Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF
TELEQUALITY COMMUNICATIONS, LLC

TeleQuality Communications, LLC respectfully submits these reply comments in response to the Commission's Notice of Proposed Rulemaking and Order seeking comment on how to strengthen the Rural Health Care (RHC) Program and improve access to telehealth in rural America.[1] TeleQuality was pleased to see that the initial comments generally agreed with the key points in TeleQuality's initial comments: that robust competition is the key to a successful RHC program, that the cap should be raised, and that the program should be streamlined and simplified. Fostering competition in the RHC marketplace is the key to addressing waste, fraud, and abuse.

[1] *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Notice of Proposed Rulemaking and Order, 32 FCC Rcd 10631 (2017) (*Notice*).

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I. THE RECORD FAVORS ENCOURAGING COMPETITION TO DRIVE RATES DOWN, RATHER THAN REGULATING RATES

In its initial comments, TeleQuality argued that fostering competition in the RHC Program would be the best way to ensure equitable rates and address many of the problems the Program currently faces. TeleQuality was pleased to see that the record supports this approach, as many commenters agreed that competition, rather than regulation, was the key to improving the RHC program. GCI put it well in its comments:

> The rules for determining the rural rate must recognize that the best protection against a healthcare provider being overcharged is competitive bidding in the open market. Where a healthcare provider conducts a proper competitive bidding process and selects the most cost-effective bid for eligible services, it will receive the best rate available.[2]

To recap briefly, TeleQuality's initial comments proposed a way to let market forces do the work while avoiding an inefficient, time-consuming, excessively subjective approach. Under TeleQuality's proposed approach, the Commission and USAC would conduct the following analysis with respect to every application for RHC funding:

1) The Commission should establish urban rates via a transparent, open proceeding.

2) Rather than regulating rural rates, the Commission should establish a rebuttable presumption that if multiple vendors bid on a request for RHC-funded services, or if the relevant services have been designated as "competitive" by the Commission in its Business Data Services proceeding, the rural rate is appropriate.[3]

3) Where there is truly no competition, the Commission may consider establishing some type of "enhanced review" for "outlier" funding requests, but this must be a last resort,

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[2] GCI Comments at 29.

[3] *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, Report and Order, 32 FCC Rcd 3459 (2017) (*BDS Order*).

should only be applicable to a small subset of funding requests, and the Commission must put clear standards in place for USAC to follow in conducting such a review.

TeleQuality believes that the Commission's ultimate goal is to see lower rates for broadband. The market-based approach that TeleQuality has proposed would achieve this goal. It would simplify the RHC Program rather than make it more complex, would safeguard against waste, fraud, and rate manipulation, and would uphold the statutory principles of sufficiency, certainty, and predictability better than rate regulation would.

A. The Commission Could Eliminate Any "Manipulation" of Urban Rates By Establishing a Process To Set Them Annually

As TeleQuality explained, the Commission should be able to establish average urban rates for telecommunications services. To the extent that the Commission believes it needs additional information on urban rates beyond what is currently available,[4] the Commission could conduct a survey or otherwise obtain accurate, competitive rates for comparable services. TeleQuality believes that a process similar to the annual updating of the E-rate Eligible Services List—in which USAC would provide draft rates to the Commission, and commenters would have an opportunity to provide feedback to the Commission before final rates are established—would be the most efficient and transparent way to keep urban rates up to date.

B. The Commission Should Adopt Rules to Strengthen the Competitive Bidding Process

As for rural rates, TeleQuality explained that the best approach is not rate regulation, but rather to promote competition in the rural healthcare marketplace. Other commenters agree with

[4] As TeleQuality noted, one option would be for the Commission to use rates charged to E-rate recipients to determine an urban rate, as long as the Commission was comparing like services (e.g., dedicated versus shared, symmetrical versus asymmetrical).

TeleQuality's position that the Telecom Program's competitive bidding processes could be improved with a few additional requirements:

- that healthcare providers (HCPs) be required to respond to requests for additional information from vendors;
- that the HCP competitive bidding process be more transparent (like those conducted by schools and libraries in the E-rate program)[5];
- that the Commission prohibit bidding criteria that discriminate in favor of a subset of vendors or a particular vendor (for example, an evaluation matrix that awards significant points for prior experience with the specific customer, or significant points if the service provider owns the circuits being used to deliver the service[6]);
- that an HCP be prohibited from seeking bids for services it is already receiving pursuant to an existing evergreen contract. Such requests for services undermine competition because service providers waste time responding to illusory bid solicitations that they cannot possibly win, which can diminish their willingness to participate in the RHC Program at all;
- that HCPs be required to describe their telecom needs in detail, instead of posting generic or vague descriptions in their competitive bidding forms and RFPs;
- that HCPs be required to sign their own procurement and application forms;

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[5] Among other things, losing bidders should be able to review the winning bid as they can in the E-rate program.

[6] Service providers—including those that HCPs are likely to consider facilities-based—typically use a combination of their own facilities and interconnection with other providers' facilities to reach rural locations.

- that HCPs be required to sign additional certifications, such as a declaration by the HCP applicant that it has evaluated all bids,[7] participated in the evaluation process; and ensured an open and fair competitive bidding process;
- that HCPs be required to participate in the review and evaluation of each bid received;
- that consultants that assist HCPs with the procurement process under a letter of agency be required to certify that they have complied with program rules, including conducting a fair and open competitive bidding process; and
- that HCPs be required to consider price as the primary factor when evaluating bids.

With these improvements to the competitive bidding process, the Commission will foster greater competition. In markets that the Commission has identified as competitive for business data services, or where there were actual multiple bidders, the Commission then need only establish a rebuttable presumption that the rural rate is correct, and USAC should defer to the HCP's competitive bidding process, absent evidence of fraud.[8] Among the other benefits, including avoiding a time-consuming and possibly subjective review process, this approach would avoid the danger of establishing rural rates that are not reflective of market realities, which could undermine the Program's statutory goals by driving service providers out of the rural healthcare market altogether.

[7] Certifications could include, for example, that the HCP participated in the bid evaluations, the HCP provided oversight of the consultant, and the HCP is not aware that its consultant has an improper relationship with a vendor. Such certifications could easily be added as check-boxes on the relevant form.

[8] The Commission should recognize that vendors that do not bid in many cases choose not to do so because they know their bid will not be competitive.

The record supports TeleQuality's recommendation that the Commission encourage transparency in the RHC bidding process in order to promote robust competition. TeleQuality agrees with USTelecom that RHC applications should be publicly available and searchable, as funding applications are in the E-rate Program.[9] In addition, it might help protect against waste, fraud and abuse if service providers had to file an annual form certifying to compliance with program rules, like the FCC Form 473 in the E-rate program.

C. The Current Rate Methodologies Make No Sense In Today's Marketplace

TeleQuality agrees with Alaska Communications that the current RHC rules setting forth methodologies to determine the urban and rural rates are both outdated and anticompetitive.[10] Alaska Communications notes, for example, that the rules' reliance on "publicly available rates" has no place in a modern, competitive marketplace: "As reflected in the Commission's recent order on Business Data Services, tariffs reflect a prior era of business and undermine the efficiencies available with a market-based approach."[11] TeleQuality urges the Commission to eliminate the current methodologies or, at a minimum, update the rules in a manner that fosters robust competition.

As GCI pointed out in its initial comments, the Commission concluded in its 2017 *BDS Order* that "packet-based services are best not subjected to tariffing and price cap regulation, even in the absence of a nearby competitor."[12] The Commission determined in the *BDS Order* that "ex ante pricing regulation [would] inhibit growth and investment" in the business data

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[9] USTelecom Comments at 15-16.

[10] Alaska Communications Comments at 43-45.

[11] Alaska Communications Comments at 44.

[12] *BDS Order*, 32 FCC Rcd 3459, 3557 ¶ 237; GCI Comments at 28.

services market, and therefore "deregulate[d] counties where the provision of price cap incumbent LECs' business data services is deemed sufficiently competitive."[13] It would be inconsistent with the Commission's approach in the *BDS Order* to institute ex ante price regulation in the RHC market.

D. "Enhanced Reviews" Should Be Performed, If At All, Only on a Small Subset of Funding Requests, and Only With Clear Standards for Review Established by the Commission

Finally, in areas where the possibility of competition does not exist, the Commission may consider some type of enhanced review to ensure that rates are reasonable. TeleQuality and other commenters have pointed out the numerous problems with establishing benchmarks or enhanced reviews.[14] This type of subjective, time-consuming review could undermine the statutory principles of certainty and predictability; it could also unfairly delay the processing of applications that involved competitive bidding and should therefore be presumed to feature reasonable rural rates. To avoid those outcomes, if the Commission decides to adopt some sort of enhanced review, it should do so only as a last resort and should incorporate these principles:

- The number of applications subject to such review must be kept as small as possible;
- The Commission must not assume that a rate is too high just because the HCP has a high discount rate; and
- The Commission must set clear and publicly available standards for USAC to follow, rather than let USAC set its own standards, so that HCPs are not left to guess how their applications will be judged.

[13] *BDS Order*, 32 FCC Rcd at 3462 ¶ 4.

[14] *See, e.g.*, Alaska Communications Comments at 26; GCI Comments at 23; NCTA Comments at 7.

Regarding the first principle—applying enhanced reviews to as few applications as possible—the Commission has proposed adopting a bright-line standard for such reviews. This standard could be based on discount rate (as the Commission has noted, for example, only HCPs receiving a 99 percent discount rate are subject to enhanced review).[15] Whatever the basis for review should be determined by the Commission and should be known to participants. And once a funding request has been reviewed, it must stay valid for the pendency of the contract. Certainty for HCPs (as well as for service providers) should be a key consideration. Once an HCP has entered into a contract with a service provider and its funding request has been approved, it should not have to worry every year that the terms of that contract will be subject to enhanced review.

The Commission should be mindful that significant additional scrutiny in high-cost areas will be counterproductive: competitors will shy away from bidding on the hardest to serve and competition will not improve. As noted previously, competition is what drives cost reductions. Improving the certainty and predictability of the program will also attract more competitors, but the unknown risk of substantial reviews coupled with potential rate reductions will not encourage service providers to participate in the program.

Further, TeleQuality supports GCI's argument that the Commission's benchmark proposal "is an impermissible deviation from the obligations and objectives imposed by section 254(h)(1)(A)."[16] GCI is correct that there is no support in the Act for differentiating between HCPs or service providers on the basis of geography or funding requests.[17] As TeleQuality

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[15] NPRM ¶¶ 44, 48.

[16] *See* GCI Comments at 36.

[17] *See id.* at 37.

noted in its initial comments, the benchmark proposal dismisses the statutory directive that rural HCPs have access to rates that are reasonably comparable to rates charged to urban HCPs.

II. USTELECOM'S PROPOSAL TO RESTRICT TELECOM SUPPORT TO MILEAGE-BASED ONLY DOES NOT REFLECT COMPETITIVE MARKET RATE STRUCTURES

TeleQuality opposes USTelecom's recommendation that the Commission establish a rebuttable presumption for the Telecom Program that non-mileage-based rates for telecommunications services outside Alaska are reasonably comparable between rural and urban areas.[18] USTelecom's proposal would, in effect, eliminate the base-rate support mechanism in the lower 48 states,[19] leaving distance-based support as the only option.[20] This proposal misrepresents the state of the market for RHC services and solves none of the problems the Commission identified in the *Notice.* The Commission should therefore reject it.

USTelecom is simply wrong when it states that "the standard rate for many, if not most, non-mileage-based telecommunications services is the same in rural and urban areas."[21] To say that there are no longer meaningful price differentials between urban and rural services in the lower 48 states, as USTelecom does, is overbroad. In fact, there are significant differences between urban and rural rates for many services that TeleQuality and other providers offer to HCPs. On this issue, TeleQuality agrees with USTelecom only that determining proper comparisons between urban and rural rates lies outside USAC's area of expertise.

[18] USTelecom Comments at 12-15.

[19] 47 C.F.R. § 54.609(a)(2).

[20] 47 C.F.R. § 54.609(a)(1). The Commission has proposed to eliminate distance-based support.

[21] USTelecom Comments at 12.

USTelecom's proposal would create more problems than it would solve. USTelecom suggests that base-rate support artificially inflates demand for RHC funding.[22] But to the extent that that is true, the better solution is to encourage competition in the RHC marketplace, as TeleQuality has suggested. Eliminating the most commonly used support mechanism, on the other hand, is an overbroad and overly disruptive approach. USTelecom may try to argue that it is not proposing to eliminate the methodology, but instead has proposed establishing a rebuttable presumption. But USTelecom fails to propose how USAC would determine if the presumption has been successfully overcome. Practically speaking, a rebuttable presumption would place a burden on the HCP that would effectively eliminate the base-rate cost option.

It is unclear to TeleQuality why USTelecom would effectively propose leaving as the only option in most of the country a cost methodology that is so little used that the *Notice* proposed eliminating it entirely.[23] And it is easy to see why it is barely used: the rule for calculating distance-based support is opaque bordering on incomprehensible. If the Commission were to adopt USTelecom's program, forcing HCPs to use distance-based support if they want RHC funding at all, the Commission would have to rewrite section 54.609(a)(1) so that HCPs could understand how the distance-based support mechanism works and comply with the rule. This strikes TeleQuality as an unnecessarily disruptive approach, compared to the simpler and more effective approach of fostering competition, coupled with the changes to the rural rate rule noted above. The Commission should reject USTelecom's proposal.

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[22] USTelecom Comments at 12 ("USTelecom believes that, [outside of Alaska], USAC is awarding funding to Telecom Program applicants to account for the alleged difference between rural and urban rates in cases where there is no legitimate difference.").

[23] *See Notice* at 10656-57 ¶¶ 79-81.

III. COMMENTERS HAVE PROVIDED EVIDENCE TO SUPPORT INCREASING THE RHC PROGRAM CAP

In its initial comments, TeleQuality argued that the RHC Program cap should be raised, including retroactively for funding year 2017, and that going forward the cap should be adjusted annually for inflation. Commenters overwhelmingly agreed that the cap must be raised and have provided evidence supporting both the reason for the increased demand in the RHC program and the need to increase the cap beyond the current $400 million allocated annually.

NTCA, for example, discusses in detail the health challenges that face rural Americans in particular, including higher rates of drug dependency and higher rates of high-risk behaviors such as smoking and lack of exercise.[24] Alaska Communications and the Schools, Health & Libraries Broadband Coalition (SHLB), among others, describe the technological advances that have driven increased demand for broadband among healthcare providers.[25] SHLB points out that the trend of closures of rural healthcare facilities has contributed to the increased need for facilities to support telemedicine.[26]

These comments reinforce the point TeleQuality made in its initial comments that the pressures on the cap are not primarily attributable to waste, fraud, and abuse. GCI also refutes the Commission's assertion that increased demand in the RHC Program is largely the result of waste, fraud, and abuse.[27] TeleQuality agrees with GCI's assessment of the Network Services Solutions notice of apparent liability and the fact that the NAL does not indicate a need for greater regulation in the RHC program. As TeleQuality pointed out in its initial comments, the

[24] NTCA Comments at 2-4.

[25] Alaska Communications Comments at 12-13; SHLB Comments at 6-8.

[26] NTCA Comments at 2-4.

[27] GCI Comments at 23-24.

increase in demand is due not to waste, fraud, and abuse, but to technological advances in modern medicine and to regulatory obligations imposed on healthcare providers in recent years. TeleQuality continues to believe that more robust competition, along with incorporating greater transparency into the Program (comparable to the transparency requirements that apply to the E-rate Program) would address many of the issues identified by the Commission. But no measures designed to address waste, fraud, and abuse will change the fact that the current RHC cap is insufficient to fund the ever-increasing pressures on the fund.

While TeleQuality has not recommended a specific amount by which the cap should be raised, those commenters that did recommend specific amounts generally argued that the cap should be at least doubled.[28] Numerous commenters agreed with TeleQuality that the RHC fund should be adjusted annually for inflation.[29]

IV. IF DEMAND EXCEEDS THE CAP, THE COMMISSION SHOULD CONSIDER ESTABLISHING PRIORITY BY PROGRAM, NOT BY THE RURAL STATUS OF THE HEALTHCARE PROVIDER

As TeleQuality explained in its initial comments, it does not favor using rural categories to prioritize funding requests. Rural categories are a poor proxy for the neediest HCPs, because the level of rurality does not necessarily reflect the gap between urban and rural costs and pricing, availability of facilities, or the level of competition. Accordingly, TeleQuality urges the Commission to reject all proposals in the comments to prioritize funding based on categories of rurality.[30] If the Commission does choose to prioritize categories of requests for RHC funding, it should give priority to the Telecom Program, because it is statutorily mandated. As

[28] *See, e.g.*, Alaska Communications Comments at 13; SHLB Comments at 14.

[29] *See, e.g.*, Alaska Communications Comments at 11-12; GCI Comments at 21-22; SHLB Comments at 5.

[30] *See, e.g.*, GCI Comments at 47-48.

TeleQuality argued in its initial comments, as the Commission considers how to prioritize funding requests when the demand for program funding exceeds the cap, it must ensure that applicants receive timely and predictable funding commitments.

V. THE COMMISSION SHOULD NOT REQUIRE THAT APPLICANTS SELECT THE LEAST EXPENSIVE PROVIDER, BUT RATHER MAKE PRICE THE PRIMARY FACTOR

Responding to the Commission's request for comment on how to define cost-effectiveness for purposes of the RHC Program, TeleQuality argued in its initial comments that the Commission should not make price the only factor that HCPs are allowed to consider when choosing services, but rather that it should require HCPs to consider price as the primary factor, as E-rate applicants are required to do. Focusing exclusively on price would prevent HCPs from making the best possible choices to ensure quality service for their patients. The record supports TeleQuality's argument that price must not be the only factor HCPs are permitted to consider.[31]

VI. THE RECORD OVERWHELMINGLY SUPPORTS IMPROVING THE APPLICATION PROCESS

Commenters urged the Commission to improve the timeliness and predictability of funding commitments. In particular, TeleQuality supports USTelecom's recommendations on this front, including establishing a "shot clock" for USAC to process applications.[32] USTelecom's proposed shot clock would eradicate the excessive delays in funding commitments that have become routine in the RHC Program.

[31] *See, e.g.,* Alaska Communications Comments at 19.

[32] USTelecom Comments at 20-21.

TeleQuality suggested in its initial comments that HCPs should be allowed to seek bids earlier than January 1 of a funding year so the bidding process timeframe is not so short. TeleQuality also supports the SHLB Coalition's proposed revisions to the program calendar.[33]

It is clear from the initial round of comments that there is strong support for streamlining the RHC application process, as TeleQuality urged the Commission to do in its own initial comments. There are good ideas for specific improvements in the record. TeleQuality supports NCTA's suggestions for improving the application process.[34] Finally, as noted above, TeleQuality agrees with USTelecom that RHC applications should be publicly available and searchable, as funding applications are in the E-rate Program.[35]

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[33] SHLB Comments at 30-31.

[34] NCTA Comments at 8-10.

[35] USTelecom Comments at 15-16.

VII. CONCLUSION

TeleQuality continues to believe that competition will address most of the current problems with the RHC Program—including concerns about waste, fraud, and abuse—much more efficiently than rate regulation would. The record in this proceeding largely supports a pro-competition approach over complex and inefficient rate regulation.

Respectfully submitted,

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March 5, 2018