

May 30, 2019

**Ex Parte**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, DC 20445

Re: *Promoting Telehealth and Telemedicine in Rural America, WC Docket No. 17-310*

Dear Ms. Dortch:

On May 28, 2019, Ron Duncan, CEO, GCI Communication Corp. (“GCI”), Chris Nierman of GCI and John Nakahata, counsel to GCI, met with Commissioner Rosenworcel and her Chief of Staff, Travis Litman. On May 29, 2019, Messrs. Duncan, Nierman and Nakahata separately met with Commissioner O’Rielly and his Legal Advisor, Arielle Roth, and with Commissioner Starks, and his Acting Legal Advisor, Randy Clarke. In addition, on May 28, 2019, Messrs. Nierman and Nakahata and Jennifer Bagg, counsel to GCI, met with Ryan Palmer, Elizabeth Drogula, Johnnay Schrieber, and Darren Fernandez, all of the Wireline Competition Bureau, and Shane Taylor, of the Office of Economics and Analytics.

During these meetings, the attendees on behalf of GCI made the following points:

- The result of the Bureau’s interpretation of existing Rural Healthcare Telecommunications Program rules has significantly stunted telecommunications facilities investment and competition to serve rural healthcare providers because GCI has no ability to predict the rates it will be able to charge over the term of multi-year contracts. This results from the Bureau’s narrow and unprecedented interpretation of what constitutes comparable rates and how to determine them, and from its refusal to acknowledge that the end-to-end price can be reasonably justified by examining comparable or publicly available rates for components such as middle mile and channel terminations.
- The record in the rulemaking proceeding reflects a consensus that rate-of-return regulation based on cost studies is inappropriate, especially when targeted only at rural healthcare services that are otherwise deregulated or rate regulated under other mechanisms. GCI’s experience confirms this. The rates that would be justified under the Bureau’s cost study approach will vary widely depending on, for example, the number and amounts of RFPs won, changes in the proportion of bandwidth used by rural healthcare providers as compared with other users, and USAC decisions to disallow some healthcare provider applications, such as it has done with Maniilaq in the middle of a five year contract. The cost study approach is inherently backward looking, but GCI must make facilities investments based on forward-looking expectations with respect to its rates.

- The rate uncertainty is further exacerbated by the fact, widely recognized by economists for over thirty years, that fully distributed cost allocation mechanisms do not yield prices that correspond with competitive market prices. The report GCI filed by the Brattle Group reinforces this point.<sup>1</sup> We noted that rates of return were much lower for facilities as a whole, which minimized distortions created by fully distributed cost allocation.
- This uncertainty has led GCI to halt the steps it was taking toward deploying a fiber link to Dutch Harbor.
- This uncertainty also led GCI to decide not to bid to serve a healthcare provider that would have required a multimillion dollar investment to serve.
- The uncertainty also creates a disincentive to reduce rates because contract rates will cap the amounts that could be charged if justified by a cost study. This is the converse of Drs. Baumol, Koehn and Willig's observation that cost allocation in competitive market can lead to underrecovery of costs, because the provider is limited to the lower of market rates or the rates allowed through a cost-of-service regulation.<sup>2</sup>
- The uncertainty covers FY2018, FY2019 and could extend into FY2020, or even beyond, depending on what going forward rules the Commission adopts.
- We noted that the Bureau's narrow interpretations of existing rules were not compelled by either the text of the rules or Commission precedent, and constituted new and novel policy decisions that were properly the full Commission's to decide in the first instance.
- With respect to both going forward rules and interpreting existing rules, we urged that rules be interpreted and written in a manner that relies on marketplace information as to competitive rates as much as possible. One way the Commission could do this would be to make public the services and rates ultimately provided to rural healthcare providers, as has been done in the E-rate program. The Commission could also decide that no rate backstop is necessary where there are multiple competitive bids. Nothing in the Commission's existing rules requires it to ignore competition when evaluating a carrier's rural rates, even under a Method 3 cost study.
- In terms of addressing concerns the Commission may have about healthcare providers' procurement decisions, it is much more effective, and economically rational, to address those directly, rather than to impose price regulation on otherwise deregulated services. Procurement decisions could be directly addressed through changes in the competitive bidding rules and requirements for Form 465 service descriptions, by timely reviewing cost-effectiveness determinations, and by gradually increasing the minimum amount that a healthcare provide is required to pay. While limited forbearance may be required to do that, such forbearance could be justified based on the competing concerns underlying

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<sup>1</sup> "The Role of Competitive Bidding Based Prices in Determining the Rural Rate" by The Brattle Group on behalf of GCI Communication Corp., WC Docket No. 17-310 (filed May 24, 2019) ("The Brattle Group Paper").

<sup>2</sup> W. Baumol, M. Koehn, & R. Willig, "How Arbitrary Is 'Arbitrary'?—Or, Toward the Deserved Demise of Full Cost Allocation," Pub. Utils. Fortnightly, Sept. 3, 1987, at 17.

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Section 254 as a whole. Of course, any change in minimum payment requirements would have to be undertaken carefully so as not to make essential services unaffordable to healthcare entities with limited funds and competing critical needs.

The GCI attendees accordingly urged the Commission to grant its Application for Review, and also to set going forward rules that reflect the Commission's overall reliance on the competitive market to discipline rates.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata".

John T. Nakahata

*Counsel to GCI Communication Corp.*

cc: Commissioner Michael O'Rielly  
Commissioner Jessica Rosenworcel  
Commissioner Geoffrey Starks  
Arielle Roth  
Travis Litman  
Randy Clarke  
Preston Wise  
Jamie Susskind  
Trent Harkrader  
Ryan Palmer  
Elizabeth Drogula  
Johnnay Schrieber  
Darren Fernandez  
Shane Taylor