 is ensuring that the rates compared are rates for "similar" services offered in the state, Alaska Communications recommends the Commission clarify what types of services USAC may consider comparable, and consider updating the "safe harbor" bandwidth ranges it adopted in 2003.[22] The method advocated by Alaska Communications will both simplify USAC's task and provide much greater certainty to service providers and HCPs.

In the past, USAC approved some rural rates based on its estimation that certain service offerings were "similar," but disapproved other rural rates based on USAC's belief that the services in the same state offered for comparison purposes were not "similar," even though both the carrier and the customer deemed the services in question to be substantially similar based on functionality and performance characteristics. Rather than adopting a common-sense approach

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[22] *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 24546, ¶34 (2003) ("*2003 Rural Health Care Support Order*").

and permitting approval of rates within a reasonable range for reasonably similar services, USAC interpreted the Commission's rules as requiring that the services used for comparison be exactly the same in bandwidth, for example.[23] This impractical parsing of service definitions has caused unacceptable uncertainty and denials of funding in recent years, harming both service providers and their HCP customers. If the Commission expects a reimbursable rural rate to fall within an average of rural rates for similar services provided to non-HCP customers in the same state, it is critical that the Commission provide guidance to USAC, HCPs and service providers as to what services will be considered "similar" for this purpose.

To remedy this uncertainty, Alaska Communications proposes that the Commission establish guidelines for service similarity that will accommodate the full range of current service offerings, relying on what HCPs and service providers deem reasonably comparable. Further, the guidelines should be sufficiently flexible so as to remain useful as services continue to evolve with the rapidly changing market.

Specifically, a rural service offering should be deemed "similar" to other services, and the rates eligible for comparison, based on two criteria: bandwidth and functionality. Both of these are typically described in the service provider's FCC Form 466, and the Commission may ensure that the form requests this information, so USAC may use it to develop its rural rate matrix.

With respect to bandwidth, Alaska Communications believes the Commission should establish broad categories – such as services at or below 10 Mbps, services between 10 Mbps and 100 Mbps, and services at or above 100 Mbps. Within these categories, USAC could establish maximum rates on a per-Mbps basis. For example, the maximum rate for services

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[23] Alaska Communications believes that in this context USAC contravened the Commission's direction in the *2003 Rural Health Care Support Order*.

between 10 Mbps and 100 Mbps for a particular area[24] might be $50 per Mbps, producing a rate ceiling of $1,000 for a 20 Mbps service, and $2,500 for a 50 Mpbs service. For services of 100 Mbps and above, the rate would be expected to be lower on a per-Mbps basis than the rate for lower bandwidths. For services at or below 10 Mbps, the per-Mbps rate might be the highest, all other factors being equal.

With respect to functionality, Alaska Communications proposes a simple test that can easily evolve with market changes: services where the routing is managed by the carrier (commonly known as Layer 3 services) versus services where the routing is managed by the customer (commonly known as Layer 2 services), both of which are purchased by HCPs participating in the Telecom Program. Both types of services – carrier-managed routing and customer-managed routing – are types of virtual private networks ("VPNs"), in which the customer's information is segregated from other traffic on the service provider's network. In a service with carrier-managed routing, such as MPLS, the service provider actively participates in routing the customer's traffic all the way from the end-user premises throughout the network. In a VPN service with customer-managed routing, such as carrier Ethernet service, while the service provider still manages the overall service, the customer assumes responsibility for routing its own traffic over a portion of the network. Distinguishing between these two basic types of services will allow comparisons of like services without unduly constraining rural rate approval as services evolve.[25]

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[24] For discussion of the need to differentiate among locations based on factors that drive network economics, such as access to the road system and proximity to terrestrial-based broadband network facilities, *see supra*, p. 9.

[25] Alaska Communications notes that other RHC services not relevant to this rural rate analysis (such as Dedicated Internet Access) may be supported under the Healthcare Connect Program.

Fifth, location-specific information should be added to these two service-specific criteria, to form a simple but dynamic matrix that could yield reasonable limits on rural rates, simplifying the task of determining if a rural rate is reasonably comparable to other relevant rates for purposes of Section 54.607. As noted above, local factors such as accessibility of the community via the road system and the existing power grid, distance from the nearest telecom networks connected to the Internet,[26] and whether such networks are satellite or terrestrial-based, substantially affect the cost of providing services to rural HCPs. Thus, the rural rate matrix should represent an average of available prices for substantially similar services actually being purchased by HCPs or commercial customers, in reasonably comparable rural areas (on-road, off-road, or satellite-accessible only) in the same state (based on economically-significant factors).

To illustrate, USAC could establish a matrix of rural rates (using price-per-Mbps times the applicable megabits-per-second of service speed/bandwidth) for the maximum rural rate in each particular state, in the following categories:

Services featuring Customer-Managed Routing: Maximum Price-Per-Mbps			
Bandwidth (Mbps)	**Area**		
	Rural On-Road	Rural Off-Road	Satellite-Only
Up to 10 Mbps			
More than 10 Mbps, less than 100 Mbps			
100 Mbps and higher			
Services featuring Carrier-Managed Routing: Maximum Price-Per-Mbps			
Bandwidth (Mbps)	**Area**		
	Rural On-Road	Rural Off-Road	Satellite-Only
Up to 10 Mbps			
More than 10 Mbps, less than 100 Mbps			
100 Mbps and higher			

26 Though not a factor in most regions of the nation, in Alaska the nearest Internet access point is beyond state lines, accessible only via undersea cable, in the lower 48 states. Thus, access to a network with a link to an Internet access point is an important factor in terms of the cost and difficulty of providing service.

Grouping services offered to HCPs into two basic functional categories and three bandwidth categories, as proposed above, will allow for service evolution as desired transport characteristics and technologies naturally change over time, without causing delays in USAC approval of rural rates. Still, in order to remain relevant to market prices and service trends, Alaska Communications recommends that USAC or the Bureau review the prices for services being purchased by HCPs and commercial customers, and update the rates in this matrix based on average prices, no less frequently than *biannually*. The average prices could be determined based on the two most recent funding years' accepted bid information provided by HCPs, as well as publicly available commercial pricing information for services being offered in the state, to the extent that the latter is available to the Commission or USAC. Failure to recalculate average prices and update the rural rate matrix at least biannually will cause these rate ceilings to lose their reasonable relation to market prices, and potentially cause service providers to be limited to non-compensatory rates. In the event the maximum rural rates are set too low, as evident by the failure of service providers to bid on particular HCP contracts, the Bureau or USAC should have the flexibility to adjust the matrix more frequently. When significant shifts in technology occur, or speeds/bandwidths significantly evolve, USAC can request Bureau approval for appropriate modifications to the categories in the matrix, based on the data USAC will be collecting on an annual basis.

While the "rural off-road" and "satellite only" zones may not be used in all states, there are likely to be rural HCPs in many areas of the nation, beyond Alaska, in locations that lack road accessibility or are limited to satellite-delivered broadband services. Thus, Alaska Communications believes that this is a reasonable approach for all areas of the nation.

II. <u>CALCULATION OF THE URBAN RATE</u>

Under Section 254(h)(1)(A) of the Communications Act, HCPs are entitled to access to the telecommunications services they need to serve rural areas, at rates that are reasonably comparable to the rates charged for similar services in urban areas of the same state, and service providers are entitled to the urban-rural rate difference to the extent they fulfill these needs.[27] The Commission seeks comment on defining the geographic contours of urban and rural areas for purposes of calculating the urban-rural difference.[28] The Commission also proposed adopting an urban rate floor based on an average or median of non-rural rates in the state.[29]

Alaska Communications supports development by USAC of an urban rate floor for the urban areas within each state. Adopting a uniform urban rate floor for each state will be administratively efficient while ensuring that competitive bidders do not artificially lower their urban rates merely to make their bids more attractive to HCPs (expanding the urban-rural difference at the expense of the RHC program).

While an average of available urban rates is a sensible approach, the Commission should ensure that like services are being compared – so, as with rural rates, a matrix approach would be best, setting rate floors for different bandwidths (on a per-Mbps basis) and different types of service (*i.e.,* customer-managed routing vs. carrier-managed routing).

USAC should adopt a matrix of urban rate floors based on an average of publicly available rates, for a range of bandwidths, for both services with carrier-managed routing (Layer 3) and customer-managed routing (Layer 2), based on information gathered from all urban service providers for all reasonably comparable services. USAC should gather urban prices from

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[27] *See* 47 U.S.C. §254(h)(1)(A); 47 C.F.R. §54.609.

[28] RHC Notice and Order, ¶72. *See also* Public Notice at 2.

[29] RHC Notice and Order, ¶¶67, 72. *See also* Public Notice at 2. The current rule only sets a ceiling on urban rates but does not specify a floor. *See* 47 C.F.R. §54.605.

all entities in the state that are providing facilities-based broadband services to end-user premises, to maximize the available information from which to develop a statewide urban rate average in an administratively efficient manner.[30] The data set for purposes of establishing the urban rate floor matrix should include all rates for services that are reasonably comparable to the matrix service categories (in terms of bandwidth and routing management) that were provided to end-users in the state's urban areas at any time during the previous two funding years. Alaska Communications recommends that this matrix be revised biannually, to remain current with market trends. The current "urban" definition of 50,000 or greater population remains sound.[31]

Because the prices for most services provided under the Telecom Program are not tariffed or otherwise published, a targeted data collection would be necessary to give USAC a basis to establish a floor in each state. Alaska Communications recommends that commercial rates be collected, on a separate form, from all urban service providers who are required to file FCC Form 477. Filing entities should be permitted to provide this data to USAC on a confidential basis, as would be afforded commercial rate information provided for rural rate comparison purposes, discussed above. USAC should be required by the Commission to preserve the confidentiality of such competitively sensitive information.

Should the Commission decline to adopt this proposal, it nevertheless should clearly articulate some form of urban rate floor to guide USAC and program participants in determining when an urban rate is permissible to employ in calculating the urban-rural rate difference on which Telecom Program support is based.[32] The Commission's rule also should require that urban rate determinations by USAC be transparent, based on data available to HCPs and carriers, for ease of processing and to add predictability to the funding program.

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[30] *See supra*, note 18.

[31] Alaska Communications Comments at 28.

[32] *See* 47 C.F.R. §54.609(a).

In recent funding years, USAC was hindered by a lack of guidance from the Commission concerning the comparability of services for purposes of determining whether an urban rate was permissible. Rather than seek guidance from the Bureau, USAC adopted inconsistent and opaque interpretations of the urban rate rule. For example, where funding was sought for 18 Mbps MPLS service, USAC found that no comparable rate, concluding that neither 15 Mpbs MPLS service nor 20 Mbps MPLS service was sufficiently "similar" for purposes of identifying an applicable urban rate. If instead USAC had looked at the range of available speeds and found the offering in question to be within an acceptable range, it need not have rejected the rate. This type of cramped interpretation of the existing rule has led repeatedly to unreasonable delays and denials of rural telecom service support, harming HCPs as well as service providers. In contrast, adoption of clear guidance of the type recommended herein could provide the flexibility that is needed for USAC to rationally process a host of varying service requests, evolving over time.

III. <u>ADMINISTRATIVE REFORMS MUST ACCOMPANY SUBSTANTIVE PROGRAM CHANGES</u>

Many of the comments in the record of this proceeding agree that procedural reform is needed to improve USAC's processing of RHC funding requests, and enforced by more direct FCC oversight of that organization.[33] Alaska Communications has proposed a number of specific changes, including collecting more information on telecom program bids from HCPs,

[33] *E.g.,* Comments of USTelecom in WC Docket No. 17-310 (filed March 5, 2018) at 21 (the Commission should impose on USAC "a consistent year-to-year schedule of funding period windows, with the first closing sufficiently in advance of the July 1 beginning of the funding year so that USAC can issue all funding decisions before the new funding year starts"); Comments of SHLB in WC Docket No. 17-310 (filed March 5, 2018) at 32 (USAC should be required to make information related to RHC administration public and readily accessible through its website, including basic information about the status of the RHC Division's progress in reviewing funding requests, remaining time to issue decisions, and basic statistics regarding the number of funding applications received and total requested funds).

and making that information publicly available after the contract cycle is closed;[34] adopting firm deadlines for USAC to process funding requests and issue funding commitment letters, and process appeals of funding denials;[35] and requiring greater transparency into USAC's processes, including applications received, estimated demand for funding, status of processing, and status of appeals.[36]

Alaska Communications also recommends accelerating application deadlines so that funding decisions are completed prior to the start of the funding year.[37] It would not be unreasonable for the Commission to permit HCPs to begin the bidding process (filing of FCC Form 465) as early as the *first day of the prior funding year – i.e.,* open this window on July 1, 2020 for funding year 2021, which begin July 1, 2021. This would allow greater time for HCPs to review competitive bids, help HCPs file more accurate and complete applications for funding, and allow USAC time to process funding requests and appeals, *all prior to the start of the funding year*.[38]

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[34] Alaska Communications Comments at 20, 42.

[35] Alaska Communications Comments at 39-40.

[36] Alaska Communications Comments at 45.

[37] Alaska Communications Comments at 40-41. *See also* Comments of TeleQuality in WC Docket No. 17-310 (filed March 5, 2018) at 23 ("HCPs should be allowed to seek bids earlier than January 1 of a funding year so the bidding process timeframe is not so short," and that "timely commitments should be one of the Program's primary goals"); Comments of FHA/PHS in WC Docket No. 17-310 (filed March 5, 2018) at 18 (requesting that "filing window periods be fixed well in advance to enable applicants to most effectively manage their RHC Program participation").

[38] Alaska Communications also agrees with comments that support greater USAC transparency at an earlier point in the process, so parties are informed as soon as possible, and on a rolling basis, if funding is expected to be approved or constrained. *See, e.g.,* Comments of USTelecom in WC Docket No. 17-310 (filed March 5, 2018) at 21; Comments of SHLB in WC Docket No. 17-310 (filed March 5, 2018) at 32; Comments of New England Telehealth Consortium in WC Docket No. 17-310 (filed March 5, 2018) at 6 (supporting "processing deadlines that would require USAC to issue funding decisions, or at least some type of provisional funding award notice, within 90 days of receiving an application").

To address another source of uncertainty in the program, the Commission should publish a non-exclusive list of telehealth services that currently qualify for Telecom Program support, and establish a process for regularly updating this list. The Commission employs this approach in administering the Schools and Libraries program.[39] The Commission should develop a similar list for the Telecom Program, and refresh it annually, based on services approved by USAC as well as input from industry, HCPs and the public.

The need for a list of approved services is evident from inconsistent USAC actions on recent Telecom Program funding requests. For example, it is clear that MPLS services qualify for support under the Telecom Program – many such offerings have been approved over the years – yet in some (but not all) recent cases, USAC has questioned a portion of the requested funding when the HCP revealed that it was using a fraction of the high-capacity transmission service for access to Internet content.

In developing a list of approved telehealth services for the Telecom Program, the Commission should clarify that rural HCPs may continue to use telecommunications services supported under the Telecom Program to gain access to Internet content supporting delivery of rural health care, as an ancillary use of the eligible telecommunications service. Rural customers typically purchase high-bandwidth circuits from a rural service location to a central point from which they can access stored data, and communicate with the wider networked world, a function traditionally considered a "private line" or VPN service. They may also use the same circuit as a jumping-off point to the Internet, though the vast majority of capacity they purchase is needed

[39] 47 C.F.R §54.502(d) ("The Administrator shall submit by March 30 of each year a draft list of services eligible for support, based on the Commission's rules for the following funding year. The Wireline Competition Bureau will issue a Public Notice seeking comment on the Administrator's proposed eligible services list. The final list of services eligible for support will be released at least 60 days prior to the opening of the application filing window for the following funding year").

not for that purpose but for the other telehealth transmissions. The same is true of commercial customers.

Thus, the Commission should reaffirm the important role of access to Internet content in supporting delivery of telemedicine services, and reiterate its 1997 endorsement of the use of telecommunications services supported under the Telecom Program, in part, to gain access to Internet content. Specifically, in the 1997 *Universal Service Order*, the Commission stated:

> [T]he telecommunications component of access to an Internet service provider, provided by an eligible telecommunications carrier, is a telecommunications service eligible for universal service support for health care providers under section 254(h)(1)(A). That is, any telecommunications service within the prescribed bandwidth limitations used to obtain access to an Internet service provider is eligible for support under section 254(h)(1)(A). The record suggests that the most efficient and cost-effective way to provide many telemedicine services, including many of the health care services described in the Advisory Committee's list of necessary telemedicine services, is via the Internet. For example, via the Internet, health care providers may gain access to expert information and databases, communicate through e-mail and on-line support groups, and access services sponsored by the National Institute of Health and the National Library of Medicine.[40]

Access to Internet content plays an equally vital role in the delivery of telemedicine services today. Rural HCPs should not be limited to those health care resources available on private networks that interconnect with other HCPs in Alaska. Rather, they should have access to the full panoply of human medical knowledge that has been documented anywhere in the world, and the ability to consult, where necessary, with experts across the nation and, indeed, around the globe.

Yet in some cases – though again, not consistently all – USAC has questioned the inclusion in a contract for telecommunications services supported by the Telecom Program of access to the Internet as an ancillary application riding on that otherwise-eligible telecommunications service. These questions may arise from USAC's uncertainty regarding the

[40] *Universal Service Order* at ¶ 630.

continued viability of the Commission's 1997 policy of supporting the telecommunications component of an Internet access service under Section 254(h)(1)(A) of the Communications Act,[41] in the wake of the Commission's 2003 creation of the Internet Access Fund[42] and the 2012 replacement of that mechanism with the Healthcare Connect Fund,[43] both of which were explicitly focused on eligibility of Internet access services for support under Section 254(h)(2)(A).

Once the eligible telecommunications service has been provisioned to a rural HCP facility, the incremental cost of enabling access to Internet content is truly *de minimis*, and the supported transmission service arrangement remains by far the most efficient way to provide that functionality. Yet, uncertainty created by USAC's questions has caused some service providers and rural HCPs alike to purchase wholly separate dedicated Internet access ("DIA") connections to supplement telecommunications services supported by the Telecom Program. Such an approach is not only inefficient and wasteful, consuming precious HCP resources and limited rural network capacity, but also it is unnecessary under the statute and the Commission's rules. A telecommunications transmission service that is eligible for Telecom Program support as necessary for rural telehealth service should not become ineligible merely because the HCP uses a portion of the capacity to access Internet content that is also necessary to support delivery of telehealth service.

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[41] 47 U.S.C. § 254(h)(1)(A).

[42] *2003 Rural Health Care Support Order*, ¶¶ 22-29.

[43] *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, FCC 12-150, 27 FCC Rcd 16678 (2012) ("*Healthcare Connect Fund Order*"). The *Healthcare Connect Fund Order* itself recognized that networks of "private line" services, presumably purchased as telecommunications services to meet the "stringent security and privacy requirements for certain types of health care data," nevertheless "can interconnect with the Internet if necessary," *id.* ¶13, n.27.

In developing a list of supported services, the Commission would ensure that its rules better track the manner in which services are provided. For example, because routers and firewalls are part of a (Layer 3) service with carrier-managed routing, they should be funded with that service, not rejected as equipment or applications, as USAC sometimes has done (on the grounds that they were placed at the customer premises rather than the service provider's central office). If the Commission would adopt a rule, based on industry input, clearly establishing the demarcation point between the customer premises and the service provider network in context of managed services for the telehealth environment, it would resolve such matters with clarity and advance notice for all.

More generally, the Commission, or the Bureau on delegated authority, should promptly issue clarification whenever USAC is uncertain about Telecom Program coverage – denial of a funding commitment letter should never be necessary merely because USAC lacks clarity concerning the scope or meaning of the Telecom Program rules.

Moreover, when USAC decides to change its instructions for a RHC-related form, FCC rules should require USAC to provide reasonable advance notice of at least 60 days. Were the FCC to adopt a change in its rules, program participants would have at least as much, and typically more, advance notice. A change to an FCC form would occur with more notice still, given the requirement for OMB approval. Yet FCC rules do not specify any notice requirement for changes to USAC form instructions, which may be as consequential as changes to either the FCC forms or the rules. Alaska Communications therefore supports a simple requirement that USAC changes to FCC form instructions be preceded by a minimum of 60 days' advance notice.[44]

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[44] *See generally* Commissioner O'Rielly,"Further Improving the FCC's Procedures," available at: https://www.fcc.gov/news-events/blog/2018/12/20/further-improving-fccs-procedures

Finally, the Commission's rules should re-emphasize that it has directed USAC to work with HCPs and service providers to correct minor errors and add clarifying changes to applications, and has provided sufficient flexibility for it to do so in order to averting denials of funding for simple mistakes.[45] Where, for example, USAC raises a question whether a router that is part of a managed VPN service is "equipment" that is ineligible under the Telecom

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[45] In the *Bishop Perry Order*, the Commission directed USAC as follows:

> USAC shall inform applicants promptly in writing of any and all ministerial or clerical errors that are detected in their applications, along with a clear and specific explanation of how the applicant can remedy those errors . . . . The opportunity for applicants to amend their filings to cure minor errors will also improve the efficiency and effectiveness of the Fund. Because applicants who are eligible for funding will now receive funding where previously it was denied for minor errors, we will ensure that funding is distributed first to the applicants who are determined by our rules to be most in need of funding. As a result, universal service support will be received by schools in which it will have the greatest impact for the most students. Furthermore, the opportunity to amend the application will improve the efficiency of the schools and libraries program. ***If USAC helps applicants file correct and complete applications initially, USAC should be able to reduce the money it spends on administering the fund because fewer appeals will be filed protesting the denial of funding for these types of issues. Therefore, we believe this additional opportunity to cure inadvertent administrative, ministerial, and clerical errors on applications will improve the administration of fund.***

Schools and Libraries Universal Service Support Mechanism, Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, New Orleans, LA, et al., CC Docket No. 02-6, FCC 06-54, 21 FCC Rcd 5316 (2006), at ¶ 23 ("*Bishop Perry Order*") (emphasis added); *see also Schools and Libraries Universal Service Support Mechanism, Requests for Waiver and Review of Decisions of the Universal Service Administrator by Ann Arbor Public Schools et al.*, CC Docket No. 02-6, Order, DA 10-2354, 25 FCC Rcd 17319 (Wir. Comp. Bur. 2010), at ¶ 2 (identifying a wide variety of typographical, transcription, rate, and discount calculation errors as "ministerial or clerical").

Although the FCC decided the *Bishop Perry Order* in the context of the E-rate mechanism, these considerations of fundamental fairness and administrative efficiency apply with equal force to the RHC support mechanism, and in fact the Wireline Competition Bureau has repeatedly applied *Bishop Perry* in the context of this program. *See, e.g., Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-150, 27 FCC Rcd 16678 (2012) ("*Healthcare Connect Fund Order*"), at ¶ 243, n. 624 (applying the *Bishop Perry Order* in the context of the Healthcare Connect Fund); *Rural Health Care Universal Service Support Mechanism, Request for Review of Bradford Regional Medical Center*, WC Docket No. 02-60, Order, DA 10-1022, 25 FCC Rcd 7221 (Wir. Comp. Bur. 2010), at ¶ 4 (applying the *Bishop Perry Order* to the RHC Telecommunications Program).

Program, or part of an eligible service, USAC should be encouraged to seek factual clarification from the applicant and service provider as to the ownership and role of the router in question and, if necessary, seek written policy guidance that can be published by the Commission or the Bureau. It is apparent that, under today's rules, USAC often feels handcuffed by past readings of the rules, such that it frequently denies funding rather than seeking FCC guidance so an aging rule can be sensibly applied in modern market conditions. The Commission should instruct USAC that its objective is to fund the services needed by HCPs to provide healthcare services in rural areas, not to deny funding based on excessively narrow readings of the rules.

CONCLUSION

The Commission should eliminate the use of cost-based rate justification for the rural rate, and permit reimbursement under the Telecom Program when reasonably accessible data demonstrates the reasonableness of a rural rate. Average rural rates should be developed for relevant service categories and relevant geographic areas. To eliminate arbitrage concerns, USAC should set uniform urban rate floors for each state, also delineated by service type. And administrative reforms should be put in place to provide better guidance to USAC and better transparency to the public, so fewer funding requests are denied, and the program becomes more efficient over time.

The Commission should hasten to adopt these changes to its RHC rules, in accordance with the specific suggestions outlined above and in Alaska Communications' prior comments and reply comments, to become effective prior to January 1, 2020. In doing so, the Commission will allow service providers and HCPs to incorporate these necessary reforms into the 2020 funding cycle.

Respectfully submitted,

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