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

In the Matter of	)	
	)	
Petition for Waiver of 47 C.F.R. § 54.675(d)	)	
	)	
Rural Health Care Universal Service Support Mechanism	)	CC Docket No. 02-60
	)	

PETITION FOR WAIVER
TO ALLOW RURAL HEALTH CARE PROGRAM FUNDING COMMITMENTS
TO BE FULLY EXPENDED

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SUMMARY

The New England Telehealth Consortium (NETC) and Connections Telehealth Consortium (CTC) are health care consortia in the Commission's Healthcare Connect Fund with over 1700 participating sites in 16 states. NETC and CTC request an extension of time to draw down funding on previously approved funding year (FY) 2017 funding commitments. Because FY 2017 commitments were released less than four months before the end of the funding year, many eligible health care providers will be unable to utilize significant amounts of awarded funding. This is because: (1) service providers cannot immediately provision or activate newly ordered services and may be unable to do so before the last month of the funding cycle; and (2) there is not time before the end of the funding year to construct and light otherwise eligible dark fiber or to install underlying broadband services that will be made functional by otherwise eligible equipment. If this waiver is not granted, many funding commitments will not be fully utilized (or will not be utilized at all). Because the funding year will expire shortly, NETC and CTC request expedited consideration for this request.

Granting this waiver is in the public interest because it will ensure that previously approved Rural Health Care funding can be used for its intended statutory purposes. Importantly, <u>because money for approved funding requests has already been collected, granting this waiver will not affect universal service ratepayers</u>. Granting this request will also reduce waste and improve program efficiency. By allowing already-committed funding to be utilized, applicants will not need to reapply for that same funding in future years. Avoiding duplicative efforts to re-apply for already-approved but unused funding will reduce administrative burdens on USAC and on program participants including consortia like NETC and CTC. Finally, there is precedent for such a waiver in the Rural Health Care pilot program where the Commission extended the time for applicants to expend and invoice approved funding commitments.

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The New England Telehealth Consortium ("NETC") and Connections Telehealth Consortium ("CTC") hereby petition the Federal Communications Commission ("FCC" or "Commission") to provide a limited waiver of Section 54.675(d) of its Rules with respect to Rural Health Care ("RHC") Program funding commitments issued in FY 2017, and to take such other actions as may be necessary to allow these funding commitments to be fully expended.[1] Granting this request will significantly improve program efficiency by minimizing unused funding and thereby reducing the number and size of future funding requests. Granting this request will impact previously approved funding commitments only and so will not require additional universal service fund collections. Because the funding year will expire shortly, NETC and CTC respectfully request expedited consideration for this request.

In support thereof, the following is respectfully submitted:

[1] *See* 47 C.F.R. § 54.675(d) ("*Annual filing requirement*. Health care providers shall file new funding requests for each funding year, except for health care providers who have received a multi-year funding commitment under §54.644.").

I. BACKGROUND

A. NETC and CTC

NETC is a consortium applicant in the Healthcare Connect Fund ("HCF"), with over 1000 health care sites currently participating. NETC was established in 2007 as part of the Rural Health Care pilot program. Leveraging one of the largest awards in that program, NETC designed an efficient state-of-the-art network dedicated to the needs of healthcare, implemented a network operations center, and leveraged universal service funding and competitive bidding to reach long-term cost-effective contracts with multiple private carriers in the region with middle- and last-mile network facilities. The core NETC network spans three states – Maine, New Hampshire, and Vermont – with redundant network cores and independent links to the Boston area for internet access. NETC's efficient network design and long-term contracts deliver secure, competitively-priced, high-availability network services for healthcare, providing reduced costs and increased availability of affordable bandwidth to health care providers across six the New England state region (now reaching Massachusetts, Rhode Island, and Connecticut). As health care systems across these six states link their networks to the NETC regional network, NETC has realized the FCC's goal of establishing a network-of-networks for our region.[2]

CTC was established by some of the NETC board of directors in 2013 with the goal of leveraging the experience gained by NETC to support health care networks in states outside of New England. CTC currently manages HCF consortium applicants in 16 states, including

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[2] *See Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 21 FCC Rcd 11111, ¶ 10 (2006) ("[the] comprehensive network [funded through the Pilot Program] will provide the health care communities access to the various technologies and medical expertise that reside in specific hospitals, medical schools, and health centers within a region or state.").

Kentucky, Tennessee, Wisconsin, Wyoming, Hawaii, Texas, North Carolina, Illinois, Indiana and Florida.[3] CTC-managed consortia include a total of 730 HCF participants.

The relief requested in this petition would benefit many health care providers participating in the Rural Health Care program, including as many as 428 health care providers in NETC and CTC-managed consortia.

B. Filing Windows in the Rural Health Care Program

The RHC program operates on a funding year basis, with funding available from July 1 each year through June 30 the following year.[4] The application process commences before the start of the funding year.[5] Before the RHC program cap was first reached in FY 2016, USAC issued funding commitments on a rolling basis – *i.e*, USAC released them as they were approved.[6] This was possible because there was no expectation that the funding cap would be breached and so USAC did not have to wait for all applications to be reviewed in order to calculate *pro rata* reductions.[7]

For the funding years before RHC filing windows were established (*i.e.*, from 1998 through 2015), applicants typically waited several months after filing a funding request to receive a funding decision from USAC. For example, if a health care provider wanted to upgrade to a more

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[3] Consortia managed by CTC include the Kentucky Telehealth Consortium, the Hawaii Telehealth Consortium, the Wyoming Healthcare Consortium, the Tennessee Telehealth Consortium, and others.

[4] 47 C.F.R. § 54.675(b) ("A funding year for purposes of the health care providers cap shall be the period July 1 through June 30.").

[5] *See generally*, USAC RHC Filing Calendar, https://www.usac.org/_res/documents/rhc/pdf/handouts/RHC-Timeline-FY2016-FY2017-FY2018.pdf (*USAC RHC Filing Calendar*).

[6] *See* 47 C.F.R. § 54.675(c)(1) ("Generally, funds shall be available to eligible health care providers on a first-come-first-served basis, with requests accepted beginning on the first of January prior to each funding year.")

[7] *See* 47 C.F.R. § 54.675(f) ("When a filing window period described in . . . this section closes, [USAC] shall calculate the total demand for Telecommunications Program and Healthcare Connect Fund support submitted by all applicants during the filing window period. If the total demand during a filing window period exceeds the total remaining support available for the funding year, [USAC] shall take the following steps . . .].)"

expensive, higher-bandwidth service – a service that it needed but could not afford without RHC program support – the health care provider could submit a funding request and generally wait only a month or two for USAC to review and approve the request. After approval, the health care provider could then order and receive RHC support for the better but more costly service.

Beginning in FY 2016, anticipating a breach of the RHC funding cap, the FCC directed USAC to institute filing windows to ensure all applications submitted in a filing window in which the cap was reached were treated the same.[8] For FY 2016, the second and final funding window closed on November 30, 2016, and USAC issued no further funding decisions until all applications in that window had been processed – which took until April 2017.[9] In FY 2017, there was a single filing window which closed on June 30, 2017.[10] USAC began issuing FY 2017 commitments over eight months later, in March 2018.

C. <u>Effects on New or Upgraded Broadband Services of Receiving Funding Approvals Late in the Funding Year</u>

Health care providers participating in the Rural Health Care program have two options with respect to the start-date for supported services: (1) they can commence service before they receive a funding commitment (ether at the start of the funding year or sometime thereafter); or (2) they can wait until after a funding commitment is received and then seek to install or activate the supported service. Health care providers that start service in advance of a funding commitment

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[8] *See Wireline Competition Bureau Provides a Filing Window Period Schedule For Funding Requests Under the Telecommunications Program and the Healthcare Connect Fund*, Public Notice, 31 FCC Rcd 9588, WC Docket No. 02-60 (Wireline Comp. Bur. 2016) (*2016 Filing Window Order*); *see also* 47 C.F.R. § 675(c)(2) ("[USAC] shall implement a filing window period that treats all eligible health care providers filing within the window period as if their applications were simultaneously received.").

[9] *See* USAC RHC 2016 Filing Windows ("The exact amount of funding each qualifying [2016] funding request will receive is detailed in each funding commitment letter issued beginning April 10, 2017."), https://www.usac.org/rhc/tools/2016-filing-windows.aspx. USAC processed applications from the first FY 2016 filing window on a rolling basis.

[10] *See USAC RHC Filing Calendar* at 2.

proceed "at risk" as to whether funding will ultimately be approved. In the past, this meant accepting the risk that USAC might not approve the application for funding. Beginning with FY 2016, there was the added risk of uncertain *pro rata* funding reductions. Health care providers are of course obligated to their service providers for services received even where their funding application is denied or there is a funding shortfall.[11]

Health care providers that do not wish to assume the financial risk of a funding denial or a funding shortfall wait until funding commitments are finally issued before commencing eligible services. The fact that a health care provider may delay starting services is not reflective of their need for the service but may simply reflect that the needed services are unaffordable without the RHC subsidy.

For health care providers that wait to start services until after receiving a funding commitment, once they receive that commitment they will order the services from their service provider and wait for the service provider to install the service. This installation process can take from several weeks to several months, depending on the service provider and other factors, including the nature of the circuit, whether the service provider must install any last-mile facilities or make upgrades, or even weather.

In situations where funding commitments are issued late in the funding year, the service provider may not install the service until there is little if any time left in the funding year. For example, if a health care provider receiving a FY 2017 funding commitment in March 2018 immediately ordered a new broadband service, it might not be installed until April 2018 at the

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[11] In FY 2016, the FCC gave service providers the option of cancelling amounts due as a result of pro-rata reductions for customers located in Alaska. *See 2016 Filing Window Order* at ¶ 9. The FCC extended that option to service providers elsewhere in FY 2017. *See Promoting Telehealth in Rural America*, WC Docket No. 17-310, Notice of Proposed Rulemaking and Order, FCC 17-164, ¶¶ 111-17 (Dec. 18, 2017) (*NPRM & Order*). This relief is optional (for the service provider) and limited to the funding year in which the relief was granted.

soonest, but possibly not until June or July 2018. Thus, at best the applicant would receive less than three months of supported service for that funding year (part of April plus May-June), or at worst, no subsidy at all. This issue can occur in either the Telecommunications Program or the HCF. In the HCF, where supported equipment may be needed to make the circuit functional, there is a further risk that the circuit will not be installed in time for the supporting equipment to be eligible for the HCF subsidy. This situation is discussed in the next subsection.

Following are specific FY 2017 examples illustrating the effects of receiving FCLs late in the funding year:

- Funding request number ("FRN") 17269441. NETC received a 36-month funding commitment letter ("FCL") for a large Internet circuit that provides Internet access to the entire network. Because of the substantial cost of the circuit, NETC delayed implementation until after the FCL was received in March of 2018. The service provider requires 90 days to install fiber Internet circuits. The expected complete date for the new circuit is in July 2018. As a result, NETC will only be able to utilize 24 months of the 36-months of funding approved in the FCL. NETC will thus have to apply for new funding for this circuit one year sooner than it would if it could use the full 36 months awarded.

- FRNs 17278291, 17277551, 17276891. CTC (on behalf of the Kentucky Telehealth Network) received a 36-month FCL for network services and an FCL for network equipment. The health care provider could not wait for issuance of the FCL and so moved forward with a sub-optimal (non-subsidized) service.

D. Effects on Dark Fiber or Purchases of Equipment Needed to Make Eligible Broadband Services Functional

Certain network equipment, such as routers located on the customer premises, are eligible for support in the HCF program. For equipment to be eligible in the HCF, it must be "necessary to make functional an eligible service that is supported under the [HCF]."[12] For a broadband circuit to be considered "supported under the [HCF]" (for purposes of determining whether equipment

[12] *See* 47 C.F.R. § 54.635(a) (equipment is eligible where); *see also Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16751 (2012) (*HCF Order*).

necessary for the functionality of that circuit is eligible for HCF funding), the relevant broadband circuit must be both installed and functional. Similarly, for dark fiber to be eligible for HCF support it must be lit within the funding year (with a one-year extension available only for weather-related delays).[13]

Because equipment cannot be purchased until the underlying broadband circuit is installed and functional, if the underlying circuit is not installed and functional before the end of the funding period (June 30), USAC will not consider the equipment purchase to be eligible for HCF support. Similarly, dark fiber must be constructed and lit by June 30 for it to be eligible for HCF support.

Following are specific FY 2017 examples illustrating the effects of the late-funding year FCLs on eligible equipment and dark fiber:

- FRNs 17271671 and 17271591. NETC received an FCL in March 2018 for a dark fiber build, an FCL for networking equipment to light up the fiber, and an FCL for installation of the dark fiber. Because of the March 2018 award date, there may not be enough time to build out and light the fiber network before the June 30, 2018 deadline. As a result, this application could end up being essentially a wasted effort by NETC and USAC.

- FRNs 17218821, 17274441, 17256171, 17265231. These NETC health care providers received FCLs for networking equipment. In all cases there is not enough time to install the equipment by the June 30, 2018 FCL expiration date. In some of these cases, additional delay (after the FCL was issued) was caused by the unexpectedly high *pro rata* reductions,[14] in other cases there was simply not enough time to coordinate installation before the FCL expires on June 30.

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[13] *See* 47 C.F.R. § 54.634(b)(1) ("Support for non-recurring charges for dark fiber is only available for fiber lit within the same funding year, but applicants may receive up to a one-year extension to light fiber if they provide documentation to the Administrator that construction was unavoidably delayed due to weather or other reasons.").

[14] If the order on circulation recently announced by Chairman Pai is ultimately approved and provides full funding for FY 2017, this will not effect the outcome of there not being enough time to fully utilize these FCLs.

II. LEGAL STANDARD

The Commission may waive any of its rules where good cause is shown.[15] Waiver is appropriate where (i) special circumstances warrant deviation from the general rule, and (ii) such deviation serves the public interest.[16] As the Commission explained in the recent *NPRM & Order*:

> The Commission may exercise its discretion to waive a rule where (a) the particular facts make strict compliance inconsistent with the public interest, (b) special circumstances warrant a deviation from the general rule, and (c) such deviation will serve the public interest. In making these determinations, the Commission may consider evidence of hardship, equity, and more effective implementation of overall policy on an individual basis.[17]

In the December 2017 *NPRM & Order,* the Commission took the extraordinary step of partially waiving the $400 million funding cap for FY 2017. In finding good cause for such a waiver, the Commission recognized unique circumstances and the potential hardship on health care providers if the waiver was not granted.[18] The Commission concluded finally that "any potential cost to the RHC Program that could result from this Order will be minor and is outweighed by the benefits of our action."[19]

In a situation somewhat analogous to the issues in this petition, the Wireline Competition Bureau repeatedly extended the deadline to file funding requests and to submit invoices for approved funding commitments in the Rural Health Care pilot program, recognizing that it was in

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[15] 47 C.F.R. § 1.3.

[16] *See NE Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (DC Cir. 1969).

[17] *NPRM & Order* at ¶ 108 (citing *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

[18] *Id.* at ¶¶ 107-108, 110.

[19] *Id.* at ¶ 114.

the public interest to allow projects to expend approved funding to meet program objectives.[20] As the Bureau explained:

> [T]he goal of the [RHC] Pilot Program is to stimulate deployment of the broadband infrastructure necessary to support innovative telehealth and, in particular, telemedicine services to those areas of the country where the need for those benefits is most acute. Denying requests for a one[-]year extension of the second and third funding year filing deadlines would likely prevent numerous projects from deploying their funded networks, thereby undermining this goal. We therefore find that waiver of the June 30, 2010 deadline serves the public interest and is consistent with the sound and efficient administration of the Pilot Program.[21]

The Bureau also found that providing the invoicing extension (in particular), would "not be overly burdensome for USAC or the Commission."[22]

III. GRANTING THIS WAIVER IS IN THE PUBLIC INTEREST BECAUSE IT WILL ALLOW PREVIOUSLY APPROVED FUNDING TO BE EXPENDED FOR ELIGIBLE PURPOSES AND WILL THEREBY MINIMIZE UNUSED FUNDING AND WASTEFUL AND DUPLICATIVE APPLICATIONS FOR SUPPORT

NETC and CTC respectfully request the Commission grant this waiver and allow all affected health care providers to expend all awarded funding on their FCLs. Strictly enforcing current FCL deadlines will result in a significant number of unused FCLs, and a substantial amount of approved funding going un-invoiced and undisbursed. The examples noted above illustrate approved funding that will never be used, or that will be partially used. Funding commitments that are fully or partially unused are inefficient because they represent two types of wasted effort: (1) for totally unused funding requests, the efforts of applicants preparing the applications and USAC reviewing and approving them in the first instance; and (2) for partially unused funding

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[20] *See, e.g.*, *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 25 FCC Rcd 1423, ¶ 7 (2010) (*2010 Pilot Extension Order*); *see also Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 26 FCC Rcd 6619 (2011) (*2011 Pilot Extension Order*).

[21] *See 2010 Pilot Extension Order*, ¶ 7.

[22] *See 2011 Pilot Extension Order*, ¶ 19.

requests, the efforts of applicants re-applying sooner than they would otherwise need to for support (with unnecessary burdens on USAC).

Special circumstances in this case warrant deviation from strictly enforcing FCL utilization deadlines. Both FY 2016 and FY 2017 were unique situations never faced by USAC or applicants in the history of the program. USAC obviously worked diligently to process all applications as soon as possible but was not able to issue them until April and March, respectively, of the funding year. This new program calendar of having to wait many months after the start of the funding year for funding commitments created unique challenges not previously faced by program applicants. And having this happen two years in a row itself represented a uniquely challenging situation that warrants special relief.[23]

Granting this waiver is in the public interest because it will further Rural Health Care program objectives by allowing program applicants to fully expend their awarded funding for its intended purposes. NETC and CTC participate solely in the HCF. The Commission recently explained:

> With the HCF Program, the Commission intended to promote the use of broadband services and facilitate the formation of healthcare provider consortia. The Commission promoted the consortia model recognizing the increasing need for rural healthcare providers to have access to specialists who are often located in urban areas, as well as the advent of certain communications-based trends in healthcare delivery, such as the move towards electronic health records.[24]

Granting this petition will help will further these Commission goals.[25]

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[23] *Cf. NPRM & Order* at ¶ 110 (finding that back-to-back years of funding *pro ration* represented a unique situation for applicants).

[24] *Id.* at ¶ 7.

[25] *Cf. 2011 Pilot Extension Order*, ¶ 7.

Finally, granting this relief will not have significant adverse impacts on program administration or on the contribution factor. While there may be some administrative burdens on USAC associated with changing systems and processes to accommodate FCLs extending beyond their expiration period, these burdens should be more than offset by USAC avoiding unnecessary efforts processing recurring requests sooner or more frequently than necessary, or processing and approving funding requests that will never be utilized.

In the first example cited in Section I.C. above, where NETC deferred the start of an Internet circuit, USAC has already completed the work of processing 36-months of funding. By not allowing NETC to utilize the full 36 months of approved support, USAC will have to process another funding application from NETC 12 months sooner than if this waiver is granted. In the dark fiber and equipment examples in Section I.D. above, valuable administrative resources were expended processing and approving applications for funding that may never be utilized.

Finally, the contribution factor will not be affected by the relief requested because NETC and CTC are seeking only the expenditure of previously committed funds. Funds that have been committed have already been collected by USAC. The only possible financial impact of granting this relief is reducing the amount of committed but unused funding for potential rollover in future years (assuming the Commission adopts an unused funding rollover mechanism as many have urged). Although some unused funds will always be available and are inherent in the design of the program, the current schedule of releasing funding commitments very late in the funding year is creating unnecessary amounts of unused funding and represents a kind of waste of limited administrative resources. Granting this request will reduce such waste and is fully consistent with sound and efficient administration of the RHC program.[26]

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[26] *See id.*

IV. CONCLUSION

WHEREFORE, good cause having been shown, the Commission should grant this petition, waive Section 54.675(d) and such other actions as may be required to allow health care providers to expend funding awarded pursuant to all approved FY 2017 funding requests. Because the funding year will expire shortly, NETC and CTC respectfully request expedited consideration for this request.

Respectfully submitted,

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DECLARATION OF BRIAN THIBEAU
IN SUPPORT OF

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TO BE FULLY EXPENDED

My name is Brian Thibeau. I am President of both the New England Telehealth Consortium (NETC) and Connections Telehealth Consortium (CTC). I provide the following Declaration to support the factual statements in the Petition for Waiver on behalf NETC and CTC.

I have read the Petition for Review filed on behalf of NETC and CTC seeking waiver of 47 C.F.R. section 54.675(d). Without this waiver, NETC and CTC will lose the ability to fully expend certain approved funding commitments in the Federal Communications Commission Rural Health Care program. My position and responsibilities at both NETC and CTC provide me with the requisite knowledge to confirm that factual statements within and attached to the Petition concerning NETC and CTC are true and accurate.

Brian Thibeau

June 10, 2018