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

In the Matter of	)	
	)	
Promoting Telehealth in Rural America	)	WC Docket No. 17-310
	)	

ALASKA COMMUNICATIONS

PETITION FOR RECONSIDERATION

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EXECUTIVE SUMMARY

Alaska Communications commends the Commission for completing its comprehensive overhaul of the Rural Health Care program in August 2019, especially for substantially updating the rules for the Telecommunications Program. This program has greatly enhanced universal service in Alaska, where telehealth services are a lifeline for hundreds of rural communities, but the program has been fraught with uncertainty and inconsistencies, particularly in recent years.

Although the August 1, 2019 *Report and Order* improves the rules in many respects, reconsideration is merited for two aspects of the Telecommunications Program: First, the capping of the compensable rural rate based on a rate median and, second, the delegation of FCC authority to USAC to establish that median.

The use of a median to cap the rural rate and limit support for the rural-urban difference will fail to compensate service providers in the most remote locations for the difference between rural and urban rates for advanced services they could provide, short-changing residents in these areas with inadequate telemedicine services. The Commission instead should accept the market rate in cases of competitively bid contracts as market prices are to be preferred under longstanding Commission policy. If published rates for competitive services are relied on, they should be accepted as the rural rate. Only in the absence of competitive bids or a published competitive rate should the FCC employ an alternative backstop to curb excessive rural rates. That mechanism should be an average of rural rates for similar services available in similarly rural areas in the state. The average should be computed annually based on the previous year's available rates.

Once the rules for establishing the rural rates are clear, the Commission, not USAC, should determine the rural rates that are eligible for support under the program. The delegation in the *Report and Order* gives USAC far too much discretion in developing the rural median rate caps, violating the intent of Congress and the Commission's own framework for USAC as an administrator rather than a policy-making body. The Commission alone should resolve the many questions about what data points to include and exclude in comparing rural rates for similar services in similar geographic areas. USAC lacks the necessary expertise whereas the Commission has both the jurisdiction and the administrative tools to resolve open issues in a timely, transparent and consistent manner.

Alaska Communications also asks the Commission to clarify that its new rule permitting non-material "site and service substitutions" in certain circumstances is intended to include corrections to reflect the real service dates, allowing USAC to make these changes without the need for a formal appeal of a funding commitment letter, and ensuring the service providers are compensated in a timely manner for the period in which they actually provide service. Any questions about the terms of service or the rural or urban rate should be communicated not only to the healthcare customer but also to the service provider seeking reimbursement for the rural-urban rate difference.

The rules and processes governing the Telecom Program should be designed to ensure continued success in the program, not to deny support where necessary services have been provided.

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I. INTRODUCTION

Alaska Communications actively participated in the rulemaking proceeding that led to the Commission's August 1, 2019 Rural Health Care ("RHC") *Report and Order* and commends the Commission for recognizing the need for new rules for this program.[1] Many of the reforms advocated by the company were adopted in some form in the *Report and Order*. Pursuant to Section 1.429 of the Commission's rules,[2] Alaska Communications[3] seeks reconsideration of certain aspects of the *Report and Order* that affect the determination of the "rural rate," the core of the support mechanism for the RHC Telecommunications Program.

First, the system of "median" rural rate caps (by service type, rurality tier, and state) adopted in the *Report and Order* will fail to compensate service providers for the difference between rural and urban rates to which they are entitled under the Communications Act. This violates the intent of Section 254(h)(1)(A) of the Act,[4] and it will reduce access to advanced telecommunications services available to healthcare providers serving the most rural, highest-

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1 *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Report & Order, FCC No. 19-78, (rel. Aug. 20, 2019), 84 Fed. Reg. 54,952 (Oct. 11, 2019) (the "*Report and Order*").

2 Any interested person may petition the Commission for reconsideration of a final action in a rulemaking proceeding. 47 C.F.R. §1.429.

3 In this petition "Alaska Communications" represents the following wholly-owned subsidiaries of Alaska Communications Systems Group, Inc.: ACS of Alaska, LLC, ACS of Anchorage, LLC, ACS of Fairbanks, LLC, ACS of the Northland, LLC, and Alaska Communications Internet, LLC, all of which provide services to rural healthcare providers.

4 47 U.S.C. §254(h)(1)(A).

cost areas. Where there have been competitive (that is, two or more) bids on a rural healthcare request for proposals, the best-value bid selected by the rural healthcare provider should be the rural rate. In the absence of competitive bids or published competitive rates, the FCC should employ as a backstop the *average* of rural rates in comparable areas.

Second, the Commission unlawfully delegated to the Universal Service Administrative Company ("USAC") the work of setting the rate caps, including the discretion to determine what services should be considered "similar," what types of rates should be compared, and what data to include and exclude in its calculations – all decisions requiring the exercise of the FCC's expert judgment that should be subject to the administrative procedures that govern the agency.

Alaska Communications also seeks clarification of Section 54.624(a) of the rules, permitting non-material "site and service substitutions."[5] The FCC should clarify that service delivery dates are among the "service substitutions" that are permissible under this rule where necessary to reflect the actual dates of service. Allowing USAC to make this type of change without the need for an appeal of a funding commitment letter will help ensure that service providers are compensated in a timely manner for the period in which they actually provide service. USAC should communicate with the service provider, not only the healthcare customer, regarding any questions about the terms of service or the urban or rural rates.

II. THE MEDIAN-BASED RURAL RATE CAPS ADOPTED IN THE REPORT AND ORDER CANNOT FULFILL THE REQUIREMENTS OF SECTION 254(h)(1)(A)

As the Commission acknowledges, telehealth services are playing an increasingly central role in serving millions of Americans in rural communities,[6] delivering essential services and

[5] 47 C.F.R. §54.624(a).

[6] *E.g., Report and Order* ¶¶1-2, 5.

cost savings.[7] But deploying and maintaining broadband in rural America is costly. In many rural communities, high-speed broadband that otherwise would be unaffordable is made available to the local healthcare clinic because of support from the RHC Telecom Program.

The essence of the RHC Telecommunications Program is a social contract. As defined in Section 254(h)(1)(A) of the Communications Act, healthcare providers are entitled to access to the telecommunications services they need to serve rural areas at rates that are reasonably comparable to the rates charged for similar services in urban areas of the same state;[8] and the service providers who fulfill those service requirements, in turn, are entitled to receive from the RHC Telecommunications Program the difference between the urban rate (which is paid by the HCP) and the rural rate, that is, the rate "for similar services provided to other customers in comparable rural areas."[9] The healthcare provider pays the urban rate, and the rural-urban rate difference is made up through support, so the service provider is not penalized for providing service in a rural area to a customer that can afford only urban rates.

While the Telecommunications Program has enabled an impressive array of rural telehealth services in many rural communities, the program also has been fraught with uncertainty and inconsistencies. Alaska Communications welcomed reform. However, in the effort to increase "efficiency" and to "prevent waste, fraud and abuse" in the Telecom Program,[10] reform has exceeded the bounds of the law. The "rural rates" to be supported under the program

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7 *See, e.g.,* Comments of Bristol Bay Area Health Corp., WC Docket No. 17-310 (filed Feb. 2, 2018) at 5.

8 *See* 47 U.S.C. §254(h)(1)(A).

9 *Id.* (emphasis added).

10 *Report and Order* ¶¶3, 13; *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Notice of Proposed Rulemaking and Order, FCC 17-164, ¶¶4, 41 (rel. Dec. 18, 2017) (the "*RHC NPRM and Order*").

are "the rates for similar services provided to other customers in comparable rural areas."[11] By its plain meaning the statute requires that support be based on actual rates; it does not permit support to be capped for the sake of an arbitrary FCC budget.[12]

By capping the "rural rate" at a median for each service type, in each state, across various communities grouped together in the same rurality tier, the program will fail to provide sufficient support to fulfill the requirements of Section 254(h)(1)(A) in locations where rural rates exceed the median (*i.e.,* the rural-urban rate difference will be artificially depressed). The urban-rural rate difference has been redefined in a manner that is guaranteed to fail to compensate service providers for bringing telecommunications services to healthcare providers in rural areas where costs exceed the median.[13] Beginning in funding year 2021, compensation to providers of rural telehealth services will be limited by the new median-based cap, so they will not be able to recoup rates they would charge for similar services in comparable rural areas, as intended by the statute. In effect, the Commission will drive providers out of the market for rural telecommunications services, in contravention of the public interest.

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[11] 47 U.S.C. § 254(h)(1)(A). Rural rates supported by the program should accurately reflect the cost of providing services in those rural areas. *Report and Order* ¶29.

[12] ACS long has advocated that the FCC study the needs of rural healthcare providers to ensure the budget for the RHC program is sufficient. *E.g.,* Comments of Alaska Communications, WC Docket No. 17-310 (filed Feb. 2, 2018) at 13 (hereinafter, "ACS 2018 Comments").

[13] The *Report and Order* characterizes the median as both a cap on rural rates and a prescription of the rural rate in each state, for each rurality tier, and for each type of service (or similar services). *See Report and Order* ¶64 (the rural rate will be the *lower of* the rate actually charged in the contract and the median set by USAC for the relevant service type and rurality tier in the state). *But see id*. ¶53 (rural rate determined to "be the median of all available rates charged for the same or functionally similar service in the rural tier where the health care provider is located within the state"), ¶60 (rural rate "will be the median of available rates for the same or similar services offered within the health care provider's rural tier" in the state). To the extent the new rural rate median attempts to prescribe rates, it unlawfully delegates that function to USAC. *See infra* notes 50-52 & accompanying text.

A. The Commission Should Reconsider the Use of a Median As an Arbitrary and Unreasonable Cap That Will Not Result In Compensatory Rural Rates

When the Commission sought comment[14] on modifying the basis for calculating the "rural rate," it proposed to average "all publicly available rates" for functionally similar services in comparable rural areas.[15] Under this proposal, the Commission indicated, USAC would establish a database containing all rural rate information obtained in a year from comparable service offerings, so the "rural rate" in any funding year would be based on the average of all relevant rural rates from the previous year.[16]

The new approach adopted in the *Report and Order* requires publication of all available rates for comparable services across similarly rural areas in each state.[17] Alaska Communications supports the availability of this information because it help to confirm market prices for rural tele-health services.[18] With access to this information, competitive bids are even more likely to reflect the cost of service.[19] Because there will be some healthcare services for which competitive bids are not offered, Alaska Communications supported the concept of using rate averaging as a backstop, helping to ensure rural rates are reasonable in the absence of market information.[20] However, it is critical that the rate average employed reflect the economics of serving the area at issue. For this reason, Alaska Communications proposed that locations in the "extremely rural" tier be subdivided according to access to communications infrastructure, the

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14 *RHC NPRM and Order*.

15 *Id.* ¶64.

16 *Id. See also id.* ¶ 69 ("USAC would collect and aggregate the prior year's Telecom Program and E-rate rate data as well as any other publicly available data").

17 *Report and Order* ¶29.

18 ACS 2018 Comments at 17-21.

19 Supplemental Comments of Alaska Communications, WC Docket No. 17-310 (filed Jan. 30, 2019) at 5, 9 (hereinafter the "ACS Public Notice Comments").

20 *Id*.

capabilities of which will determine what services are available as well as the prevailing prices.[21] Averages would be developed based on rate inputs from comparable services provided in the previous year, provided in comparable areas of the same state.[22] Alternatively, Alaska Communications suggested that services that include a documented third-party cost component (such as transport) be deemed not "similar" to services lacking such a component.[23] The inclusion of third-party costs is extremely common in the most remote parts of Alaska, where only one transport provider may be operating. Developing separate medians or average rates for these different classes of services is a reasonable way to group together similar services. The *Report and Order* does not appear to address this proposal.

The *Report and Order* did adopt an alternate framework suggested by ACS, subdividing "extremely rural" and "frontier" areas of Alaska based on whether they are on or off the road system, respectively.[24] The proposal that Alaska Communications advocated differs from what was adopted by the Commission in two critical respects, however: The Commission failed to permit USAC to approve rural rates that are derived from competitive bids or published rates; and the Commission adopted a median rate cap in lieu of rate averaging for functionally similar services within a geographic tier. Alaska Communications seeks reconsideration of both.

Where a healthcare provider, following the procedures prescribed by Commission rule, has selected the best value contract from among two or more competing bids, the rate in that winning bid should not be second-guessed. In a competitive market, rates may be presumed to

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21 Alaska Communications proposed separate rate averages for on-road, off-road and satellite-only areas of extremely rural Alaska. ACS Public Notice Comments at 9-13.

22 *Id.* at 8-12.

23 Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, FCC Secretary, WC Docket No. 17-310 (filed July 29, 2019) at 3 ("ACS July 19 Letter").

24 *Report and Order* ¶35.

be reasonable, the most efficient measure of the price of delivering service.[25] Moreover, the Commission has prescribed detailed rules for the conduct of competitive bidding that will ensure both that bids are submitted on an arms' length basis, and that bids will be responsive to the needs of the healthcare providers, and not result in provisioning a more expensive service than the healthcare provider needs.[26] When a rate is selected as a result of competitive bidding, the FCC reasonably may rely on that rate being the most efficient offer available to ensure that the services needed by the healthcare provider will be delivered at a price that represents the cost of serving that community. In such markets, capping prices discourages competitive entry, creates a disincentive to investment and innovation, and imposes undue administrative and financial burdens.[27] Therefore, where healthcare providers receive two or more competitive bids, the rate in the winning bid should be the rural rate.

Similarly, where the healthcare provider selects a service based on a published intrastate or interstate tariff or published price list, the Commission must accept that rate as presumptively lawful.[28] Only in circumstances where the proffered rural rate is not based on a competitive bid or published rate should the Commission use another mechanism to cap rural rates. However, the Commission should reconsider its adoption of a median-based rate cap and instead use an average of all available rates for similar services in the same type of areas of the state.

A rate average would incorporate "outlying" rates, both the highest and the lowest, in setting a cap for rates for similar services in a particular tier of rurality; but a median ignores the

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25 *See Business Data Services In an Internet Protocol Environment, et al.*, Report and Order, 32 FCC Rcd 3459, 3495-3501 (2017) (subsequent history omitted) ("*BDS Order*").

26 *See Report and Order* ¶¶155-162.

27 *See, e.g., BDS Order*.

28 *Cf.* 47 U.S.C. §203(c). *See also* Letter from Lynn Follansbee, U S Telecom, to Marlene Dortch, FCC Secretary, WC Docket No. 17-310 (filed July 25, 2019). For detariffed competitive services, rates are available on published price lists.

highest and lowest rates. As the Commission acknowledged, it would not serve the public interest if rates in the most rural, highest-cost areas are "unfairly reduced by being combined with rates from less rural areas."[29] In the same manner, a median will unfairly cap rates in extremely rural and frontier areas, ignoring the higher prices of the most rural, highest-cost areas within those tiers. This rule will be particularly burdensome on service providers attempting to fulfill the universal service goal of providing much-needed telecommunications services to eligible rural healthcare providers in the extremely rural and frontier areas with the fewest service choices and poorest infrastructure access. Alaska Communications believes the choice by the Commission of the median over the average could profoundly diminish the availability of affordable telehealth services in the most underserved areas of Alaska by effectively eliminating support for those areas.

The decision to simply rely on rates in a *less rural* geographic tier where the Administrator cannot find publicly available rates in the same rurality tier[30] similarly is guaranteed to under-compensate telecommunications providers for service to rural healthcare facilities in the most rural – and highest-cost – areas of the nation. The *Report and Order* offers no explanation as to how this will satisfy the statute or serve the public interest. Telecommunications providers delivering telehealth services pursuant to Section 254(h)(1)(A) ought to have the reasonable expectation of *at least* the average compensation rate for similar services in similar locations – and if none is available (a situation the Commission predicts will be "unlikely")[31] then they ought to receive the average rate for the next *more* rural tier. To do otherwise would disincentivize the deployment of advanced services in rural areas.

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[29] *Report and Order* ¶33.

[30] *Id.* ¶61.

[31] *Id*.

The Report and Order appears to give weight to the desire to eliminate "inconsistencies" among the rural rates supported by the Telecom Program.[32] This seems to be a false priority, however. As the Commission has acknowledged, the cost of providing telehealth services in Alaska, especially in its off-road communities, can greatly exceed those of other rural areas.[33] The extremely large frontier tier likely will include communities with very diverse resources and a variety of service challenges – some with access to fiber-based telecommunications infrastructure, others relying primarily on microwave-based fixed wireless technology but still enjoying some low-latency terrestrial broadband capability, and still others limited to satellite connections and their attendant limitations and costs – all grouped together for purposes of developing the "rural rate" cap. It is unreasonable to assume that these different infrastructures have similar capital or operating costs, or similar prices. Moreover, price is influenced by the per-user cost which not only depends on the technology deployed and the geographies to be traversed but also depends significantly on demand. Even within the same technology and geography, the incremental per-user cost in a community of 50 is much higher than in a community of 5,000. All of these factors need to be accounted for in determining what constitutes "similar services."

The rates in these diverse communities vary widely for many legitimate reasons including, *inter alia,* the distance of the community from the nearest fiber infrastructure, the difficulty of accessing the community due to location, topography, and other local factors, and size of the population of the community. In Alaska's frontier locations there is no standard set of conditions. It is only reasonable to expect the rates in the frontier areas to be not only higher

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[32] *E.g., Report and Order* ¶¶12, 58, 59, 67; *RHC NPRM and Order* ¶¶60-61.

[33] *Report and Order* ¶34.

than in other rural areas but also variable from one place to another within this category.[34] By effectively prescribing rural rates for all eligible telecommunications services, the median constitutes unreasonable and arbitrary rate-making and should be reconsidered.

Nor is the Commission's desire to cap the size of the RHC Program[35] a legally adequate rationale to justify unreasonably limiting the service providers' compensation under Section 254(h)(1)(A). While the statute may not create "an unlimited right" to support,[36] it does require that support be *sufficient* to fund the telecommunications services necessary for healthcare providers to serve rural areas.[37] This compels the Commission make reasonable inquiry into both the needs of healthcare providers and the actual prices of the services they need. Moreover, the Commission has a mandate to ensure its definition of universal service meets the evolving needs of customers, including those in rural areas.[38] As the customers' telehealth needs evolve, the subsidy program also must evolve to support the services they require, including information services.[39] The Commission may not adopt a cap on Telecom Program support merely to meet a budgetary goal if that cap undermines the very program for which the support was developed.

B. <u>The Commission Should Clarify That a New Rural Rate Cap for Each Type of Service In Each Rurality Tier In Each State Will Be Calculated Annually, Based on the Previous Year's Available Rates</u>

The Commission initially proposed to have USAC establish a database containing all rural rate information obtained from comparable service offerings *in a year*, so the "rural rate" in

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34 *See* ACS Public Notice Comments at 8-10.

35 By the Commission's own design, the RHC program's budget is by far the smallest of the FCC's universal service programs, yet the Commission has targeted the program as needing elimination of "wasteful spending." *E.g., Report and Order* ¶13; *RHC NPRM and Order* ¶4.

36 *Report and Order* ¶136.

37 *See* 47 U.S.C. §§254(b)(5), 254(h)(1)(A).

38 47 U.S.C. §§254(b)(4), 254(c)(1).

39 ACS July 19 Letter at 5-6.

any funding year would be based on the average of all relevant rural rates *from the previous year*.[40] As stated above, in the *Report and Order*, the Commission adopted a median rather than a rural rate average, and Alaska Communications seeks reconsideration of that ruling, as well as the Commission's decision to substitute the median for the market rate in competitive situations. But it also appears that the Commission has failed to specify *which rates* (respecting their service dates) will be included in the median that is applicable in any given funding year.

Alaska Communications urges the Commission to specify on reconsideration that the rural rate average or median in any given funding year must be calculated using only rural rates that were in effect in the previous year. Thus, for funding year 2021, only rates in effect in calendar year 2020 would be used to compute the rural rate average or median. Alaska Communications timely proposed this in comments in the rulemaking.[41] Ensuring that the rural rate cap draws on rates that are current is essential to maintaining a cap that reflects market realities. The *Report and Order* mentions that the rural rate (median) cap will be drawn from "broadly inclusive" rates available in the market, including "prior funding year RHC Program pricing data," but also including rates that may not have been recently charged in the market, such as state master contracts, tariffed rates, rates posted on websites, and rate cards.[42] This pool is bound to include outdated rates for services no longer being ordered. The Commission should clarify that only rates that actually were charged for services delivered in the prior calendar year will go into the rural rate calculation for any RHC funding year.

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40 *RHC NPRM and Order* ¶¶ 64, 69.

41 Supplemental Comments of Alaska Communications at 8.

42 *Report and Order* ¶61.

III. THE COMMISSION UNLAWFULLY DELEGATED TO USAC THE WORK OF EVALUATING AND REGULATING RURAL RATES

Alaska Communications seeks reconsideration of the delegation of authority to the Administrator for purposes of rural rate determinations, because it is the Commission, not USAC, that ought to make the policy decisions regarding the calculation of the rural rate in circumstances where the cap applies,[43] particularly what services are "similar" for rural rate determinations, what prices should be included in the median or average used to cap those rates, and what data to include and exclude. It is the Commission that has the authority and expertise to make these decisions, and it is the to the Commission that parties must have a right to seek redress in the case of erroneous or inconsistent rulings.

A. The Commission, Not the Administrator, Has Authority To Establish Rate Caps

The Commission appointed the Universal Service Administrative Company ("USAC") as the permanent administrator of federal universal service support mechanisms,[44] and specifically, to bill contributors, collect contributions, and disburse support.[45] The role of administrator is strictly constrained by FCC rule: USAC may not make policy, interpret unclear provisions of the Communications Act or FCC rules, or interpret the intent of Congress.[46] Alaska Communications believes the *Report and Order* places responsibilities on USAC that greatly exceed its intended administrative function, requiring USAC to make policy and interpret the intent of the Commission and Congress, and should be reconsidered.

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43 As noted, the Commission should only use this cap on rural rates as to telecommunications services that have not been selected following a competitive bidding process and are not available from a published tariff. *See supra*, pp. 6-8.

44 47 C.F.R. §54.701(a); *see Changes to the Bd. of Directors of the Nat'l Exch. Carrier Ass'n, Inc.*, 13 FCC Rcd. 25058, 25067-68 (1998) ("*USAC Revised Structure Order*").

45 47 C.F.R. §54.702(b).

46 47 C.F.R. §54.702(c).

The Commission states that the *Report and Order* does not delegate "ratemaking" authority to USAC; rather, "the Commission itself adopts rules dictating how urban and rural rates will be determined for the Telecom Program."[47] However, in the Commission's formulation of the "rural rate" (or more precisely the median that will serve as a cap on rural rates), there are many variables requiring the exercise of the agency's expert judgment in light of the goals expressed in the statute and the intent of Congress, including:

- *Which rural services* are "the same or similar" within the meaning of the statute, based on factors including bandwidth, service quality, security, reliability, service level guarantees, and whether a service is symmetrical or asymmetrical;[48] and
- *At what rate* are those similar services "available" in any particular year, which may require parsing multi-year contracts and volume and term discounts, such as may be found in the prior funding year's RHC contracts, and in the rates, terms and conditions offered to E-rate program participants.[49]

The Commission has decided to make USAC the interpreter of the statutory term "similar services" requiring it to parse questions such as those listed above. This delegation plainly is unlawful. Only the Commission, not USAC, may interpret the intent of Congress in establishing and implementing universal service programs.[50] While delegation of the Commission's universal service authority would be permissible if Congress had intended it, in the case of

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47 *Report and Order* ¶89.

48 *Report and Order* ¶¶ 15, 17.

49 *See Report and Order* ¶61.

50 "[T]he single entity proposed by the Commission to administer the universal service support mechanisms must be 'limited to implementation of the FCC rules for applications for discounts and processing the applications […] [and] may not administer the programs in any manner that requires that entity to interpret the intent of Congress….'" *USAC Revised Structure Order, supra,* 13 FCC Rcd. at 25066 (quoting Section 2005(b)(2)(A) of Senate bill S.1768).

Section 254 no delegation to USAC was permitted.[51] For this reason the Commission's own rules prohibit USAC from "interpret[ing] unclear provisions of the statute"[52] and the delegation to USAC is unlawful.

Moreover, USAC is asked to determine service similarity "from the perspective of the end user" – that is, from the perspective of the healthcare provider that would use the services.[53] How USAC is to put itself in the healthcare provider's shoes is not explained. USAC has never amassed a record documenting end-user experience with different telecommunications services. The *Report and Order* would put USAC in the position of making qualitative judgments about the functional attributes of various services from the perspective of the end-user, without any indication how USAC is do so in accordance with its mandate to administer the program in a "competitively neutral manner."[54] In contrast, the Commission has gathered considerable input from end-users, such as through this RHC docket as well as in its annual Section 706 broadband inquiries, in which the Commission is continually refreshing its understanding of the broadband communications market.[55] It should be the Commission that instructs USAC which services

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[51] *See id. See also U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (delegation of agency authority to a subordinate federal officer or agency presumptively permissible absent affirmative evidence of contrary congressional intent, but delegation to an outside party assumed to be improper absent affirmative showing of congressional authorization). To the extent the Commission is not only capping the amount of support that may be received through the RHC Telecom Program, but prescribing how much the service provider may recover from the customer, the Commission's new rural rate scheme constitutes "rate-making" as well as universal service policy-making, and may not be delegated to USAC. *See* 47 U.S.C. § 155(c) (limiting scope of entities to which the Commission may lawfully subdelegate its authority).

[52] 47 C.F.R. § 54.702(c).

[53] *Report and Order* ¶15.

[54] 47 C.F.R. §54.701(a).

[55] *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans In a Reasonable and Timely Fashion,* GN Docket No. 19-285, Notice of Inquiry, FCC 19-102 (rel. Oct. 23, 2019).

should be grouped together as "the same or substantially similar" for purposes of developing a database of rates that can be meaningfully compared.

The Commission reasons (without citing any source of authority) that giving this authority to USAC will "reduce healthcare provider burdens" [56] but this assumption defies plain reason as well as experience. Participants in the Telecom Program in recent years have had considerable experience with USAC's lack of understanding of the functional similarities and differences among services (in at least one case, USAC informed a customer that DSL and MPLS services were functionally similar).[57] The Commission, based on input from healthcare providers, is far better positioned than USAC to determine, "from the perspective of the end user," what services are functionally similar. The Commission is uniquely positioned to make policy choices in the event of novel questions requiring interpretation of the statute and rules.

The *Report and Order* states that delegating to USAC the determination of service similarity will avoid "manipulation" of rural rates.[58] However, this concern has been appropriately addressed through other reforms. The Commission now requires that healthcare providers list the services for which they seek bids with greater specificity than in the past,[59] and include their bid evaluation criteria with their initial applications for support.[60] Revised FCC

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[56] *Report and Order* ¶14 ("we now place the burden of identifying 'similar services' for rate determination on the Administrator"); *id.* ("This approach will reduce health care provider burdens").

[57] Digital Subscriber Line service is a mass market, "best efforts" service, whereas Multi-Protocol Label Switching service is a dedicated, managed service offered with a wide range of performance guarantees or "service level agreements."

[58] *Report and Order* ¶14.

[59] *Id.* ¶155.

[60] *Id.* n. 469.

Form 465 will reveal the customer's service specifications, a change that is bound to ensure that the services delivered do not exceed healthcare providers' needs.[61]

Having this type of detailed input from customers, the Commission will be in the best position to make the value judgments necessary to group "similar" services together for purposes of setting rural rate caps. Further, the Commission has the technical expertise to evaluate such details as whether a service requested by a customer is a dedicated service, is symmetrical or asymmetrical, includes service level guarantees, or is merely a "best efforts" service.[62]

To the extent that the Commission believes "similar" services can be found among the non-telecommunications services offered by such competitors as cable and satellite operators, the Commission has the jurisdiction to request pricing information from those entities for the rural rate database.[63] Regrettably, the *Report and Order* falls short of a cogent explanation as to why private telecommunications and information services cannot be supported by the Telecom Program,[64] even though the record demonstrates that healthcare providers actually demand these services.[65] Nevertheless, the Commission thinks services in those categories can be sufficiently similar to supported services that they are relevant for rate-making purposes, and Alaska Communications agrees that some such services meet the functional similarity standard and should be included – and to the extent they *are* needed by healthcare providers, they also should be supported.

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[61] *Id.* ¶154 & n. 469.

[62] *See id.* ¶17.

[63] *See id.* ¶18. It is unclear how USAC would have knowledge of the functional characteristics of non-telecommunications broadband or information services.

[64] *See id.* ¶102. The *Report and Order* fails to address ACS's argument that Section 254(b) of the statute requires the Commission to update its definition of services supported under Section 254(h). *See* ACS July 19 Letter at 3-4.

[65] *E.g.,* ACS July 19 Letter at 3-6 (and healthcare provider comments cited therein).

Regarding the available rates being charged for similar services, the Commission also is better suited than USAC to make the many decisions that will go into the development of an appropriate pool of rural rates (which can be delivered to USAC for the purely mathematical calculation of the average or median for any given year). The data points that are included in (or excluded from) the pool will be the basis for the rate median or average that will govern support in many instances, and will inform healthcare providers and service providers in the bidding process each year. It is critical, therefore, that these decisions be made within the Commission, not delegated to an outside entity.

The Commission will need to exercise discretion in evaluating available contracts for RHC and E-rate services, for example, to extract a fair estimate of a one-year rate where term discounts apply. Similarly, rates that contain volume discounts for multiple circuits will have to be translated into single-circuit pricing for purposes of the rural rate pool that is used for any given service type. In the *Report and Order,* the Commission cryptically states, "using the median instead of a mean to determine rates will mitigate any potential impact term or volume discounts may have on the rate calculation."[66] The fact remains that volume and term discounts must be considered in extracting a one-year, one-circuit rate that is useful for comparison purposes, or for developing a rate cap (whether a median or an average) for each type of service in each rurality tier in each state. The Commission thus will be interpreting the statutory term "rates"[67] in establishing which rural rates will be used in calculating support under the Telecom Program. This function may not be delegated to USAC.[68]

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[66] *Report and Order* n. 49.

[67] 47 U.S.C. § 254(h)(1)(A).

[68] *See supra* notes 50-52 & accompanying text.

Having gathered rates for similar services in similarly rural locations in each state, the determination must be made which rates should govern as a guide (or a cap) for any particular telehealth contract. If the question of similarity is one of functionality from the customer's perspective, the customer should make this choice, not USAC. At a minimum, services should be grouped together so the customer readily can identify the rates for offerings with similar performance characteristics, including not only bandwidth but also service quality, security, reliability, service level guarantees, and whether a service is symmetrical or asymmetrical.[69] The Commission notes that USAC "may need to determine and publish two types of rates in its urban and rural rate database – one applicable to funding requests for which bids were only sought for dedicated services, and one applicable to funding requests for which responsive bids were not so limited." The implied limitation of this statement is worrisome. If the Commission is consistent, USAC would publish rates for each state, for each rurality tier, for any given bandwidth, for not just two but any number of different services based on their different functionality from the customer's perspective, including not only whether they are dedicated but whether they are symmetrical, what service level guarantees they feature, and so on, consistent with the Commission's definition of similar services.[70] Alaska Communications seeks clarification of this point.

The Commission established USAC as an administrator with no policy-making authority.[71] It violates the Commission's rules and the statute to delegate to USAC any responsibility for value-based judgements that will affect the rural rate and therefore the amount

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[69] *See supra* note 48.

[70] *See Report and Order* ¶¶14-17.

[71] 47 C.F.R. §54.702(c). *See also Report and Order* ¶249.

of support authorized for rural healthcare services.[72] Determining whether rural services are "similar" and what rural rates should be compared for purposes of Section 254(h)(1)(A) are functions that should be retained by the Commission, not delegated to the Administrator.

B. <u>The Commission Is Better Positioned Than USAC To Resolve Questions About Rural Rate Determinations In a Timely Manner</u>

The Commission stated that it "has not delegated ratemaking authority to the Administrator," but has adopted rules instructing the Administrator how to determine the rural rate caps, and required it to publish "not only the median rates but also all the rates that the Administrator used to calculate the median."[73] As explained above, this calls for interpretation of the statutory terms "rate" and "similar services" that are at the heart of the compensation mechanism. The statute requires the Commission to determine the rural rate, based on rates for similar services, "which determines the subsidy to which the telecommunications service provider is entitled."[74] Experience teaches that the implementation of these RHC program reforms will require interpretation and clarification of key terms in any number of respects, both today and as services continue to evolve. The Commission should take charge of its own rules, not delegate to USAC matters that will ultimately come back to the Commission for decision.

The statute delegates Section 254 authority to the FCC, which is accountable to Congress, even when it subdelegates to its bureaus and offices.[75] In contrast, delegation to an

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[72] *U.S. Telecom Ass'n, supra*, 359 F.3d at 566 (federal agencies "may not subdelegate [their decision-making authority] to outside entities – private or sovereign – absent affirmative evidence of authority to do so").

[73] *Report and Order* ¶89.

[74] *Id.* n. 246.

[75] *U.S. Telecom Ass'n, supra*, 359 F.3d at 565 ("When an agency delegates authority to its subordinate, responsibility – and thus accountability – clearly remain with the federal agency").

outside party removes "an important democratic check on government decision-making."[76] The Commission should not put key statutory and policy questions in the hands of USAC.

In delegating the task of establishing the rural rate cap to the Administrator, the Commission stated that a healthcare provider "may appeal that decision to the Commission, which will conduct *de novo* review."[77] However, before it may seek FCC review, the healthcare provider first must seek review by the Administrator of an erroneous Administrator decision,[78] and all of this process has proven to take months, and in not a small number of cases it has taken years.[79] Justice delayed often is justice denied, especially because this program requires participants annually to request approval for support, and funding requests often processed well after the relevant service has been provided. Where a healthcare provider fails to timely exercise its right of appeal, a service provider can be entirely without recourse.[80]

If the key rural rate questions, including what services are deemed similar, and what rural rates are included in the rate pool that is used to generate each median or average rural rate cap each year, are decided at the Commission, the parties' opportunity for review would be more meaningful and more certain. The Commission's processes are well established and well known. Moreover, only the Commission may act on requests for waiver of a rule.[81] Alaska

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[76] *Id.*

[77] *Report and Order* ¶90.

[78] *Id.* n. 248, *citing* 47 C.F.R. §54.719(a).

[79] In connection with two RHC Telecom Program funding requests for Funding Year 2016 that remain "in review" at USAC, Alaska Communications still is waiting for support to be distributed.

[80] Below Alaska Communications requests that the Commission instruct USAC to communicate with the affected service provider as well as the healthcare customer in any correspondence that pertains to the urban and rural rates or the terms of service. *See infra* p. 23. This would help ensure that service providers have an opportunity to seek an appropriate remedy if questions arise related to the requested support.

[81] *Report and Order* n. 248, *citing* 47 C.F.R. §54.719(c).

Communications respectfully requests that the Commission, on reconsideration, limit the Administrator's role to the truly ministerial tasks of publishing available rates and performing the mathematical calculations prescribed in the Commission's rules.

IV. THE COMMISSION SHOULD SPECIFY THAT A REQUEST TO CONFORM FUNDING COMMITMENT DATES TO ACTUAL SERVICE DATES DOES NOT REQUIRE AN APPEAL OF A FCL CHANGE BUT MERELY AN ADMINISTRATIVE CORRECTION BY USAC

In the Report and Order, the Commission made several changes to the administration of the Telecom Program which, Alaska Communications agrees, "will provide applicants with greater certainty throughout the application process and facilitate smoother and swifter funding decisions."[82] Among these, the rules now expressly permit "site and service substitutions" where they are permitted by the service contract (or constitute only minor modifications), are not prohibited by applicable procurement laws, and are within the scope of the controlling RFP.[83] Such substitutions often arise following the RFP and bidding process, and permitting them without requiring modification of the FCL will smooth the delivery of service and eliminate an unnecessary administrative burden.[84]

Alaska Communications seeks clarification that among the "service substitutions" permitted by this change the Commission intended to include the *service delivery dates*. In the company's experience, this is the most common change to a contract that occurs after the bidding process has been completed and FCC Form 465 has been submitted, and often after a funding commitment has been received from USAC. It is a minor change, and yet it often results in funding being substantially delayed, or denied altogether, even though funding was committed

82 *Report and Order* ¶172.

83 47 C.F.R. §54.624(a); *Report and Order* ¶194.

84 *See Report and Order* ¶197.

for the contract at the outset of the funding year, and the contract provided for variable service dates depending on factors expressly set forth in the terms (and provided to USAC).

Many telecommunications service contracts with rural healthcare providers are entered into before the parties are certain of the date when the service will commence, the date on which the service will terminate or be upgraded to another offering, or both.[85] This may be so, for example, because the service in question requires a carefully planned transition from a different service, or because the service requires the deployment of new capabilities by the service provider. The contract typically states that the actual term of service will commence on the date when service is first delivered, and proceed for the prescribed term from that date. The parties therefore cannot specify the precise dates of service when the request for support is filed. USAC uses the signature date on the contract as a proxy date for service commencement, knowing this date will have to be modified at a later date. However, once the parties know the dates of service, persuading USAC to commit to funding for the correct service dates is neither simple nor a sure thing. The current process involves a request by the applicant to USAC to change the dates of service set forth in the FCL. If this is denied, an appeal to USAC must be filed, followed by an appeal to the FCC. If an appeal is late-filed, as has happened when the applicant initially was told by USAC that the dates would be corrected, only later to find that this was not

[85] The *Report and Order* acknowledges a version of this problem in the context of support for non-recurring services (*e.g.,* one-time construction costs) where circumstances beyond a healthcare provider's control, including delay in receiving a funding commitment, can make it impossible to complete the project within the applicable funding year. In granting applicants the right to seek an extension of the service delivery deadline, and granting USAC the authority to allow an extension of up to one year to complete the project, the Commission is alleviating much of the uncertainty caused by the risk of committing resources without the certainty of a funding commitment at the start of the funding year. *See Report and Order* ¶¶180-183. This rule change will facilitate completion of projects for non-recurring offerings that require substantial financial commitments even if the FCL is delayed. *See id.* ¶180.

done, the applicant also must request a waiver from the FCC. Even after these burdensome (and seemingly unnecessary) steps, the appropriate funding has not always been forthcoming. Often it has been USAC's response that, following months of administrative process to sort out the correct dates of service, the available funding for the applicable funding year has been fully committed, and USAC has no means to provide the missing support.

A related problem with USAC's current procedures, only the healthcare provider receiving the service can communicate these details to USAC. The service provider initiates service, and generates the invoice for services provided to the rural healthcare provider, but only the latter has direct communication with USAC regarding the dates of service and the related invoices. On reconsideration, the Commission should require USAC to communicate to service providers as well as customers in any communication concerning the urban and rural rates or the terms of the service. USAC's processes should be designed to ensure that funding requests for eligible rural telehealth services be timely processed, not set them up for failure or lengthy delay.

"Evergreen" contracts that roll from one year to another, in the middle of a funding year, are particularly problematic under USAC's current practice. In one case, Alaska Communications committed to provide service from October 1 to September 30, three years later. The actual date the service commenced was October 14. So the termination date of the service under that "evergreen" contract (three years later) should have been October 13. However, USAC failed to consider how the term was defined in the contract, and merely inserted June 30 as the termination date (the end of the third funding year). A new service did, in fact, commence the following October, but the service provider was never paid for the service it provided under the old contract in the months of July, August and September. The company was simply short-changed for three months of service. Although an appeal is pending, the company has no assurance when, or if, it will ever receive compensation for those months of service.

The reforms set forth in the Report and Order appropriately advance the deadline for applications for support under the RHC program. Beginning next funding year, USAC will open an application window that will close no later than April 1st for the funding year that is to begin July 1st.[86] Applicants will be seeking bids on RFPs as early as July of the prior year, and telecom providers will submit bids as early as July and no later than March, for services that won't begin until the following July (or later).[87] These reforms are to be applauded as they increase the likelihood that USAC will be able to issue FCLs at or near the start of the funding year (which has not been the case in recent years). However, the service date/FCL mismatch is likely to occur with even greater frequency when this accelerated application schedule takes effect in funding year 2021. Applicants and service providers are even less likely to know the start date for supported services when they must apply for support that much earlier. (And if they already participate in the RHC program, they cannot simply indicate "July 1" as a projected start date because USAC will not issue commitments for overlapping funding requests.)

Moreover, under the new rules, applicants are required to submit their invoices even sooner than before.[88] If invoice dates (reflecting the actual dates of service) do not match the dates in USAC's funding commitment letter, either the applicant risks having invoices rejected, the applicant will be late submitting its invoices, trying to convince USAC to modify the FCL.

The rules should not penalize applicants, or the entities that commit substantial resources to serve them, merely because it is impossible to know at the time Form 465 is filed when an

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[86] 47 C.F.R. §54.621(a); *Report and Order* ¶176.

[87] *Report and Order* ¶175.

[88] *Report and Order* ¶188.

existing service will be completed and a new service begin. This is so whether the service is completed within a single funding year, or continues under a multi-year, "evergreen" contract. The Commission should specify that, under Section 54.624(a), applicants may request that USAC substitute the correct service delivery dates and evergreen dates, and USAC may modify the FCL, where the actual service dates do not match the dates set forth in the FCL. USAC should be encouraged to do so promptly if, as required in Section 54.624(b), the applicant files this request for minor change no later than the service delivery deadline.[89] The FCC should, on reconsideration, expressly acknowledge that this type of minor correction to the FCL is among the type of "service substitution" that was intended to be permitted by new Section 54.624(a) of the Commission's rules, obviating the need for administratively burdensome appeals.

V. CONCLUSION

For the foregoing reasons, the Commission is urged to grant this petition and promptly rule on all outstanding matters in this rulemaking.

Respectfully submitted,

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[89] *Report and Order* ¶196.