

March 13, 2019

BY ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: *Rural Health Care Support Mechanism*, WC Docket No. 02-60;
Promoting Telehealth in Rural America, WC Docket No. 17-310

Dear Ms. Dortch:

This filing is made on behalf of the Alaska Communications affiliates participating in the FCC's Rural Health Care Telecommunications Program ("Alaska Communications"). Alaska Communications recognizes the time and effort devoted by the Wireline Competition Bureau to providing "guidance regarding the Commission's rules for determining rural rates in the Rural Health Care Telecommunications Program" through its February 15, 2019 Public Notice.¹ Alaska Communications appreciates the Bureau's desire to help service providers and their customers navigate the Commission's rules and prepare program filings so as to expedite review and funding.²

However, Alaska Communications is concerned that the Public Notice does not comport with the company's recent experience with the Rural Health Care ("RHC") Telecommunications Program, experience that Alaska Communications has gained working collaboratively with the Commission. The Public Notice appears to overlook some of the pragmatic realities of the program as it currently is being administered, and the business realities of furnishing rural services. For these reasons, Alaska Communications offers the following specific comments on the Public Notice, and urges the Commission to take these comments into account as it crafts new RHC rules in its pending rulemaking.³

¹ "The Wireline Competition Bureau Provides Guidance Regarding the Commission's Rules for Determining Rural Rates In the Rural Health Care Telecommunications Program," Public Notice, WC Docket No. 02-60, DA 19-92 (WCB rel. Feb. 15, 2019) (the "Public Notice").

² *Id.* at 1.

³ *Promoting Telehealth in Rural America*, Notice of Proposed Rulemaking and Order, WC Docket No. 17-310, 32 FCC Rcd 10631 (2017) (the "RHC NPRM").

Public Notice Guidance: “A service provider should determine the rural rate before it responds to a health care provider’s request for bids (FCC Form 465) and ensure that the rate is sufficiently documented at that time.”⁴

Response: While this guidance may seem elementary on its face, it overlooks the challenges faced by service providers in determining the rural rate under the current rules, and fails to account for the role of USAC and the Commission in making this determination. Because the Commission’s rules provide a series of options for determining the rural rate that must be applied sequentially, the service provider often has no assurance when it places a bid in response to a healthcare provider’s Form 465 whether or under which option the rural rate will satisfy USAC. Specifically, a service provider has no way of knowing when responding to a request for bids whether its rates will satisfy the first rural rate option (average of rates actually charged to commercial customers for the same or similar services) or whether it must attempt to show USAC that its rates satisfy the second alternative (publicly available rates charged by other service providers) or whether it must finally rely upon the third alternative by attempting to cost justify its rates to the Commission (or the state). As the Commission has acknowledged, commercial rates for the same or similar services in the rural areas that qualify for RHC are rare, and thus the third option in many cases is the only viable alternative.⁵ However, this raises an even more thorny problem, which is the *time* needed to satisfy the cost justification requirement under the current rule. Alaska Communications has submitted rates for approval based on cost for three consecutive funding years. In the first instance, it took four months for Alaska Communications to secure approval of its rural rates – and such approval did not occur until after the funding year had ended and after Alaska Communications had paid millions of dollars out of its scarce cash resources to third-party service providers. Most recently, Alaska Communications submitted its rates and cost justification on November 19, 2018, and to its knowledge, Alaska Communications responded to all questions regarding this submission before the end of 2018. Healthcare providers began soliciting bids for Funding Year 2019 in January. Yet nearly four months after filing them, Alaska Communications has yet to receive word whether or when its Funding Year 2019 rates will be approved. Thus, despite its best efforts to obtain approval for its rates *before* responding to health care provider requests for bids, as advised in the Public Notice, Alaska Communications has had no choice but to bid on Telecom Program contracts without such approval. Neither the service provider nor the healthcare providers it seeks to serve has any way to know whether or when Alaska Communications’ rural rates will be approved. While Alaska Communications believes it “determined the rural rate” appropriately in each case before bidding to provide the rural healthcare provider’s service, Alaska Communications could not have known at the time of the bid whether the Commission would agree with that determination or whether it had “sufficiently documented” its rates without further explanation.

⁴ Public Notice at 2.

⁵ See *RHC NPRM*, 32 FCC Rcd at 10652, ¶63 (“We recognize that there are often few customers of a size comparable to the healthcare provider in the rural area and often even fewer service providers. This circumstance may make it difficult to develop an average rate consistent with the Commission’s rules for determining the rural rate”).

Public Notice Guidance: “Once the health care provider selects a winning bid and service provider, and enters into a commitment, any attempt to change the rates or other contract terms could violate the program’s competitive bidding rules.”⁶

Response: This guidance presumably refers to changes in rates or other contract terms made by service providers and their customers *without* the involvement of the government. However, service providers may have no choice but to make such changes after-the-fact when those changes are directed by USAC or the Commission. For example, in Funding Year 2017, after contracts had been executed, Alaska Communications was told by USAC and the Commission that its rates were “too high” and would not be approved unless reduced. Upon reducing those rates, the company still was required to obtain FCC approval, which took more than four months, as described above. The approval of rates and payment of RHC support eventually occurred well past the period when the company provided the services that it was contractually bound to provide. Although the company did not raise rates from Funding Year 2017 to Funding Year 2018, it still could not guarantee healthcare providers that its rates would not change; in that case, after two months of discussion with FCC staff, the rates submitted were approved relatively promptly, but still well after the start of the funding year. And so it continues in Funding Year 2019. Alaska Communications, of course, hopes that its rates for the coming funding year will be approved as submitted in November, but it cannot guarantee that the Commission will not require rate changes. This approach puts providers seeking approval of cost-based rates in an impossible position – providers must either refrain from bidding when healthcare providers issue requests, or bid using rates they know may change upon final FCC approval. The Commission should modify its rules as soon as possible so service providers and healthcare providers are not subject to this uncertainty in future funding years.⁷

Public Notice Guidance: “The submission of inaccurate and/or unsupported rural and urban rate information to USAC could result in a denial in funding, in whole or in part.”⁸

Response: While again this guidance is straightforward to the extent it assumes intentional submission of inaccurate or unsupported information to USAC, it ignores the difficulties providers currently face in submitting rural rate information to USAC – difficulties that the Commission can and should address in its pending rulemaking. As noted above, the three possible methods for rural rate approval currently operate sequentially; thus, service providers will not know when they submit their rates for approval under the first or second option whether USAC will reject their submission and require that they ask the FCC (or the state) for cost-based approval under the third option. Furthermore, neither USAC nor the

⁶ Public Notice at 2.

⁷ See Comment of Alaska Communications in WC Docket No. 17-310 (filed Feb. 2, 2018); Reply Comments of Alaska Communications in WC Docket No. 17-310 (filed March 5, 2018); Supplemental Comment of Alaska Communications in WC Docket No. 17-310 (filed Jan. 30, 2019); Supplemental Reply Comment of Alaska Communications in WC Docket No. 17-310 (filed Feb. 13, 2019).

⁸ Public Notice at 3.

Commission provides insight into why contracts for rural healthcare services that had been approved year over year are now being held for further examination, or why rates for services that were funded under the first two options in prior funding years now require cost justification to the FCC (or state commission). Multi-year contracts that have been faithfully performed by the service provider now are at risk because USAC is not approving *the same rates it previously approved for the same service*. This approach is patently unfair to both service providers and their healthcare provider customers, and the Commission should rectify this problem with new RHC program rules that clearly state an objective basis on which rural rates will be deemed acceptable, and which bring program operations into parity with the funding year deadlines.

Public Notice Guidance: “[U]pon receiving a bona fide request from an eligible health care provider, carriers are obligated to provide the requested, eligible telecommunications services to that health care provider at a rate no higher than the urban rate allowed under program rules. That means carriers may not require health care providers to pay any amount for the service that the carrier expected to—but did not actually—receive from the Telecom Program because the rates do not comply with program rules. Similarly, a carrier may not discontinue or refuse to provide service to a health care provider because it has not paid more than the permissible urban rate for the service.”⁹

Response: Alaska Communications believes that this guidance overstates the rights of healthcare providers under the RHC Program, and ignores the rights of service providers under the Communications Act. Service providers are obligated to provide telecommunications services upon reasonable request, where they have facilities, or to deploy facilities in accordance with their tariffed terms. Healthcare providers are entitled to purchase those services that are necessary for the provision of healthcare services in rural areas, at the urban rate, and service providers that do furnish such services are entitled to reimbursement for the urban-rural rate difference. This does not mean that service providers are required to provide service in rural areas in exchange for the urban rate and no more. They are entitled to a reasonable opportunity to recoup their costs for telecommunications services, and they are entitled to just compensation for services that are mandated under the law. That funding may be denied under the RHC program does not mean that the service provider is not entitled to payment for the services provided. Indeed, there are many reasons for denial of funding under the RHC Program over which the service provider has no control, including the healthcare customer’s failure to file the necessary paperwork with USAC, over which the service provider has no control. Failure to comply with the RHC program rules should not automatically lead to an assumption that the service provider is at fault, nor should it be cause to compel the service provider to deliver service without an opportunity to earn just compensation. Any other conclusion would quickly force service providers out of the market, to the detriment of rural healthcare services and the individuals who rely on them.

Conclusion: Notwithstanding the Public Notice, support under the RHC Program has become unpredictable, and the current program rules are difficult and sometimes impossible to comprehend and satisfy. Alaska Communications urges the Commission to adopt new rules and

⁹ Public Notice at 6 (footnotes omitted).

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procedures that are practical from an operational standpoint, capable of implementation by healthcare providers as well as service providers, ensure greater transparency, and provide more effective Commission oversight of USAC. Service providers and their customers should be able to understand and satisfy the RHC Telecommunications Program requirements in advance of the start of bidding for the funding year in which they are to apply. Support should not be denied based on arbitrary or opaque decision-making. Healthcare providers should be able to rely on this program, and service providers should have an incentive to participate in it, to serve the public interest.

Alaska Communications believes the Rural Health Care Telecommunications Program has provided well-established benefits to Alaskans that far outweigh the costs of the program. However, the current uncertainties put all service providers in an impossible position, and already some healthcare providers are dropping out of the program. To the Bureau's credit, it is attempting to improve predictability and transparency. But such efforts will not succeed until the Commission modernizes its rules and puts the program on solid footing, with clear rules and processes announced in advance, a predictable funding schedule, and accountability for all.

Please direct any questions concerning this filing to me.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Karen Brinkmann".

Karen Brinkmann

Counsel for Alaska Communications

cc: Kris Monteith
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