HWG | HARRIS, WILTSHIRE & GRANNIS LLP

July 25, 2019

Ex Parte via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

On behalf of GCI Communication Corp. ("GCI") and following up on our July 17, 18, and 23, 2019 ex parte letters, this letter further addresses legal issues raised by the Draft Order regarding the Rural Healthcare Telecommunications Program support mechanism currently slated for consideration at the Commission's August 1, 2019 Open Meeting.[1] Our prior ex partes have raised significant issues with the Draft Order's proposed rural rate-setting mechanisms that will lead to under-supporting critical services for health care providers and their patients living in highly rural areas. We also flagged unanswered questions as to how the Commission would direct USAC to implement the Commission's rural rate-setting mechanism. Additionally, our ex partes pointed out that the E-rate databases, which the Draft Order places at the core of an entirely new USAC database, cannot support the similar service determinations that the Draft Order directs USAC to make. Finally, we have also explained that, given the need to collect additional data, implementation of the Draft Order in time for the FY2021 procurement cycle is highly unlikely.

This ex parte sets out more fully why the Draft Order's rate-setting mechanisms are fundamentally unlawful, and, if adopted, would fail to meet the Administrative Procedure Act's ("APA") reasoned decision-making requirement. Accordingly, GCI again respectfully suggests that the Commission seek additional comment on the rate provisions of the Draft Order in a Further Notice of Proposed Rulemaking while, at the same time, proceeding to an order on the administrative and competitive bidding reforms set forth in the Draft Order.

[1] *Promoting Telehealth in Rural America*, Draft Report & Order, FCC-CIR1908-03, WC Docket No. 17-310 (Draft rel. July 11, 2019), https://docs.fcc.gov/public/attachments/DOC-358434A1.pdf ("Draft Order").

I. The Draft Order Fails to Consider GCI's Proposed Alternative of a Phased-In Minimum Healthcare Provider Copayment Implemented Through a Limited Exercise of Forbearance.

The Draft Order acknowledges that GCI proposed, on the record, a much simpler, less regulatory, and more market-friendly approach to reform the Program's rate mechanisms. Specifically, GCI proposed that the Commission gradually phase in a minimum copayment for healthcare providers, starting at 1% and increasing up to 5% of the difference between rural and urban rates, with rural rates determined through competitive bidding.[2] This approach would harness market forces to incent healthcare providers to design and seek in their RFPs cost-effective technology choices and network design,[3] and acknowledges and factors in the Commission's prior rate regulation determinations, which ensure that the just and reasonable standard is satisfied.[4] Rather than impose a separate ex ante rate regulation regime solely for service to rural healthcare providers supported by the Telecommunications Program, the GCI approach is consistent with the Commission's treatment of these services as offered to non-healthcare providers and with Section 254(h)(1)(A)'s language benchmarking support to "rates for similar services provided to other customers in comparable rural areas in that State,"[5] and far easier to implement. Finally, we have acknowledged that imposing such a copayment would require the Commission to undertake a limited forbearance from the urban rate requirement, but imposing such a copayment would be "more tailored and economically rational than rate regulation."[6] Moreover, the Commission has the authority to undertake such forbearance on its own motion.[7]

---

2 *See* Comments of General Communication, Inc. at 47–48, WC Docket No. 17-310 (filed Feb. 2, 2018) ("GCI 2/2/18 Comments"); Reply Comments of General Communication, Inc. at 47–48, WC Docket No. 17-310 (filed Mar. 5, 2018); Additional Comments of GCI Communication Corp. at 32, WC Docket No. 17-310 (filed Jan. 30, 2019) ("GCI 1/30/19 Comments"); Additional Reply Comments of GCI Communication Corp. at 9–10, WC Docket No. 17-310 (filed Feb. 13, 2019) ("GCI 2/13/19 Reply"). The Schools, Health & Libraries Broadband Coalition similarly proposed "[r]equiring HCPs to pay 5% of the urban-rural rate difference" to "ensure that HCPs are price sensitive to the total cost of the services." Comments of The Schools, Health & Libraries Broadband (SHLB) Coalition at 7, WC Docket No. 17-310 (filed Jan. 30, 2019).

3 *See* GCI 2/2/18 Comments at 47-48; GCI 1/30/19 Comments at 16–17; Letter from John T. Nakahata, Counsel to GCI Communication Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-310, at 8 (filed Mar. 20, 2019); *see also Promoting Telehealth in Rural America*, Notice of Proposed Rulemaking & Order, 32 FCC Rcd. 10631, 10639 ¶ 13 (2017).

4 *See* GCI 1/30/19 Comments at 9–11.

5 47 U.S.C. 254(h)(1)(A).

6 GCI 2/13/2019 Reply at 10.

7 *Modernizing Common Carrier Rules*, 32 FCC Rcd. 7132, 7134 n. 17 (2017) ("Under the statute, the Commission has the authority to forbear from applying regulation on its own motion, as well as in response to a petition for forbearance"), *citing Appropriate Framework*

Significantly, however, while the Draft Order acknowledges GCI's proposal, it fails to address it. The APA requires, of course, that courts must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[8] And it is arbitrary and capricious for an agency to "entirely fail[] to consider an important aspect of the problem . . . ."[9] Accordingly, to satisfy the requirement of reasoned decision-making, the Commission must expressly consider GCI's copayment proposal. Indeed, Section 10 also requires the Commission consider whether its conditions are met, per its terms and consistent with Section 706 of the Telecommunications Act of 1996, and the Commission must adopt it if those conditions are met.[10]

The forbearance analysis under Section 10 of the Communications Act is straightforward. Section 10(a) directs that "the Commission *shall forbear* from applying any regulation or any provision of [the Communications Act]" if it determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[11]

In making the "public interest" determination under Section 10(a)(3), the Commission must "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[12]

---

for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14901 ¶ 90 (2005), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

8 5 U.S.C. § 706(2)(A).

9 *See Motor Veh. Mfrs. Ass'n v. State Farm Ins.,* 463 U.S. 29, 43 (1983).

10 47 U.S.C. § 160(a) ("the Commission *shall forbear* from applying any regulation or any provision of [the Communications Act]") (emphasis added); *see also* 47 U.S.C. § 1302 (requiring the Commission to encourage deployment of telecommunications capability "by utilizing, in a manner consistent with the public interest, convenience and necessity . . . regulatory forbearance, [and] measures that promote competition in the local telecommunications market . . .").

11 47 U.S.C. § 160(a) (emphasis added).

12 *Id.* at (b).

With respect to the first prong of the forbearance analysis, strict adherence to the urban rate as the maximum healthcare provider payment is not necessary to ensure that charges or practices are "just and reasonable." To the contrary, the relatively small copayments (1% escalating to 5%, if necessary, over a five-year period) that GCI proposed utilize rates (whether deregulated or regulated) that the Commission has already found will be just and reasonable, and will also *promote* just and reasonable charges by ensuring that the healthcare providers are more cost sensitive in their procurement decisions. Moreover, to the extent rural healthcare providers would have to pay incrementally more, that is balanced by greater efficiency and thus reduced universal service contributions. With respect to the second forbearance prong, enforcement of this provision is not necessary for the protection of consumers. Forbearance will better serve the interests of ratepayers who ultimately bear the cost of Universal Service Fund ("USF") contribution charges by aligning the economic interests of healthcare providers with their interests, while having little impact on healthcare providers.

Most importantly, under the third prong of the forbearance analysis, adopting GCI's proposal will enhance competition precisely as Congress intended in adopting Section 10(b). As GCI has explained:

> Such an approach would permit the competitive market to function without being subjected to the distortions introduced by rate regulation. It would also serve the [Commission's] goals [of] . . . increas[ing] transparency and predictability for participants in the RHC Program. And it would be far simpler and less costly to administer than the existing and proposed alternatives.[13]

Such a market-based approach is particularly desirable in the context of the kinds of services at issue here. The Commission long ago de-tariffed non-dominant interexchange carrier rates,[14] and in the more recent *BDS Order*, the Commission mandated detariffing for business data services like those purchased by healthcare providers both where competition is fully developed and where it continues to emerge.[15] And as explained in Section IV below, the Draft Order never explains why ex ante rate regulation is unnecessary and contrary to the public interest when entities other than the USF are paying the rates, but detailed ex ante rate regulation (which is what the Draft Order would impose) is necessary and in the public interest when the USF is the payor.

Finally, GCI submits that simplifying the Program rules in a market-friendly manner will encourage greater participation by service providers, an outcome the Commission has long sought. As a number of commenters have noted, the current complexity and unpredictability of the rules is a significant deterrent to healthcare provider participation in the RHC Program. Simplifying the rules, together with the steps the Commission announced in the Draft Order for

---

[13] GCI 1/30/19 Comments at 32.

[14] *Policy & Rules Concerning the Interstate, Interexchange Marketplace*, Second Report & Order, 11 FCC Rcd. 20730, 20750 ¶ 36 (1996).

[15] *Business Data Services in an Internet Protocol Environment*, Report & Order, 32 FCC Rcd. 3459, 3557 ¶ 237 (2017) ("BDS Order").

strengthening the competitive bidding process, would increase the likelihood of competitive bids—and thus the price-disciplining effect of both bids that are actually submitted and *potential* bids.[16]

II. The Draft Order's Provisions Regarding the Determination of "Comparable Rural Areas" Are Arbitrary and Capricious, and Inconsistent with Section 254(h)(1)(A).

Under 47 U.S.C. § 254 (h)(1)(A), rural rates must be based on "rates for similar services provided to other customers in *comparable rural areas in that State*."[17] But the provisions of the Draft Order addressing how the "comparability" determination should be made are both arbitrary and capricious, and inconsistent with the statute. They are arbitrary and capricious because, as drafted, the Draft Order's four rurality zones (Extremely Rural, Rural, Less Rural, and Urban) treat geographic areas that are *not* comparable as comparable without a reasoned explanation. For the same reason, those provisions also violate the statute: as proposed, the Draft Order would cap rates at median rate levels across areas that are clearly incomparable.

In adopting the three rural area tiers, the Draft Order anticipates "a more precise means of determining rurality because it prevents rates in the most rural areas from being unfairly reduced by being combined with rates from less rural areas." Yet this foundational principle does not hold true for Alaska, where almost all communities would be treated as "extremely rural." As GCI explained in a recent *ex parte*,[18] Figure 3 of the Draft Order illustrates that the Draft Order

---

[16] In the *BDS Order*, the Commission explained that "business data services contracts, being large-scale, winner-take-all awards, closely approximate the conditions laid out by Klemperer of an ideal bidding market environment." *BDS Order* at 3483 ¶ 47. In such circumstances:

> When bidding on a contract, providers often "have no way of knowing with any reasonable degree of certainty which other providers are capable of serving that customer over their own facilities" and, therefore, when bidding on an RFP they "make much rougher assessments of the possibility of facing competitive bids"—a dynamic that "ensure[s] that the benefits of competition redound to all customers in an area where competitive facilities have been deployed, not just those who are located within a certain distance of a network, or that offer a certain level of revenues.

BDS Order at 3512–3513 ¶ 118. The Draft Order nowhere considers the impact of potential bidders on prices offered.

[17] 47 U.S.C. § 254 (h)(1)(A) (emphasis added).

[18] Letter from John Nakahata, Counsel to GCI Communication Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-310, at 1–2 (filed July 17, 2019) ("GCI 7/17/19 Ex Parte"). *See also* Letter from John T. Nakahata, Counsel to GCI Communication Corp. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-310, at 2 (filed July 25, 2019) ("GCI 7/25/19 Ex Parte") (proposing four subcategories of "Extremely Rural" and giving the

treats highly dissimilar areas of Alaska as "comparable," by including all of these dissimilar areas within the "Extremely Rural" tier.[19] As set forth in the Draft Order, the areas in Alaska covered by the Extremely Rural tier include, for example, both Valdez—which is a highway-served community with electrical power supplied by an intertied power grid, and fiber backhaul—and St. George Island—which is a small island in the Bering Sea accessible only by boat or plane, with only local power generation, and without fiber backhaul. There are many other places on the Alaska mainland that also lack road access, intertied power grids, and fiber backhaul, including regional centers of a few thousand people such as Bethel or Dillingham, and tiny villages with only a few hundred (or fewer) inhabitants. The costs to serve such areas with widely varied infrastructure endowments and geographic and demographic circumstances are very different:

> In a small, extremely rural community that is not located on the road system, the price for a service can be ten times (or more) greater than the price for the same service in a similarly-sized (yet still extremely rural) community on the road system. These price differences often reflect very high underlying costs associated with purchasing capacity from third-party service providers to span the considerable distance to an existing fiber network.[20]

Costs-to-serve also vary dramatically depending on the kinds of networks available:

> Areas that can be served only by satellite should not be grouped with areas that can be served by satellite and other means; similarly, areas that can only be served by satellite and microwave are likely not similar from a cost perspective to areas that can also be served by fiber.[21]

Indeed, wide cost variations exist even among terrestrially served areas—those without fiber are much higher cost than those with fiber.[22] Grouping such disparate areas together will systematically under-support service to the higher cost areas because the rates included in determining a median will mix rates for lower cost and higher cost areas.

The Draft Order exacerbates this problem. When there is no comparable service within a particular rurality tier, rates will be determined by "the available rates . . . from the tier next

---

example of Kotzebue and Koyuk as communities in the same general region, but with very different telecommunications infrastructure and thus costs to serve and increase capacity).

[19] Draft Order ¶ 32 (Fig. 3).

[20] Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-310, at 2 (filed July 19, 2019).

[21] GCI 7/17/19 Ex Parte at 2.

[22] *Id.* Indeed, even fiber-served areas can have very different costs—for example, those served by Quintillion in the northwest have very different supporting infrastructures (and associated costs) than fiber-served areas along Alaska's highways. *See, e.g.*, Letter from Andrew D. Lipman, Counsel to Quintillion Subsea Operations, LLC, to FCC, WC Docket Nos. 02-60, 17-310, & 02-6, at 7–9 (filed June 19, 2019) ("Quintillion 6/19/19 Ex Parte").

lowest in rurality in the health care provider's state."[23] In other words, "the Administrator will use the rates from the Rural tier if no rates are available in the Extremely Rural tier, and from the Less Rural tier if no rates are available in the Rural tier."[24] As applied to Alaska—which overwhelmingly comprises relatively to extremely remote areas falling into the "Extremely Rural" tier—this process could have "rural rates" determined by services in small *cities* like Juneau or Ketchikan. By grouping almost all of Alaska into one category, the current proposal fails to take into account substantial geographic and cost of service differentials across the state. To capture a reasonable estimation of these variabilities, adjustments must be made to address the well-documented and widely accepted unique nature of Alaska.

ACS's proposal simply to add a fourth tier for off-road areas still does not sufficiently address this variation, and thus would still lack a rational basis for meeting the statutory requirement that areas be "comparable."[25] By lumping fiber-served, off-road communities into the same geographical category with terrestrial (non-fiber) served, off-road communities, ACS's proposal would compare communities with vastly different underlying infrastructure and network cost characteristics. For instance, ACS's proposal would compare Sitka—an off-road fiber-served community of almost 9,000 in Southeast Alaska—with Kiana, a village of 300 people located north of the Arctic Circle and served by a microwave network that does not that have the almost unlimited capacity of fiber. This is also true of communities in closer proximity: the off-road regional center of Kotzebue is served by both Quintillion fiber and GCI microwave, but the village of Koyuk, approximately 150 miles away but not connected by roads, is served only by microwave. Neither of these examples can rationally be considered similar, nor can they be expected to have similar costs or rates. Comparing prices for services in such communities will most certainly result in under-recovery of costs in the much more isolated rural village. For this reason, GCI has proposed grouping Extremely Rural Alaska communities into four subcategories: Road-system/fiber-served; Off-road-system/fiber-served; Off-road-system/terrestrially (non-fiber) served; Satellite-only served.[26]

Furthermore, administrative feasibility cannot justify ignoring these differences among communities. As GCI has separately proposed, the Wireline Competition Bureau already has data allowing it to classify the substantial majority of Alaska communities in the "Extremely Rural" tier into one of the four subcategories.[27]

Moreover, the Draft Order contains virtually no analysis as to the outcome of its proposed rurality tiers. Without such analysis, the Draft Order's geographic comparability tiers are

---

[23] Draft Order ¶ 58.

[24] *Id.*

[25] Letter from Karen Brinkmann, counsel to Alaska Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-310, at 2 (filed July 24, 2019).

[26] *See* GCI 7/25/19 Ex Parte at 2.

[27] *See id.* at 2 (describing the existing data collected pursuant to Alaska Plan commitments and how it could be supplemented efficiently).

arbitrary and capricious. As noted above, under the APA, an agency's decision must be "based on a consideration" of all "relevant factors"[28]—it cannot "fail[] to consider an important aspect of the problem."[29] Here, the fundamental question of what makes rural areas "comparable" within the meaning of Section 254(h)(1)(A) is an "important aspect of the problem," and the Commission's failure to consider it is inconsistent with both the statute itself and the agency's APA obligations.[30]

III. The Draft Order is Arbitrary and Capricious in Other Important Respects.

Although the geographic "comparability" issue discussed above is the most glaring failure of reasoned decision-making in the Draft Order, the decision fails the "arbitrary and capricious" standard in other respects as well. We briefly set forth those defects here.

1. Lack of Guidance Regarding What Services Should be Treated as "Similar": The Draft Order's failure to consider "important aspect[s] of the problem" is not limited to the geographic comparability analysis. With respect to the critical question of what services should be treated as "similar" for the purpose of calculating RHC rates, the Draft Order raises far more questions than it answers.

First, as noted above, the Draft Order indicates that USAC should not limit the "similar inquiry to solely telecommunications services," but it does not address which non-telecommunications services should be included or why.[31] Leaving this sort of fundamental policy determination to USAC does not just violate non-delegation principles[32]—it also represents a failure of reasoned decision-making.[33] Any consideration of "relevant factors" consistent with the Commission's obligations under the APA would need to address what makes services that are not covered by the RHC Program (including all non-telecommunications services) "similar" to those that are.

---

28 *See, e.g., Sangre de Cristo Commc'ns, Inc. v. F.C.C.,* 139 F.3d 953, 957 (D.C. Cir. 1998) (internal citations omitted).

29 *See Motor Veh. Mfrs. Ass'n v. State Farm Ins.,* 463 U.S. 29, 43 (1983).

30 That failure is particularly notable here because the Commission expressly recognized Alaska Communications' proposal for a more granular rural tier structure, *see* Draft Order ¶ 31 n.84, but failed to address it.

31 *Id*. at 11 ¶ 18.

32 *See infra* Parts V–VII.

33 *See ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) (if a standard "'offers no meaningful guidance' to affected parties, it will fail 'the requirement of reasoned decisionmaking'") (quoting *United States Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 754–55 (D.C. Cir. 2015)).

The limited guidance that the Draft Order provides regarding "similarity" only underscores the intractable problems as to which the Commission offers USAC no guidance. For example, the Order recognizes that whether a service is best-efforts or dedicated, as well as whether it is symmetrical versus asymmetrical, may be relevant to the similarity analysis.[34] The Draft Order also recognizes that other, unspecified service quality specifications may be significant—but then in a footnote suggests that USAC will publish only two types of rates, dedicated and not-specified-as-dedicated.[35] Clearly, however, any real-world consideration of similarity would require USAC to consider a much broader range of priority levels than "best efforts" and "dedicated"[36]—as well as to distinguish circuits that have latency limits, given that some of these circuits support medical procedures or electronic health records systems that are not latency-tolerant, and to distinguish other important service quality factors such as whether a service is protected (e.g. has redundancy in case of failure), jitter, or mean time to restoral. These are customary, not exotic, service quality factors, and each can substantially affect the rate of the service offered. There are serious questions whether USAC even has the expertise to evaluate such distinctions and make comparability determinations, as well as whether the databases to which it has access will support such critical delineations.[37] A failure to address these issues would be arbitrary and capricious.

The Draft Order also recognizes that bandwidth level is a significant determinant of similarity. In determining functional similarity, USAC is supposed to consider other services with "advertised" speeds 30% above or below the requested service.[38] But the Draft Order contains no discussion of why a 30% rule makes sense across the board, and it does not. The 30% bandwidth range is very large for high capacity circuits—for example, 700 Mbps to 1.3 Gbps for a 1 Gbps circuit. On the other end of the spectrum, at low bandwidths, ± 30% is a very narrow range: a 5 Mbps circuit would have a comparability range of 3.5 Mbps to 6.5 Mbps. To address this, GCI has proposed that the Commission consider that the comparability range would be no lower than a fixed amount, which could be 30 Mbps, as in the 30% example given in the Draft Order, 40 Mbps, the existing DS3 safe harbor range, or 50 Mbps, the range up through the

---

[34] *See* Draft Order ¶ 17

[35] *Compare* Draft Order ¶ 17 with Draft Order ¶ 17 n. 51.

[36] AT&T's pricing guide, for example, shows six levels of service quality priority. *See AT&T Business Guide: AT&T Switched Ethernet Service (TCAL)*, AT&T, at 7, 14–16 (July 25, 2019), http://serviceguidenew.att.com/sg_CustomPreviewer?attachmentId=00P0h00001KJwt3EAD. Significantly, however, there is no standardization of service quality levels across the industry, which will make it even more difficult for USAC to compare relevant service quality tiers.

[37] USAC's E-Rate Open Data database does not even distinguish between "best efforts" and "dedicated" levels of priority, let alone the level of prioritization of packets, jitter, latency, outage or service restoral SLAs. *USAC Open Data: E-Rate*, USAC, https://opendata.usac.org/browse?category=E-rate&limitTo=datasets (last visited July 24, 2019). A new data collection methodology would be necessary to obtain this information.

[38] Draft Order ¶ 15.

Ethernet equivalent of a DS-3. The Commission needs to explain why a blanket 30% similar service zone is reasonable and justified by the record.

In addition, the Draft Order contains no discussion of why the price for a high capacity circuit providing 85% greater bandwidth should be treated as similar to the lower-bandwidth service, especially if the Commission is contemplating that USAC will select a median of the *total price* of all circuits within that range, rather than a median of the per Mbps rates that would then be applied to the healthcare provider's circuit. There is certainly no data in the record to support a conclusion that circuit prices are flat across the entire ± 30 % bandwidth range. In any event, what actually makes sense—as GCI has argued throughout this proceeding[39]—is computing a median per Mbps rate, rather than a median of the total circuit price, that could then be applied to the specific circuit purchased by the healthcare provider. If the Commission intends for USAC to determine the median of the total price of circuits rather than the median per Mbps rate within the specified bandwidth range, that determination also would be arbitrary and capricious.

The key point here is that the Draft Order simply *contains no discussion of these issues*—this failure of reasoned explanation will render the Commission's adoption of the 30% rule and the associated determination of the median rate arbitrary and capricious.

In addition, the Draft Order fails to address how USAC would be required to treat volume or term commitments, so the pool of purportedly "similar" services could end up including all levels of total volume purchased and contract terms. Indeed, this result will be hard to avoid, since any database to which USAC could turn will likely include both rates subject to volume and term discounts together with rates that are not. As GCI has previously argued, however, using high volume, longer term contracts to set rates for shorter term or lower volume contracts disrupts the economics of such offers and could limit their availability—and thus lead to higher rates and support costs.[40] Once again, the Draft Order's failure to address this important issue at all is arbitrary and capricious.

2. Lack of Justification for ILEC-Prescribed Rate-of-Return: The Draft Order eliminates the cost-based support mechanism under which carriers can currently request approval of a cost-based rate if there are no rates for similar services, but would allow service providers to file a petition for waiver of the rules and seek cost-based rates.[41] Among the showings that a carrier

---

[39] *See, e.g.*, Application for Review of GCI Communication Corp. at 8–9, WC Docket No. 17-310 (filed Nov. 9, 2018); Letter from John T. Nakahata, Counsel to GCI Communication Corp., to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur., WC Docket No. 17-310 at 4–6 (sent via email May 15, 2018), attached to Application for Review of GCI Communication Corp. at Exhibit E, WC Docket No. 17-310 (filed Nov. 9, 2018) ("GCI 5/15/18 Letter").

[40] *See, e.g.,* GCI 5/15/18 Letter at 14–15.

[41] Draft Order ¶¶ 68–69.

would need to make, however, is that "application of the rural rate published by [USAC] would result in a projected rate of return on the (net) investment in the assets used to provide the rural health care service that is less than the Commission-prescribed rate of return for incumbent rate of return local exchange carriers (LECs)" of 10.875%.[42]

In previous filings, GCI has explained that there is no rational basis to use the low ILEC-prescribed rate of return in the context of the RHC Program—it is inapplicable for a number of reasons.[43] Perhaps most importantly, the Commission has not adopted a prescribed rate of return for interexchange services, let alone for interexchange rates in rural Alaska. Unlike local services, interexchange services are at significant risk for nonpayment, and of course interexchange carriers lack the risk mitigation of NECA pooling and other mechanisms available to ILECs.[44] In addition, these services under the RHC Program must mandatorily be rebid annually unless they fall under an evergreen contract.[45] In short, the two contexts involve entirely different kinds of carriers operating in very different markets, and the Draft Order contains no reasoned explanation for imposing the rate of return from one market on the other.

3. Fundamental Arbitrariness of the "End-to-End" Requirement: The Draft Order provides that a "'rate' under our new approach continues to mean a single rate for complete end-to-end service."[46] But the Commission order cited in support has nothing to do with the kinds of comparables that may be used to determine a RHC Program rate, or whether comparables for each component may be used when there are no end-to-end comparables.[47] Rather, the issue addressed by the portion of the *Universal Service First Report and Order* cited in the Public Notice was "whether distance-based charges could be eligible for support pursuant to section 254(h)(1)(A)."[48] In that context, the Commission's interpretation that the rate referenced in the

---

42 *Id.* ¶ 69.

43 *See, e.g.,* Application for Review of GCI Communication Corp. at 15–16, WC Docket No. 17-310 (filed Nov. 9, 2018); Letter from Jennifer P. Bagg, Counsel for GCI, to USAC, Rural Health Care Program, WC Docket No. 17-310, 13–14 (Mar. 30, 2018), attached to Application for Review of GCI Communication Corp. at Exhibit C, WC Docket No. 17-310 (filed Nov. 9, 2018).

44 *See Connect America Fund, et al.,* Report & Order, Order & Order on Reconsideration, & Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3198 ¶ 292 (2016) (cataloging AT&T points regarding small ILEC risk mitigation mechanisms).

45 *See Evergreen Contracts*, USAC, https://www.usac.org/rhc/telecommunications/health-care-providers/evergreen-contracts.aspx (last visited July 25, 2019).

46 Draft Order ¶ 57 n.156.

47 *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, 9127–29 ¶¶ 674–75 (1997) ("*Universal Service First Report and Order*").

48 *Id.* at 9127 ¶ 673.

statute was the total end-to-end charge for the rural circuit made sense. Otherwise, "section 254(h)(1)(A) could do little to reduce the disparity between rural and urban rates," which would undermine Congress's "emphasi[s] [on] the importance of making telecommunications services affordable for rural health care providers."[49] But the fact that the end-to-end rate must be *supported* to achieve Congress's goals does not logically limit comparables for *pricing* purposes to end-to-end circuits rather than components—particularly where no end-to-end comparables exist. The Draft Order thus contains *no* legal justification for the end-to-end requirement.

Under the Draft Order, that requirement will have the arbitrary and capricious consequence of treating services that are not genuinely comparable as comparable. That is because of the Draft Order's lack of granularity in the determination of "comparable rural areas." As discussed above, nearly all of Alaska falls into the "Extremely Rural" category. But ILECs across Alaska have very different channel termination rates.[50] And those channel terminations are a significant cost component for carriers providing services under the Program. The result will be that widely differing end-to-end rates—reflecting different channel termination rate components—will be subject to the same median rate cap. The Draft Order's completely unjustified end-to-end requirement is thus both unreasonable in itself, and underscores the unreasonableness of the "comparable rural areas" determination.

---

49 *Id.* at 9128 ¶ 675.

50 The following Alaska incumbent LECs, all in the "Extremely Rural" tier, have published DS1 Channel Termination rates in NECA Tariff No. 5, § 17.3.8:

Company Name	7/2/19 Special Access Band	DS1 Rate
BRISTOL BAY TEL COOP	10	$ 139.24
YUKON TEL CO INC	11	$ 151.78
MUKLUK TEL CO INC	18	$ 277.45
BETTLES TEL CO INC	19	$ 302.42
INTERIOR TEL CO INC	20	$ 329.64
NUSHAGAK ELEC & TEL	21	$ 359.31
COPPER VALLEY TEL	23	$ 426.89
ARCTIC SLOPE TEL	24	$ 453.59
BUSH-TEL INC.	26	$ 515.71
NORTH COUNTRY TEL CO	28	$ 612.71
OTZ TEL COOPERATIVE	28	$ 612.71
ALASKA TEL CO	29	$ 667.86
ADAK TEL UTILITY	33	$ 942.73
SUMMIT TEL & TEL -AK	36	$ 1,220.87
CIRCLE UTILITIES	39	$ 1,581.06

IV. The Draft Order Fails to Justify Erecting a Scheme of Ex Ante Rate-Setting Regulations for Services for Which the Commission has Forborne from Ex Ante Rate-Setting Regulations.

As noted above, the Draft Order proposes to revise rather than eliminate the current complicated system of ex ante price regulation under RHC Program rules. As GCI has argued throughout this proceeding, however, such ex ante rate regulation is outdated, unnecessary, difficult to administer, and undermines incentives for investment.[51] The Commission long ago de-tariffed non-dominant interexchange carrier rates, and in its recent BDS orders have also mandated detariffing for some same kinds of business data services purchased by healthcare providers under the Program. The Draft Order's complete failure to explain why multi-layered backstop pricing rules are needed under the Program for a telecommunications marketplace *that the Commission itself has repeatedly found to be competitive*—as well as the Draft Order's unexplained departure from those precedents—is arbitrary and capricious.

The Commission initially implemented the RHC Telecom Program in 1997, when the process of detariffing long distance rates was just beginning.[52] Even at that time, however, the Commission recognized that competitive bidding should be the foundation of determining rural rates; it found that "fiscal responsibility compels us to require . . . competitive bids," which are "the most efficient means for ensuring that [Program participants] are informed about all of the choices available to them."[53] The rules therefore required competitive bidding for all services provided to RHC Program participants.[54] Unfortunately, the Commission did not stop with that easy-to-implement, market-driven framework. It also promulgated the complex regulatory backstop that the Draft Order now seeks to revise.[55]

In the intervening two decades, however, the types of business voice and data services available and the Commission's overall approach to regulation have changed dramatically. The Commission now relies primarily on competitive markets to regulate both long distance and Ethernet service rates, in contrast to the price regulation regime of 1997.[56] Today, *no* packet-

---

51 *See, e.g.,* GCI 1/30/19 Comments at 8–18.

52 *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report & Order, 11 FCC Rcd. 20730 (1996); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Order on Reconsideration and Erratum, 14 FCC Rcd. 6004 (1999) (following remand of the first decision by the D.C. Circuit).

53 *Universal Service First Report and Order* at 9029 ¶ 480.

54 *Id.* at 9133 ¶ 686.

55 *See* 47 C.F.R. § 54.607.

56 *See, e.g., The Role of Competitive Bidding Based Prices in Determining the Rural Rate* at 1, William Zarakas and Agustin J. Ros, Principals, The Brattle Group (May 24, 2019), attached to Letter from John Nakahata, Counsel for GCI Communication Corp., to Marlene H. Dortch,

based business data services are subject to ex ante rate or tariffing regulation,[57] and even DS-1 and DS-3 special access services are being mandatorily detariffed across the vast majority of the country.[58]

Significantly, this is true not only where competition is fully developed, but also where it continues to emerge. As the Commission indicated in the *BDS Order*, "[w]e further find that packet-based services are best not subjected to tariffing and price cap regulation, *even in the absence of a nearby competitor*."[59] The Commission noted that, in its view, *potential* BDS competitors "constrain[] pricing by . . . participating in similar customer service bidding requests" even "without any physical presence of the potential competitor in the nearby geography."[60] Moreover, the Commission explained that potential new competitive entrants must be given incentives to invest in new networks or facilities and to realize a return on their investment.[61]

The Commission's recent *BDS Transport Order* reaffirmed these principles with respect to transport services offered to enterprise and wholesale customers, "tak[ing] the next steps in eliminating the unnecessary costs and harmful market distortions that arise from imposing pricing and other regulation where competition can be reasonably expected to ensure just and reasonable rates."[62] That *Order* also reiterated that such "regulatory burdens" can "stifle investment and growth in advanced communications networks and ultimately inhibit the transition to IP-enabled and other next generation services."[63]

Secretary, FCC, WC Docket No. 17-310 (May 24, 2019) (discussing the deregulatory evolution with respect to BDS).

[57] *BDS Order* at 3557 ¶ 237.

[58] *See* 47 C.F.R. §§ 61.201 (Price cap ILECs), 61.203 (CLECs).

[59] *BDS Order* at 3500 ¶ 88 (emphasis added).

[60] *Id.* at 3490 ¶ 67.

[61] *Id.* at 3501–02, 3505, 3517–18 ¶¶ 92–93, 101, 127. Importantly, however, the Alaska market *is* competitive, not just potentially competitive. The Requests for Proposals ("RFPs") issued by healthcare providers under the RHC Telecom Program often attract multiple bidders, such as ACS, Leonardo DRS, AT&T, and GCI. Indeed, GCI has lost approximately 50% of competitive bids. In these circumstances—where services for RHC providers *are* "subject to competition"—the Commission has correctly found that "anchor or benchmark pricing is unnecessary and could in fact inhibit investment in this dynamic market by preventing providers from being able to obtain adequate returns on capital." *Id.* at 3500 ¶ 87.

[62] *Business Data Services in an Internet Protocol Environment, et al.*, Report & Order on Remand, FCC No. 19-66 ¶ 4 (rel. July 12, 2019) ("*BDS Transport Order*").

[63] *Id.* It also bears emphasis that relying on market-driven rates appropriately acknowledges the risks of regulatory error inherent in ratemaking, which the Commission also acknowledged in the *BDS Order*:

The Draft Order appears to contend that competitive bidding is insufficient to reliably establish just and reasonable rates because of a purported lack of competitive bids.[64] However, nothing in the Commission's general rate regulation regime applicable to all purchasers of these services relies on the instances of multiple responses to RFPs. Where the Commission has eliminated ex ante rate regulation, it has made a predictive judgment that the market will be sufficiently competitive to discipline rates, irrespective of the number of bids that users may receive in response to an RFP.[65]

In short, the Commission now relies on the market to set rates for Ethernet and most other business data services. The RHC Telecom Program rules rationally should do the same. The same motivating factors are present with respect to pricing in the RHC Program—indeed there is *no* coherent basis for applying strict ex ante regulation to RHC-purchased BDS services, while applying no such reviews to purchases of the same services by other parties. The distinction is entirely arbitrary.

Significantly, the Draft Order does not even attempt to justify this arbitrary differential treatment of the same services. That omission alone would represent a failure of reasoned decision-making—but here the Commission has *also* departed from its BDS orders without explanation. It is, of course, "axiomatic that agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent."[66] Here the Commission has done neither.

> [I]t is very difficult . . . for a regulator to estimate the efficient price level in a business with the following characteristics: high uncertainty due to frequent and often large unforeseen changes in both customer demand for services and network technologies that are hard to anticipate and hedge against in contracts with customers; a complex set of products and services, which are tailored to individual buyers; costs of provision that vary substantially across different customer-provider combinations, and large irreversible sunk cost investments that a provider is required to make before offering service.

32 FCC Rcd. at 3517–18 ¶ 127.

[64] Draft Order ¶ 62. USAC filed this data in the record, but there is no ability for interested parties to examine how that data was compiled. Thus, interested parties cannot assess the reliability of this data. For example, did USAC count evergreen contracts as no-bid contracts in the years in which they were not required to be re-bid?

[65] *See BDS Order*, at 3498–99 ¶¶ 83–84

[66] *Nat'l Cable & Telecommunications Ass'n v. FCC,* 567 F.3d 659, 667 (D.C. Cir. 2009) (quoting *Williams Gas Processing–Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C.Cir.2006) (internal quotation marks and brackets omitted)). *See also Commc'ns Satellite Corp. v. FCC,* 836 F.2d 623, 632–33 (D.C. Cir. 1988) (finding Commission decision arbitrary and capricious where it provided no explanation for departing from prior practice).

V. The Draft Order's Delegation of Ratemaking Authority to USAC and the Wireline Competition Bureau Violates 47 U.S.C. § 205.

Section 205 of the Communications Act limits how rates may be prescribed.[67] Specifically, Section 205 provides that the *Commission* may "determine and prescribe" a "just and reasonable charge" and a "just, fair, and reasonable" "classification, regulation, or practice."[68] But the Commission cannot delegate its authority to prescribe either rate-setting *practices* or specific *charges* to either USAC or the Bureau consistent with Section 205.

The mechanism proposed in the Draft Order—a database that will be used to compute a median of rates for "similar" services—plainly involves the "prescri[ption]" of a "rate." Regardless of which entity (the Wireline Competition Bureau or USAC) executes that prescription, the mechanisms of the Draft Order prescribe charges without a hearing and thus violate Section 205.

Other provisions of the Act confirm that only the full Commission can prescribe rates. Section 5(c)(1), 47 U.S.C. § 155(c)(1), expressly *prohibits* the Commission from delegating to the bureaus the power to hold hearings on the lawfulness of rates.[69] Specifically, Section 155(c)(1) *excludes* functions "referred to" in Section 204(a)(2) from those that may be delegated to the bureaus, and 47 U.S.C. § 204(a)(2) includes hearings that "concern[] the lawfulness" of any "charge." Section 5(c)(1) also precludes the delegation of any complaint regarding rates and charges and, of course, any challenge to an existing rate would typically be brought as a complaint. Accordingly, only the full Commission has the authority to determine lawful rates—it cannot be done by delegation.[70]

Yet the Draft Order expressly purports to delegate authority over "rate determination" to "the Administrator," *i.e.*, USAC," with no provision for a hearing.[71] On its face, "rate determination" *is* "prescri[bing]" a rate. And the structure of 47 U.S.C. § 254(h)(1)(A) confirms that is precisely what the Draft Order asks USAC to do. The statute provides that carriers *must* provide certain services to health care providers at "rates that are reasonably comparable to rates charged for similar services in urban areas of the State"—urban rates *to be determined by USAC* under the Draft Order. Moreover, the total charge carriers are entitled to receive under the Program, combining the urban rate paid by the end user and the support payment from USAC, is the "rural

---

[67] 47 U.S.C. § 205(a).

[68] *Id.*

[69] *See* 47 U.S.C. § 155(c)(1).

[70] *See also Verizon v. FCC*, 535 U.S. 467 (2002) (upholding rate-setting methodology adopted by the full Commission); *Virgin Islands Tel. Corp. v. FCC*, 444 F. 3d 666, 672 (D.C. Cir. 2006) (noting that 47 U.S.C. Section 155(c)(1) "prohibits the Commission from delegating to one of its bureaus the power the conclude hearings on the lawfulness of rates under § 204(a)(2)").

[71] Draft Order ¶ 14.

rate," also *to be determined by USAC*. The prescription of the *entire* rate that the service provider receives is to be performed by USAC (unless a request for waiver is made to the Bureau).

Neither the term "prescribe" nor the term "rate" is ambiguous in the context of Section 205. As a matter of plain meaning, "prescribe" means "to lay down as a rule."[72] That is exactly the task that the Draft Order delegates to USAC—determining "as a rule" the maximum amount that carriers will be paid. The meaning of "rate" is similarly straightforward. As relevant here, it is "a charge, payment, or price," such as for a "public-service commodity."[73] That is what USAC is prescribing here—the "charge, payment, or price" that carriers will receive for providing a government-mandated service.

Moreover, in *Nader v. FCC*, the D.C. Circuit held that the terms in Section 205 should be construed broadly. With respect to "prescription," the court held that where the "practical effect of the Commission's . . . order was establish a limit on the permissible rate of return, this "was a prescription under section 205."[74] Similarly, with respect to "rates," the court held "that within the power to prescribe charges is the power to determine and prescribe those elements that make up the charge."[75] Accordingly, establishing a rate of return—while not expressly mentioned in Section 205—was setting a "rate" for purposes of the statute. Here, as further discussed below, the Draft Order purports to confer far broader authority on USAC to set rules regarding nearly all aspects of how rates will be determined. Under *Nader*, such prescriptions fall under Section 205.

Moreover, it is not a legally sufficient response to argue that the Sections 5 and 205 requirements are met because any delegated decision will always be subject to full Commission review. That interpretation would render the Sections 5 and 205 requirements a dead letter, contrary to basic principles of statutory interpretation—a "statute not be interpreted in a way that renders any part of it superfluous."[76] Moreover, under the Draft Order, the Commission does not appear to have expressly retained any oversight or review responsibility for the authority it has impermissibly delegated.

Finally, while the Draft Order—as discussed above—purports to delegate "rate determination" to USAC, it confers authority to "approve or deny all or part of requests for waiver of the rural rate rules" on the *Bureau*.[77] But this provision only compounds the Draft

---

[72] *See Prescribe,* Merriam-Webster, https://www.merriam-webster.com/dictionary/prescribe (last visited July 25, 2019).

[73] *See Rate,* Merriam-Webster, https://www.merriam-webster.com/dictionary/rate (last visited July 25, 2019).

[74] *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975).

[75] *Id.* at 203–04.

[76] *Agnew v. Government of the District of Columbia*, 920 F.3d 49, 57 (D.C. Cir. 2019).

[77] Draft Order ¶ 72.

Order's violation of Sections 5 and 205. Again, the statute does not discuss let alone distinguish between USAC and the Bureau—it confers rate-setting authority *on the Commission*. Therefore, neither the Bureau nor USAC have authority to adopt rates by waiver or by rule. Sections 5 and 205 expressly reserve rate setting responsibility for the full Commission, and only after a hearing.

VI. The Draft Order Unlawfully Delegates Inherently Governmental Functions to USAC.

The Draft Order's delegation of ultimate authority over RHC Program rates to USAC violates the fundamental principle that "inherently governmental functions" must be performed by government employees. USAC is not, of course, a government entity—it is "an independent, not-for-profit corporation designated by the Federal Communications Commission (FCC) as the administrator of universal service."[78]

47 U.S.C. § 254(h)(1)(A) mandates that carriers *must* provide certain services to rural healthcare providers at below market rates: "[U]pon receiving a bona fide request" for service, a telecommunications carrier must:

> [P]rovide telecommunications services which are necessary for the provision of health care services in a State . . . to . . . any . . . health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State.[79]

The statute further provides that a "telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in State and the rates for similar services provided to other customers in comparable rural areas."[80] Section 254(h)(1)(A) thus couples government-mandated service (at a discounted rate) with an entitlement to repayment under the RHC Program for the discounted portion of the rate. As a result, as a practical matter, the *entire* rate that the service provider receives—the sum of the "urban" rate charged directly to the healthcare provider plus the Program payment of the difference between the urban and rural rates—depends on what urban and rural rates are found to be "similar."

Along with computing and prescribing the actual rate, the Draft Order also expressly "place[s] the burden of identifying 'similar services' *for rate determination* on the Administrator."[81] According to the Commission, this will "promote a more equitable distribution of program funding by ensuring that funding requests for Telecom Program support

---

[78] *See Who We Are,* USAC, https://www.usac.org/about/about/who-we-are/default.aspx (last visited July 25, 2019).

[79] 47 U.S.C. § 254(h)(1)(A).

[80] *Id.*

[81] Draft Order ¶ 14 (emphasis added).

are consistently evaluated and based on the same parameters."[82] Under the Draft Order, however, those parameters are open-ended and subject to the Administrator's discretion—for example, although the "Telecom Program is statutorily limited to supporting telecommunications services," the Draft Order "direct[s] the Administrator not to limit the functionally similar inquiry solely to telecommunications services."[83] But the Draft Order contains virtually no guidance about which non-telecommunications services should be included or why.[84] It also contains little guidance as to how the Administrator will determine which services are "similar" and which are not, which will require the exercise of judgment and will involve policy considerations as to how similar services with some differing characteristics or specifications must be to be sufficiently similar. This is particularly striking because agency ratemaking is a quasi-legislative function.[85]

The basic notion that governmental functions, including regulatory actions, may not be delegated to "private persons" is both long-established[86] and clearly of continuing validity and importance.[87] Over the past fifty years, the Office of Management and Budget ("OMB") has issued numerous Circulars and Policy Letters addressing the types of non-delegable "functions are inherently governmental and must always be performed by Federal employees."[88] A 2011 OMB Policy Letter provides "a single definition of 'inherently governmental function' built around the well-established statutory definition in the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270,"[89] which states:

> ["Inherently governmental function"] includes activities that require either *the exercise of discretion* in applying Federal Government authority or the *making of value judgments* in making decisions for the Federal Government, *including judgments relating to monetary* transactions and entitlements. An inherently

---

[82] *Id.*

[83] *Id.* ¶ 18.

[84] *See also supra* at Part III(1) (arguing that the Draft Order's failure to provide meaningful guidance regarding what services should be considered "similar" for rate purposes is arbitrary and capricious).

[85] *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 388 (1932) ("The prescription of a maximum rate, or maximum and minimum rates, is a legislative quality as is the fixing of a specified rate.")

[86] *See., e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding that regulatory power cannot be conferred upon "private persons").

[87] *See, e.g.,* 48 C.F.R. § 7.503(a) ("Contracts shall not be used for the performance of inherently governmental functions.").

[88] *See* Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 FR 56227-01, at 1 (2011) ("2011 OMB Policy Letter").

[89] *Id.*

> governmental function involves, among other things, the interpretation and execution of the laws of the United States so as--
>
> * * *
>
> **(v)** to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or *disbursement of appropriated and other Federal funds*.[90]

The Draft Order violates this prescription in two ways. First, by requiring USAC to exercise broad discretion "relating to monetary transactions and entitlements." Second, by vesting USAC with "ultimate control over the disbursement" of federal funds.

The case law further reinforces that the burdens placed on USAC here cross the line into inherently governmental functions. In *Lyttle v. AT&T Corp.*[91], for example, the court acknowledged that "agencies such as the FCC are *prohibited* from delegating inherently governmental functions to private entities." It noted that this prohibition "includes 'the interpretation and execution of the laws of the United States so as . . . to exert ultimate control over the acquisition, use, or disposition of the property . . . of the United States, including the collection, control, or disbursement of appropriate and other Federal Funds.'"[92] But it does not include the "'collection of fees, fines, penalties, costs or other charges . . . where the amount to be collected is predetermined or can be readily calculated and the funds collected can be readily controlled using standard cash management techniques.'"[93] The court found that NECA (and later RLSA) in that case was doing the latter—subject to "FCC regulations, orders and contracts set[ting] out what NECA and RLSA 'shall do' (that is, collect TRS contributions and cost data from carriers) and 'shall not do' (exercise inherently governmental functions)"—but the Draft Order here unlawfully purports to authorize USAC to do the former.[94]

The Draft Order therefore impermissibly delegates performance of inherently governmental functions—RHC Program rate determination and discretionary disbursement of federal funds—to an independent, not-for-profit corporation.

---

90 *See* FAIR Act, Public Law 105-270, Sec. 5(2)(B)(v) (emphasis added).

91 *Lyttle v. AT&T Corp.*, 2012 WL 6738242, at *16 (W.D. Pa. Nov. 15, 2012), *Report and Recommendation Adopted,* No. CIV.A. 2:10-1376, 2012 WL 6738149 (W.D. Pa. Dec. 28, 2012) (quoting FAIR Act, Sec. 5(2)(A)).

92 *Lyttle v. AT&T Corp.*, 2012 WL 6738242, at *16 (quoting FAIR ACT, Sec. 5(2)(B)(v)).

93 *Lyttle v. AT&T Corp.*, 2012 WL 6738242, at *16 (quoting 2011 OMB Policy Letter, ¶ 20(a)).

94 *Lyttle v. AT&T Corp.*, 2012 WL 6738242, at *17–18; *see also Farmers Tel. Co., Inc. v. FCC*, 184 F.3d 1241, 1250–51 (10th Cir. 1999) (noting that NECA performed no "governmental functions" because the "pertinent regulations do not provide NECA with any authority to issue binding interpretations of FCC regulations," and the FCC "retain[ed] 'full authority to review NECA's tariff filings'").

VII. The Draft Order Unlawfully Delegates Novel Questions of Fact, Law, and Policy to USAC.

In addition to the extensive administrative—and judicial—guidance addressing "inherently governmental functions" discussed above, a related body of black-letter law establishes that *all* issues of policy must be decided by the Commission itself rather than delegated. Under the Commission's own regulations and decisions, the Bureau cannot rule on "novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines."[95] The same is, of course, true of USAC: 47 C.F.R. § 54.702(c) expressly provides that the "Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission."

The Commission's rules "do not address" many of the "particular situation[s]" over which the Draft Order proposes to delegate authority to USAC. For the most part, the Commission's rules are not just "unclear"—they are virtually non-existent. The Draft Order asks USAC to determine, for example, what services should be considered "similar" enough to be used to set both urban and rural rates,[96] including both the *kinds* of service (including not just telecommunications services, but also "private carriage and information services") and the *characteristics* of those services (*i.e.*, dedicated vs. best-efforts and symmetrical vs. asymmetrical, and other relevant service quality characteristics). Under the Commission's regulations, USAC should "seek guidance from the Commission" in situations like this—but under the Draft Order, the roles are exactly reversed.

The Commission has applied these principles in circumstances where the Bureau purported to make determinations about what should be included in or excluded from a rate base, as USAC is required to do here. In *Responsible Accounting Officer Letter 20* (*"RAO 20"*), the Common Carrier Bureau issued a letter setting forth "ratemaking instructions" for "how to account for ['post retirement benefits other than pensions' or 'OPEB'] costs."[97] While the Commission "tentatively agree[d]" with the Bureau's treatment of OPED costs, it nonetheless held that *RAO*

---

[95] 47 C.F.R. § 0.291(a)(2); *see also TRT Telecomms. Corp.*, 77 F.C.C.2d 845, 848 ¶ 7 (1980) (Bureau determinations within its delegated authority must be based on "sound interpretation" of existing "statutory provisions or regulatory policy"); *Appl. of Tully-Warwick Corp.*, 95 F.C.C2d 1427, 1430 (1980) (The Bureau exceeded its delegated authority were "there [was] no Commission precedent—one way or the other—on the" application of a rule under circumstances similar to those before it).

[96] *See* Draft Order ¶ 14.

[97] *RAO 20*, Mem. Op. & Order & Notice of Proposed Rulemaking, 11 FCC Rcd. 2957, 2957 ¶¶ 1, 3 (1996).

20 "exceeded the Bureau's delegated authority to the extent that it directed exclusions from and additions to the rate base for which the [existing] Part 65 rules do not specifically provide."[98]

Again, USAC plainly does not have any *greater* authority to make such determinations than the Bureau, and indeed its discretion is actually more limited because, as discussed above, it is not a government entity. Here, however, USAC is not merely "direct[ing] exclusions from and additions to" the rate base—the Draft Order tasks it with making the rules about what *kinds* of services and rates are relevant; with "determin[ing] . . . two types of rates" in an "urban and rural rate database" that it is supposed to develop; and with applying the overall system that it devises to the "equitable distribution of [RHC] program funding."[99] These kinds of determinations cannot possibly be characterized as merely "ministerial"—they are squarely policymaking.

VIII. The Commission Failed to Provide Sufficient Notice that it was Considering Expanding "Similar" Services to Include Non-Telecommunications Services Not Covered by the RHC Program.

The purpose of the APA's "comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process."[100] The agency must accordingly "describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making."[101] This obligation is often described as a requirement that the "agency's final rule . . . [must] be a 'logical outgrowth' of its notice."[102] The courts will not "allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities."[103]

The Draft Order's "direct[ion]" that USAC should "not limit the functionally similar inquiry to solely telecommunications services," but should also consider "private carriage and information services" is just such a "surprise switcheroo."[104] In Paragraphs 73 through 78 of the

---

98 *Id.* at 2961–62 ¶¶ 25–29.

99 Draft Order ¶¶ 14–20.

100 *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982).

101 *Horsehead Resource Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (quoting *Small Ref. Lead Phase–Down Task Force*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

102 *CSX Transp., Inc. v. Surface Transp. Bd.,* 584 F.3d 1076, 1079–80 (D.C. Cir. 2009) (quoting *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006)).

103 *Envtl. Integrity Project v. EPA,* 425 F.3d 992, 996 (D.C. Cir. 2005).

104 *See* Draft Order ¶ 18.

2017 NPRM,[105] the Commission gave notice of its intent to potentially reform how to "defin[e] similar services." It did propose to retain the concept of "functionally similar as viewed from the perspective of the end user."[106] But it did not give any indication that the scope of such services could be expanded to include non-telecommunications services not covered by the RHC Program. To the contrary, the NPRM's discussion of "functional similarity" cited a 2003 Commission decision stating that "eligible health care providers must purchase telecommunications services and compare their service to a *functionally equivalent telecommunications service* in order to receive this discount."[107]

In short, neither the Notice of Proposed Rulemaking in this proceeding nor the 2003 decision on which it relies gives any indication that "functional similarity" could be expanded beyond functionally equivalent *telecommunications* services. Under the logical outgrowth rule:

> [T]he key focus is on whether the purposes of notice and comment have been adequately served. This means that a final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commenters with their first occasion to offer new and different criticisms which the agency *might* find convincing.[108]

Here, neither GCI nor other commenters offered any criticism of expanding "similar services" beyond telecommunications services because there was simply no notice that was even a possibility.

---

[105] *Promoting Telehealth in Rural America*, Notice of Proposed Rulemaking & Order, 32 FCC Rcd. 10,631 (2017).

[106] *Id.* ¶ 75.

[107] *Rural Health Care Support Mechanism*, Report & Order, Order on Reconsideration & Further Notice of Proposed Rulemaking, 18 FCC Rcd. 24546, 24564 ¶ 33 (2003) (emphasis added).

[108] *Fertilizer Inst. v. U.S. EPA,* 935 F.2d 1303, 1311 (D.C. Cir. 1991) (internal citations omitted) (emphasis added).

IX. Conclusion

The Draft Order is defective both as a matter of policy and as a matter of law. The record in this proceeding allowed multiple options for pursuing a simple, market-friendly Rural Healthcare Telecommunications Program. Instead, the Draft Order lays out, without explanation or justification, an overly-complex, highly regulatory path forward. While GCI supports the Commission's effort to take the step of reform, the agency failed to take the steps necessary to answer the questions and address the issues as required under fundamental administrative law principles.

Sincerely,

John T. Nakahata
Timothy J. Simeone
Deepika Ravi
Counsel to GCI Communication Corp.

cc: Preston Wise
Arielle Roth
Joseph Calascione
Travis Litman
Randy Clarke
Trent Harkrader