

# **Exhibit E**

**REDACTED - FOR PUBLIC INSPECTION**

May 15, 2018

***Via Email***

Ms. Elizabeth Drogula  
Deputy Division Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: GCI Rural Health Care Support for Funding Year 2017

Dear Liz:

This letter follows up on our meeting of May 5, 2018 in which the Telecommunications Access Policy Division (“the Division”) discussed with GCI Communication Corp. (“GCI”) a spreadsheet that the Division had provided to GCI earlier that day containing rates purported to be comparable under 47 C.F.R. § 54.607(a). GCI appreciates the approach the Division and Bureau have been taking here, to work through the questions as to how to apply Section 54.607 with respect to services provided under the Rural Health Care Telecommunications Program (“RHC”) in Alaska. The analysis we provide here is intended to further our mutual understanding. As we discuss below, it is difficult yet for us to propose new rates, as overarching questions remain as to the permissible interpretation and application of Section 54.607 that warrant further discussion. If we can agree on these issues, then it will be easier to resolve the question of which specific rates are appropriate and how others, if any, should be revised.

Before turning to those overarching questions, we briefly identify our concerns with both the Approach 1 and Approach 2 analyses, as described by the Division and as set out in the Division’s spreadsheet.<sup>1</sup> Approach 1 compared GCI’s RHC rates with rates for services that GCI provided to E-rate recipients, as reported by the recipients and reflected in the E-rate Open Data. While those rates could be part of a reasonable analysis, in theory,<sup>2</sup> the E-rate Open Data

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<sup>1</sup> As a matter of prioritizing work given the relative amounts of funding requested, we only focus here on rates for satellite and TERRA-based services, and not ones using non-TERRA terrestrial middle mile. We will address these separately at a later time.

<sup>2</sup> It is not clear that E-rate rates are properly included within the averaging calculation under 47 C.F.R. § 54.607(a), as those rates to the end user are “reduced by universal service support mechanisms.” For the purposes of this letter only, we assume that E-rate rates should be included as comparables. Nonetheless, GCI has justified its rural rates even without reference to E-rate data, as explained in our March 30, 2018 letter to USAC. Letter from Jennifer P. Bagg, Counsel to GCI Communication Corp.,

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contained errors that affected the analysis. In numerous instances, services in the E-rate Open Data appear at first glance to be similar to RHC services but with lower prices. In fact, the vast majority of the rates used were not for similar services. In some cases, the E-rate Open Data incorrectly listed terrestrial services as satellite services, presented services as symmetrical when they are in fact asymmetrical, or applied rates for best efforts services to the dedicated services purchased by RHCs.

The execution of Approach 1 to identify purported comparables also appears to have problems. For example, acknowledged asymmetric services may have been used to propose rates for symmetric RHC services;<sup>3</sup> not all comparable E-rate data was included but was selectively picked from among several data points; selections from the E-rate Open Data were inconsistently limited to certain geographic areas; and/or comparable commercial services were excluded. While we could reverse engineer some of the proposed rates—usually those that were based on a single E-rate comparable—we were unable to replicate averaging calculations for other rates based on the description provided. All of this is particularly troubling because Approach 1 resulted in a reduction of over [REDACTED] per month in support (or about [REDACTED] of the total reductions). We have summarized these issues on a line-by-line basis in the attached spreadsheet.<sup>4</sup>

Approach 2 examined rates in the E-rate contracts that GCI had already provided, to determine whether any could be used as comparables for RHC purchases. This analysis also has problems: It ignores the effect of volume discounts without any basis for doing so; it fails to include commercial comparables and other E-rate comparables, even within the same safe harbor range; and it fails to average all rates in E-rate contracts within the same safe harbor range. We have also summarized these issues on a line-by-line basis in the attached spreadsheet.

Turning to the overarching issues, we identify four sets that are critical to applying Section 54.607. For each we also summarize GCI's conclusion that the interpretation proffered by the Division is not compelled by the plain language of the rule and Commission precedent, and is not a reasonable way to apply the rule in this (and in some cases, any) context. We also provide an alternative, more reasonable way to interpret and apply the rule here.

1. Does Section 54.607(a) preclude comparing service rates on a per Mbps basis, as opposed to total circuit price irrespective of bandwidth? If not, what considerations should determine the range of bandwidths for which per Mbps comparisons would be permissible?

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to RHC Review, Universal Service Administrative Company (Mar. 30, 2018) ("March 30, 2018 Letter to USAC").

<sup>3</sup> The descriptions under Approach 1 are not clear.

<sup>4</sup> See Attachment 1. The contracts referenced in GCI comments in the spreadsheet are provided in Attachment 2.

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GCI conclusion: Section 54.607(a) does not preclude a per Mbps comparison on a reasonable basis; indeed, a per Mbps comparison is the only way to apply Section 54.607(a) in a manner consistent with the statutory requirements of 47 U.S.C. § 254(h)(1)(A). It should be *per se* reasonable within any safe harbor tier to use a per Mbps comparison. Even outside of safe harbor tiers, it should be reasonable across any range of service with similar economies of scale. That range will be different for different transmission platforms, which have different costs of incremental bandwidth.

2. Does Section 54.607(a) require that rates for a service be compared only on the basis of the end-to-end total, or can it reasonably be interpreted to permit assessing the comparability of each component when there is no overall end-to-end discount for the total package as compared to the sum of the parts?

GCI conclusion: Section 54.607(a) does not preclude assessing the rates of each component of an end-to-end service, particularly where there is no overall end-to-end pricing comparability.

3. Does Section 54.607 preclude justifying rates for one portion of an end-to-end service based on Section 54.607(a) and other portions based on either sentence of Section 54.607(b)?

GCI conclusion: Section 54.607 does not preclude utilizing a combination of 54.607(a) and 54.607(b) to justify RHC rates, particularly where there is no overall end-to-end pricing comparability.

4. Does Section 54.607(a) compel ignoring volume discounts? If not, is it reasonable to ignore volume discounts when determining whether rates are for similar services?

GCI conclusion: Nothing in Section 64.507 suggests that volume discounts must or should be ignored. Consistent with FCC precedent that has found volume discounts to be reasonable and not unreasonably discriminatory, purchasers with different volumes cannot reasonably be considered similar.

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**Discussion of Overarching Issues**

- I. Does Section 54.607(a) Preclude Comparing Service Rates on a Per Mbps Basis, as Opposed to Total Circuit Price Irrespective of Bandwidth? If Not, What Considerations Should Determine the Range of Bandwidths for Which Per Mbps Comparisons Would Be Permissible?**
- A. Section 54.607(a) of the Commission’s rules can only be interpreted consistently with the plain meaning of 47 U.S.C. § 254(h)(1)(A) by calculating an average on a per Mbps basis.**

The first sentence of 47 C.F.R. 54.607(a) reads: “The rural rate shall be the average of the rates actually being charged to commercial customers, other than health care providers, for identical or similar services provided by the telecommunications carrier providing the service in the rural area in which the health care provider is located.” This language has not changed since it was first adopted in 1997.<sup>5</sup> In that Order, the Commission did not explain what it meant by “average.” Of course, if the services are identical in bandwidth and other dimensions, an average would be calculated by summing the price of each circuit and dividing by the number of circuits.

With its *2003 Report and Order*, however, the Commission made clear that—at least within the safe harbor ranges it adopted—“similar” services include services of varying bandwidths. Of relevance here, the Commission adopted safe harbor ranges of 1.41 to 8 Mbps (labeled T-1) and 8.1 to 50 Mbps (labeled T-3).<sup>6</sup> When a range of circuit bandwidths is included within the average, the question arises how to calculate the average. Nothing in the *2003 Report and Order* provides the answer, either explicitly or implicitly. While the Commission made clear that it would consider services within the safe harbor range to be functionally similar, provided that they were also similarly symmetrical or asymmetrical, the Commission did not specify how the rates should then be averaged.<sup>7</sup>

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<sup>5</sup> See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, 9120 ¶ 660 (1997) (“1997 First Report and Order”).

<sup>6</sup> *Rural Health Care Support Mechanism*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 24,546, 24,564 ¶ 34 (2003) (“2003 Report and Order”). As discussed in GCI’s March 30, 2018 Letter to USAC at 5 & n.14, the Commission developed these safe harbor ranges to ensure that urban rates were not inflated because of the introduction of newer, less expensive alternatives in urban areas before rural areas. This is a different issue than how best to compare rural rates of differing capacities. For the purposes of this letter only, we assume that the safe harbors are applicable to the calculation of average rural rates pursuant to Section 54.607(a).

<sup>7</sup> See *2003 Report and Order* at 24,564 ¶ 34 (“We will also consider whether a service is symmetrical or asymmetrical when determining functional equivalencies. Telecommunications services will be considered functionally similar when operated at advertised speeds within the same category (low, medium, high, T-1, or T-3) and when the nature of the service is the same (symmetrical or

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An arithmetic example shows why this difference is significant to the application of Section 54.607(a) as well as to fidelity to the plain meaning of 47 U.S.C. § 254(h)(1)(A). Section 254(h)(1)(A) requires that the providing telecommunications carrier be compensated for “an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State [i.e. the urban rate] and the rates for similar services provided to other customers in comparable rural areas in that State [i.e. the non-discounted rural rate].”<sup>8</sup> Take a hypothetical situation in which there are six symmetrical circuits sold to commercial customers within the 1.41-8 Mbps safe harbor range—five 1.5 Mbps DS1s and one 7.5 Mbps Ethernet service—and a 5 Mbps symmetrical circuit, also encompassed by that range, is being sold to a rural health care provider. The DS1s are priced at \$75 each, and the 7.5 Mbps Ethernet circuit is priced at \$375. The 5 Mbps Ethernet service is sold to the health care provider at a pre-discount rate of \$250. Reading Section 54.607(a) to mandate a simple average of all circuits within the safe harbor range yields a rural rate of \$125 ( $5 \text{ DS1s} \times \$75 + 1 \text{ 7.5 Mbps Ethernet} \times \$375$ ) / 6 circuits) for any circuit in that safe harbor range, regardless of whether it is a DS1, 5 Mbps or 7.5 Mbps. This creates the very odd situation in which Section 54.607(a) would permit a carrier to receive much higher revenue for DS1s provided to a rural health care provider (by \$50 per DS1) than it would have for a DS1 provided to a commercial customer; and it would only reimburse the carrier for far less than the actual charge to a similarly situated customer that purchased either a 5 Mbps or 7.5 Mbps Ethernet circuit, underpaying the carrier by \$125 ( $\$250 - \$125$ ) and \$250 ( $\$375 - \$125$ ), respectively, as compared with the actual commercial charge.

Moreover, reading Section 54.607(a) to permit the rate to be established by the circuit that is closest to, but above, the capacity purchased by the health care provider would set a ceiling of (in this example) \$375 for the 5 Mbps circuit purchased by the rural health care provider, again above the \$250 rate a commercial customer would have paid. None of these results can be squared with the plain meaning of 47 U.S.C. § 254(h)(1)(A), which clearly lays out that the support is the difference between the urban rate charged to the rural healthcare provider, and the rate the telecommunications carrier would otherwise have charged the rural health care provider had the statute not mandated that it be charged the comparable urban rate.

Since a simple average is statutorily impermissible in this situation, the only way to calculate an “average” that yields a result consistent with the plain meaning of Section 254(h)(1)(A) is to calculate the per Mbps rate for each circuit, and then to average those per Mbps rates. In the example above, each 1.5 Mbps DS1 is \$50 per Mbps ( $\$75 / 1.5 \text{ Mbps}$ ), and the 7.5 Mbps Ethernet circuit is also \$50 per Mbps ( $\$375 / 7.5 \text{ Mbps}$ ). The average of the

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asymmetrical). For example, a symmetrical fractional T-1 service operating at an advertised speed of 144 kbps would be considered functionally similar to a symmetrical DSL transmission service with an advertised speed of 256 kbps.”). It is also important to recognize that the Commission was focused on whether the urban rate would be low enough, as less costly newer services were introduced, not on the level of the rural rate.

<sup>8</sup> 47 U.S.C. § 254(h)(1)(A).

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per Mbps rates is \$50 per Mbps. The rate for each service permitted under Section 54.607(a) would then be \$75 for a DS1, \$250 for a 5 Mbps circuit, and \$375 for a 7.5 Mbps Ethernet circuit. This matches the commercial comparable rates actually charged to non-health care providers in the rural area, and also provides a way to determine the appropriate rate for a circuit with bandwidth that falls within the safe harbor range but between the six comparables.<sup>9</sup>

Computing an average on a per Mbps basis also is consistent with the Commission's purpose in adopting the safe harbor ranges. When it adopted the safe harbors, the Commission stated that "new technologies are often first deployed in urban areas, and such services may be less expensive than services in rural areas based on older technologies."<sup>10</sup> Applied in this context, an analogous concern could be that, as less expensive newer technologies are deployed, the cap on supported rural rates would not otherwise be likely to come down where more costly legacy technologies may persist. By calculating an average rate per Mbps, the rural rate falls as newer, less costly technologies are adopted. Using the above example, if the 7.5 Mbps Ethernet service was priced at \$300 (\$40 / Mbps) instead of \$375, the average per Mbps rate would fall from \$50 to \$48.33.<sup>11</sup>

This analysis also shows that the Universal Service Administration Company ("USAC") was correct when it permitted GCI to use per Mbps rates when GCI justified those rates in both USAC's 2009-2010 pre-commitment review and its 2015 audit.<sup>12</sup>

**B. A Per Mbps Rate Is Conclusively an Appropriate Basis for the Rural Rate When Calculated and Applied Within the Same Safe Harbor Range, and Should Be Considered an Appropriate Basis for a Rural Rate Across Bandwidth Ranges with Similar Economies of Scale, Regardless of Safe Harbor Boundaries.**

**1. Within a Safe Harbor Range**

The only way to construe the *2003 Report and Order* establishing safe harbors is to conclude that a per Mbps average created by averaging the per Mbps rates of all comparables within the safe harbor range can be applied to establish any rural rate within the same safe harbor range. Otherwise, the safe harbor would not be a safe harbor.

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<sup>9</sup> This example could be replicated within the T-3 safe harbor using five 10 Mbps symmetrical Ethernet circuits and one 50 Mbps Ethernet circuit as comparables, and a rural healthcare provider purchasing a 30 Mbps symmetric Ethernet circuit.

<sup>10</sup> *2003 Report and Order* at 14,563 ¶ 33.

<sup>11</sup> This safeguard, however, should not be necessary since the health care provider is under the obligation to select the most cost-effective service.

<sup>12</sup> For a more complete description of these reviews, see March 30, 2018 Letter to USAC at 6-7.

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## 2. Outside or Across Safe Harbor Boundaries

The safe harbor ranges cannot be the only way to determine whether a service provided to a non-health care provider is sufficiently similar to the service provided to a health care provider such that the charge for the non-health care provider's service should be included in determining whether there is an applicable average rural rate pursuant to Section 54.607(a). This conclusion flows from the concept of a safe harbor, which, by definition, is not the exclusive means of demonstrating compliance.<sup>13</sup> It also flows from the fact that the Commission has not established any safe harbors above 50 Mbps, even though services above 50 Mbps have become common across the country, particularly for Ethernet services.

A reasonable way to approach this question would be to consider how the services are offered to non-health care providers, such as whether the offered rates have significantly different per Mbps rates, and the underlying cost characteristics of the transmission platform underlying the service. As discussed further below, this second factor—cost characteristics of the transmission platform—is particularly relevant to satellite-based services.

### *a) A Per Mbps Rate for T-1s Is Reasonable to Apply to All Bandwidths of Satellite Transport Services GCI Sells to Rural Health Care Providers.*

As GCI explained in its March 30, 2018 letter to USAC, GCI essentially pays the same per Mbps price for each Mbps of space that it rents on a satellite transponder.<sup>14</sup> While the underlying contracts with the satellite provider do not literally have per Mbps pricing, a single C-band satellite transponder has very limited bandwidth capacity—only approximately 3,000 Mbps throughput if all circuits are dedicated and not oversubscribed. Ku-band transponders are even more limited—only 80 Mbps throughput if all circuits are dedicated and not oversubscribed. Accordingly, each transponder's capacity is exhausted relatively rapidly as incremental demand increases. GCI currently utilizes [REDACTED] C-band transponders and [REDACTED] Ku-band transponders to provision its satellite-based services. Thus, there are no meaningful economies of scale for satellite-based service, and there is therefore no price compression for larger bandwidth purchases over satellite, both from GCI's perspective as a buyer of satellite transponders and from its perspective as a seller of satellite-based transport services. This results

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<sup>13</sup> See March 30, 2018 Letter to USAC at 5 n.15.

<sup>14</sup> *Id.* at 11. This letter provides a more technically precise description of how GCI purchases satellite transponders and the associated cost structure. However, there is not a material difference to the analysis between the description in the March 30, 2018 letter and the description here.



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in linear satellite pricing across all capacities of dedicated satellite service that GCI provides (which currently do not exceed [REDACTED] Mbps).<sup>15</sup>

In this situation, it is appropriate to use the per Mbps rate derived from GCI's sales of dedicated symmetric satellite service to non-health care providers within the T-1 safe harbor range to determine average per Mbps rates for dedicated symmetric satellite services to health care providers within the T-3 safe harbor range.<sup>16</sup> This is distinct from the situation that would be presented by, for example, a fiber network, on which there are substantial economies of scale because the costs of lighting additional fibers are small as compared with the cost of laying the fiber in the first instance. Accordingly, as GCI described in its March 30, 2018 Letter to USAC, to formulate the average of its satellite rates, GCI searched its entire invoice inventory for commercial customers that purchase dedicated, symmetrical Ethernet service on GCI's satellite network.<sup>17</sup> All identified commercial customers that purchased dedicated Ethernet service were included in the comparable calculations. Because there is no price compression with satellite Ethernet services, these comparables establish compliance with 54.607(a) for all the satellite services GCI sells to rural health care providers, irrespective of the safe harbor categories.

***b) For TERRA Transport Services, Per Mbps Rates Based on Aggregate Volume Are Reasonable and Above Safe Harbor Levels Reasonably Can Be Grouped into 50-300 Mbps Aggregate Volume and Over 300 Mbps Aggregate Volume for the Purpose of this Review.***

As GCI described in its March 30, 2018 Letter to USAC, for TERRA transport charges, middle mile capacity is not priced on a per circuit basis, but based on the aggregate amount of TERRA middle mile capacity that the customer purchases. TERRA dedicated transport rates are not distance sensitive, but are postalized within the groupings of regional center-to-Anchorage and between all other points. Within these respective groupings, the purchaser buys capacity across the entire TERRA middle mile network, irrespective of the particular end points. Because the purchaser can reassign that capacity as it chooses, the particular end points are not significant to the overall pricing.

Unlike satellite services, the TERRA network is subject to a degree of economies of scale, although not to the same extent as an all-fiber network. The network has substantial fixed costs, for example, for installing its initial microwave towers and radios, as well as its limited

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<sup>15</sup> The satellite services provided to rural health care providers all fall either within the T-1 or T-3 safe harbor, with the highest bandwidth service a [REDACTED] Mbps satellite circuit, of which there are only [REDACTED]. See March 30, 2018 Letter to USAC at Attachment 3 (Master FRN Spreadsheet CONFIDENTIAL).

<sup>16</sup> All of the satellite comparables are within the T-1 safe harbor range. See *id.* at Attachment 5 (TERRA-Satellite-Terrestrial Comps CONFIDENTIAL).

<sup>17</sup> March 30, 2018 Letter to USAC at 12.

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undersea cable link, and those costs do not necessarily increase as the provisioned bandwidth increases, until the capacity nears exhaustion. Of course, GCI has taken steps to increase capacity, including refining radio tuning and closing the ring (which by itself practically doubled capacity among the communities on the ring), so it has incurred some incremental costs since the system first came on line in 2009. Moreover, over the longer term, unlike a fiber network in which additional strands can more easily be lit, when GCI has to add more radios and, in some cases, towers, it will incur significant incremental costs to add capacity.<sup>18</sup>

Against this cost background, and also in light of the fact that TERRA is a high risk investment in a competitive environment that continues to see facilities-based competition increase (such as from Quintillion and from both current and next generation satellites), GCI offers TERRA dedicated services with per Mbps rates that decline with commitments to purchase greater volumes and/or longer terms. This recognizes that customers that purchase higher volumes and longer terms both provide a greater long-term assurance that GCI can cover the substantial costs of building and operating TERRA, and cover a portion of overall common costs, thereby enabling GCI to earn a return sufficient to continue to induce investors to back investments in rural Alaska infrastructure. GCI described these rate tiers more specifically in its March 30, 2018 Letter to USAC. The key point, as articulated in that letter, is that “although TERRA pricing may appear linear based on a clinic-by-clinic comparison within the same health care provider contract, that linear appearance masks the significant discount that purchasers of larger volumes receive—because every clinic within that health care provider contract received the benefit of the aggregated rate.”<sup>19</sup>

As also discussed in GCI’s March 30, 2018 Letter to USAC, where the rural health care provider in aggregate purchases 50 Mbps or less in total TERRA capacity, those purchases can be compared with purchases by non-health care provider commercial and E-rate customers within the ranges of 1.41-8 Mbps and 8.1-50 Mbps in aggregate capacity. This approach applies the existing safe harbor ranges in a manner consistent with how TERRA is sold. Above 50 Mbps, GCI used two groupings of similar aggregate capacity: 51-300 Mbps and greater than 300 Mbps aggregate capacity.<sup>20</sup> As apparent from that letter and attached data, there were commercial and E-rate comparables in the 1.41-8 Mbps and 8.1-50 Mbps ranges (with or without including E-rate services), as well as in the over 300 Mbps grouping (when E-rate services are included). For each of those groupings, the average rate charged to commercial and/or E-rate customers was greater than the rate GCI would have charged to its rural health care purchaser in the absence of RHC support. There were no comparables within the aggregate purchase range of

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<sup>18</sup> GCI’s ability to add additional radios is limited, as some towers on the TERRA backbone are already near structural limits and could not accommodate the weight of additional antennas, waveguides, ice shielding, ice accumulation, and wind loading. Thus, additional capacity will require GCI to incur the incredible costs of rebuilding from the ground up many of the towers on the TERRA network.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.*

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51-300 Mbps. However, additional comparables are not necessary to reach the conclusion that GCI has shown that its rural rates are appropriate under Section 54.607(a). That is because GCI has justified both the lower end and the high end of the TERRA price matrix. With both ends reasonable, it is reasonable to conclude that the intermediate rates are also reasonable and justified under Section 54.607(a) by the surrounding average rates.<sup>21</sup> The reasonableness of this conclusion is further supported by GCI's cost study, which shows no excessive earnings.

In any event, were the Division to conclude that a service must actually be sold to a non-health care customer within a particular bandwidth range in order to satisfy Section 54.607(a), the result would then be to shift to examining TERRA rates under the second sentence of Section 54.607(b). GCI has already submitted a cost study showing that all of its TERRA rates are justified on that basis.

**II. Does Section 54.607(a) Require that Rates for a Service Be Compared Only on the Basis of the End-to-End Total, or Can It Reasonably Be Interpreted to Permit Assessing the Comparability of Each Component, When There Is No Overall End-to-End Discount for the Total Package as Compared to the Sum of the Parts?**

In its discussion with GCI, the Division has suggested that Section 54.607(a) can only be applied to the rate for an entire end-to-end service, and cannot be applied separately to distinct segments of that end-to-end rate, such as the channel terminations and the middle mile transport. In this context, an analysis limited to end-to-end services and ignoring comparable prices for each component is neither required by the rules nor a logical way to identify the comparable rates that commercial customers pay for similar services. As a practical matter, requiring the comparable non-health care providers to match on an end-to-end basis will make Section 54.607(a) unusable due to variations in channel termination charges among the incumbent local exchange carriers even when middle mile transport charges are the same. This variability is particularly pronounced for services to rural areas, like Alaska, which are served by almost 20 unique local exchange carriers.

The rules for determining the level of support for rural healthcare telecommunications services require calculating the difference between the urban rate and the rural rate for "identical or similar services" to the services for which the health care provider seeks support.<sup>22</sup> Nowhere do the rules require (or even mention) that the "identical or similar service" must be the end-to-end service, lumping together all components necessary to make the service work. Certainly, where an exact end-to-end comparable service is provided to non-health care providers, it is a

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<sup>21</sup> For further explanation, *see id.* at 11.

<sup>22</sup> 47 C.F.R. § 54.605 (determining the urban rate); *id.* § 54.607 (determining the rural rate); *id.* § 54.609(a) ("The amount of universal service support provided for an eligible service to be funded from the Telecommunications Program shall be the difference, if any, between the urban rate and the rural rate charged for the service, as defined here.").

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preferable basis for comparison, assuming that the purchasers are also similar (such as with respect to volume and term). But an exact comparable is not necessary to apply Section 54.607(a) as written. If an end-to-end analysis were required, the rule would have said so, or the Commission would have made that clear when adopting the rule.<sup>23</sup> Moreover, the fact that the rule requires, in some cases, examination of tariffs supports the reading that the “identical or similar service” need not be analyzed as a whole. Tariffs typically contain entirely separate sections for different elements of telecommunications service, such as channel termination, switching, mileage, and transport.<sup>24</sup>

The Commission’s prior use of the words “end-to-end” in the rural healthcare context do not compel or even support a requirement that the only comparable services are those that provide the same functionality from end-to-end. In the *1997 First Report and Order*, the Commission addressed end-to-end service in the context of its decision to provide support for distance-sensitive charges.<sup>25</sup> Carriers had argued that Section 254(h)(1)(A) requires rates, but not costs, to be comparable for similar services in urban areas, and therefore, that if the rate for transport was \$10/mile in urban areas, then a rate of \$10/mile in rural areas was comparable, and the carrier did not need to offer health care providers a discount on that rate no matter how high the total price for transport was, due to the number of miles needed to reach the rural health care provider.<sup>26</sup> The Commission rejected that argument. In deciding to fund distance-based charges, the Commission concluded that the term “rate” in Section 254(h)(1)(A) “refers to the entire cost or charge of a service, *end-to-end*, to the customer . . . not [to] rates for particular facilities or elements of a service.”<sup>27</sup> The context makes clear that the Commission was using the term “end-to-end” to clarify that the cost to the rural health care provider for the entire end-to-end service needs to be comparable to urban levels, and to reject a reading of the statute that rural health care providers should simply pay the same “rate” for one element of a service when the total cost for that element far exceeded what an urban counterpart would pay.<sup>28</sup>

The Commission’s recent Notice of Apparent Liability (“NAL”) against DataConnex also does not compel limiting Section 54.607(a) to a full end-to-end comparable. In that NAL, the Commission reviewed evidence suggesting that DataConnex inflated the amount of support

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<sup>23</sup> Likewise, if there were any prior application of the rule in this manner, USAC would not have accepted GCI’s submissions when it justified the rates being charged in USAC’s 2015 audit.

<sup>24</sup> See, e.g., Windstream Telephone System, Tariff F.C.C. No. 6, Section 7 (providing rates for local switching, local transport, voice grade special access service, and high capacity special access service, among others).

<sup>25</sup> *1997 First Report and Order* at 9127-29 ¶¶ 673-75.

<sup>26</sup> See *id.* at 9570-71 ¶ 413 (Appx. J—Summary of Comments).

<sup>27</sup> *Id.* at 9128-29 ¶¶ 674-75 (emphasis added).

<sup>28</sup> Notably, the variation at issue was entirely due to the price of the interexchange transport component.

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requested by its customer health care providers by understating the cost of comparable urban services. It did so, according to the NAL, by submitting to the health care provider “urban rate letters that did not include *all the costs* associated with the services.”<sup>29</sup> DataConnex’s urban rate letters were purportedly based on AT&T sales quotes for Ethernet service. AT&T’s service includes a port connection, a committed information rate, and customer port connection capacity; DataConnex’s urban rate letters, however, relied only on the port charge, not the committed information rate that was also part of the sales quotes.<sup>30</sup>

In analyzing DataConnex’s actions, the Commission repeated the language from the *1997 First Report and Order* that “‘rate’ refers to the entire cost of a service, end-to-end, to the customer and does not refer to the cost of each element or sub-element of a telecommunications service.”<sup>31</sup> Consistent with the *1997 First Report and Order*, the Commission recognized that Section 254(h)(1)(A) contemplates that rural health care providers receive support for the difference between the rural rate for the entire service and the urban rate for the entire service—not the difference between the rural rate for the entire service and the urban rate for only a portion of that service. The Commission alleged that DataConnex misrepresented the urban rate by selectively ignoring certain relevant costs on the comparable urban sales quotes.<sup>32</sup>

Both of these orders support the notion that the purpose and plain meaning of Section 254(h)(1)(A) is to bring the cost of telecommunications services to rural health care providers down to levels paid by their urban counterparts for similar services. But neither suggests that calculating the comparable rates requires comparing only the total cost of “end-to-end” services and precludes an analysis of the comparability of channel termination charges separate from middle mile transport. This is particularly true where such a calculation does not inflate the amount of support sought but simply reflects the fact that the channel terminations and middle mile transport are offered and sold over differing geographic scopes, and thus produces a broader range of comparable sales for the middle mile transport component than for the channel terminations—or, because of the limited geographic scope of the channel termination charges, for the combined total of channel terminations plus middle mile transport. The rule does not compel only one way to identify and assess a comparable “end-to-end service,” but rather prescribes that the assessment itself include all of the component parts of that service.

It is important to understand the implications of choosing to interpret Section 54.607(a) as precluding evaluation of comparability by component segments. Take, for example, two end-to-end circuits purchased over TERRA, one by a school district from Bethel to Anchorage and one by a health care provider from Kotzebue to Anchorage. For simplicity, assume that both

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<sup>29</sup> *DataConnex, LLC*, Notice of Apparent Liability for Forfeiture and Order, 33 FCC Rcd. 1575, 1602 ¶ 67 (2018) (emphasis added).

<sup>30</sup> *Id.* at 1603 ¶ 67 n.223

<sup>31</sup> *Id.* at 1614 ¶ 94 (citing *1997 First Report and Order* at 9128-29 ¶¶ 674-75).

<sup>32</sup> *Id.* at 1615 ¶ 96.

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circuits are symmetric, dedicated 100 Mbps and in the same aggregate capacity tier on the TERRA matrix (so that their TERRA charges are identical). Although the Anchorage channel terminations will be the same, the tariffed charges for the Bethel channel termination (\$12,619.08) differ from the one in Kotzebue (\$5,544.00), because Bethel is served by United Utilities as the incumbent LEC, and Kotzebue is served by OTZ. In this example, if only the charge for the entire end-to-end circuit is considered in applying Section 54.607(a), the middle mile charge for the Bethel to Anchorage circuit could not be considered comparable to the middle mile component of the Kotzebue-to-Anchorage circuit, even though they are substantively identical. At the same time, it would be irrational and contrary to Section 251(h)(1)(A)'s focus on the rate that the rural health care provider would otherwise have paid absent the mandate to charge the urban rate to treat these two services, with different channel termination charges, as if they were similar and thus subject to averaging under Section 54.607(a).

As a practical matter, choosing to interpret Section 54.607(a) as precluding a comparison of middle mile rates with other similar middle mile segment prices, irrespective of the channel termination rates, would essentially eliminate Section 54.607(a) as a means to establish the rural rate. Because there are also no publicly available end-to-end rates for these services, the first sentence of Section 54.607(b) also could not be utilized. That would force all rates into the cost review under the second sentence of Section 54.607(b). However, even in that circumstance, the analysis would have to be segmented by component part: in the example above involving circuits between Kotzebue and Anchorage, GCI could submit a cost study for its middle mile transport component over TERRA, but could not provide a cost study for the channel terminations it purchases from OTZ (in Kotzebue) and ACS (in Anchorage), respectively. GCI's costs for channel terminations would be based on the charges paid for those channel terminations, which may or may not be tariffed, depending on the LEC and the service.

### **III. Does Section 54.607 Preclude Justifying One Portion of an End-to-End Service Based on Section 54.607(a) and Other Portions Based on Either Sentence of Section 54.607(b)?**

Assuming that one agrees with the conclusion in Section II, above, that an end-to-end rate can be justified on the basis of the sum of its parts, there is nothing in the text of Section 54.607 that precludes using different parts of Section 54.607 to justify different components of the rural rate. Section 54.607 sets out a hierarchy of options, preferring comparable rates to commercial customers to publicly available rates charged by other carriers for the same service, which in turn are preferred to establishing rates through a cost study. But the rule does not suggest that all parts of an end-to-end circuit must be justified under the same subsection, particularly if a comparable rate to a commercial customer does not exist for one component. The rule simply does not discuss this scenario.

As an example, take the situation in which an exact end-to-end non-health care provider comparable does not exist, but GCI has comparable rates for the middle mile transport component. In that case, if there are channel terminations sold to non-health care provider in the

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A and Z communities, they could be used as comparables under Section 54.607(a). If such comparables do not exist, the reasonable next step would be to turn to publicly available tariffed channel termination rates, pursuant to the first sentence of Section 54.607(b), if those are available. This is the only alternative available under the rules, since GCI cannot conduct a cost study on those facilities (unless one were simply to accept the cost paid to the third party LEC as the cost of that component, which is effectively the same result).

It would simply not make sense to read Section 54.607(a) as precluding use of a Section 54.607(b) method in this scenario. Indeed, the only result of doing so would be to require GCI to submit a cost study to set the rural rate for the total end-to-end charge, including the middle mile component, even though the middle mile component could have been priced using a middle mile comparable service and even though the channel termination facilities are not owned by the middle mile provider. Such an interpretation would waste both providers' and the Commission's resources, with no improvement in program protection.

**IV. Does Section 54.607(a) Compel Ignoring Volume Discounts? If Not, Is It Reasonable to Ignore Volume Discounts When Determining Whether Rates Are for Similar Services?**

Section 54.607(a) says nothing explicitly about how to treat volume discounts when identifying the rural rate. Therefore, it does not *require* an analysis that fails to take into account whether a non-health care provider customer purchased a sufficient quantity of service to qualify for a volume discount. A more common sense reading would take bulk discounts into account in a way that is faithful to both Section 54.607(a) and Section 254(h)(1)(A).

The Commission has encouraged participants in the Rural Health Care Program, as well as the E-rate Program, to form consortia precisely because larger purchases often allow lower per-unit prices. As noted above, discounts for volume purchases reflect that higher volume and term customers offer the provider greater financial stability, which supports longer-term planning and the ability to attract investors. But these discounts are available precisely because the customer is purchasing a particular, larger amount of service. The same rates cannot be offered to all customers, because they would fail their very purpose—to encourage customers to commit to purchasing larger amounts of service over a longer period of time when doing so meets their communications needs. Indeed, under existing legal precedent, volume and term discounts can be reasonable and nondiscriminatory—meaning that they are *different* among otherwise similarly situated customers, but not unreasonably or unreasonably discriminatorily so.<sup>33</sup>

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<sup>33</sup> See, e.g., *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984) ("The Communications Act prohibits unjustifiably different rates for the same service. 47 U.S.C. § 202(a) (1976). But when there is a neutral, rational basis underlying apparently disparate charges, the rates need not be unlawful. For instance, when charges are grounded in relative use, a single rate can produce a wide variety of charges for a single service, depending on the amount of the service used.

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The customers that qualify for a higher discount rate are not, therefore, purchasing the “identical or similar service” to the rural healthcare customer. A tanker truck’s worth of gasoline is not “identical or similar” to ten gallons purchased at the pump. The customers that qualify for a higher discount rate are purchasing something different—something that allows the carrier to apply a discount. Within the context of the Rural Health Care Program—the statutorily explicit purpose of which is to bring rates for rural health care providers down to urban levels—the appropriate rural rate must factor in the volume and term that meets the rural health care provider’s needs.

This leaves two options for determining the rural rate. Services that provide an “identical or similar” functionality can be considered if their rates are considered in the context of the volume and term to which the customer committed. Or services can be “identical or similar” only if they are of similar aggregate volume and for a similar term as the service for which the health care provider seeks support. If no such services are available for comparison, then, in the absence of a publicly available rate from another provider for the same service, the rural rate must be determined by a cost study under Section 54.607(b).

The method that the Division seems to be applying—not taking discounts into account but considering any volume or term to be comparable to another—leads to unfair and unlawful results. The posted TERRA price per Mbps per month for a hub port with a one-year commitment ranges from \$778 per Mbps to \$446 per Mbps, depending on the aggregate capacity purchased.<sup>34</sup> To the extent that services at different volume- or term-tiers are considered under Section 54.607(a), they should be adjusted to account for the pricing differences that result from those volume and term commitments.

Imposing the highest volume rate on low volume purchases is also contrary to the Commission’s and statute’s objectives. It creates a substantial disincentive to create volume discounts, especially in areas like remote Alaska, which lack a robust commercial market across all volume levels. This would both increase the risk of rural broadband investment and likely increase prices to be supported by the USF.

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GCI continues to believe that the materials it has submitted demonstrate that its comparable rural rates are no higher than permitted by Section 54.607, utilizing each of its subsections as appropriate. We continue to ask that the Bureau authorize USAC to finalize

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Yet there is no discrimination among customers, since each pays equally according to the volume of service used.”); *Regulation of Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459, 3540 ¶ 185 (2017) (permitting all price cap LECs in non-competitive counties to lower rates through volume and term discounts).

<sup>34</sup> Prices are for hub ports that support service between Anchorage and a regional center (Bethel, Dillingham, Kotzebue, King Salmon, or Nome).



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Funding Commitment Levels for the rural health care providers served by GCI at the requested support levels, as we are now in the 11<sup>th</sup> month of the program year.

We remain available to discuss any or all portions of this letter and its attachments with the Division.

Sincerely,



John T. Nakahata  
Julie A. Veach  
Jennifer P. Bagg  
*Counsel to GCI Communication Corp.*

Enclosures:

Attachment 1 – GCI Rural Rate Analysis GCI COMMENTS CONFIDENTIAL

Attachment 2 – Supporting Contracts CONFIDENTIAL

cc: Trent Harkrader  
Ryan Adams  
Preston Wise  
Arielle Roth  
Nirali Patel

**E-rate Rural Rate Analysis – GCI Response Redacted in Entirety**

**Supporting Contracts Redacted in Entirety**