BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	**)**	
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Promoting Telehealth in Rural America	**)**	WC Docket No. 17-310
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USTELECOM – THE BROADBAND ASSOCIATION
PETITION FOR RECONSIDERATION AND CLARIFICATION

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November 12, 2019

EXECUTIVE SUMMARY

USTelecom supports the Commission's efforts to improve access to healthcare in rural America via telehealth services and applauds the Commission's reforms to the Rural Health Care Telecom Program. However certain aspects of the Telehealth Report and Order adopted in August do not sufficiently consider the real-world operation of the program and in some instances fail to provide proper notice and opportunity for comment in violation of the Administrative Procedure Act.

As such USTelecom requests that the Commission reconsider multiple aspects of the Telehealth Report and Order and how it implements the median rural rate framework as follows:

- The creation of a rate ceiling that does not allowing service providers to charge above the median rate in various circumstances where either the marketplace demands it or when the rate does not align with the real world operation of the Rural Healthcare program.
- The decision to direct USAC to include non-telecommunications services as part of the "similar services" included in the median rural rate without providing proper notice and comment for such a decision in violation of the APA.
- The decision to improperly delegate a decision to require such market expertise to USAC is not supported by the rules.
- The certification rule that prohibits service providers from employing commissioned consultants, or otherwise clarify that it does not apply to existing arrangements.

USTelecom also requests that the Commission clarify other administrative rules to better harmonize certifications overall and to ensure applicants specify their requested bandwidth so that they do not undermine competitive procurement and discourage bidding.

TABLE OF CONTENTS

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	)	
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	)	

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I. Introduction

Pursuant to Section 1.429 of the rules of the Federal Communications Commission (Commission),[1] USTelecom – The Broadband Association (USTelecom)[2] respectfully petitions the Commission to reconsider and clarify limited aspects of its Telehealth Report and Order (R&O).[3] USTelecom supports the Commission's efforts to improve access to healthcare in rural America via telehealth services and applauds the Commission's reforms to the Rural Health Care (RHC) Telecom Program (Telecom Program). However well-intentioned, certain aspects of the R&O do not sufficiently consider the real-world operation of the program and in some instances fail to provide proper notice and opportunity for comment in violation of the Administrative Procedure Act (APA).[4]

More specifically, the Commission should reconsider multiple aspects of how it implements the median rural rate framework, including creating a rate ceiling and not allowing service providers to charge above the median rate in various circumstances where either the

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[1] 47 C.F.R. § 1.429.
[2] USTelecom is the premier trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications service to both urban and rural markets.
[3] *In the Matter of Promoting Telehealth in Rural America,* Report and Order, WC Docket No. 17-310, 34 FCC Rcd 7335 (Aug. 1, 2019) (*Telehealth R&O).*
[4] 5 U.S.C. § 553.

marketplace demands it or when the rate does not align with the real world operation of the RHC program. The Commission should also reconsider its decision to direct USAC to include non-telecommunications services as part of the "similar services" included in the median rural rate without providing proper notice and comment for such a decision in violation of the APA, as well as the decision to delegate the rate setting responsibility to USAC more generally.

The Commission should also reconsider its certification rule prohibiting service providers from employing commissioned consultants, or otherwise clarify that it does not apply to existing arrangements. Finally, the Commission should also clarify other administrative rules to better harmonize certifications overall and to ensure applicants specify their requested bandwidth so that they do not undermine competitive procurement and discourage bidding.

II. The Commission Should Reconsider How It Implements Its New Median Rural Rate Framework.

The R&O adopts rules that create a rate ceiling for the "rural rate" a service provider may charge health care providers participating in the RHC Telecom Program and instructs the Universal Service Administrative Company (USAC) to calculate the rate ceiling using a median rural rate based on "available rates for the same or similar services offered within the healthcare provider's rural tier" in the same state.[5] Once effective, service providers with customers that participate in the Telecom Program are prohibited from charging those customers more than the USAC-calculated "rural rate." USTelecom has significant concerns with how the Commission will implement its new median rural rate framework. Some of those concerns could become moot if the Commission were only to use the median rural rate to cap the discount amount available to the Telecom Program beneficiary, as opposed to capping the rate the service

[5] *See Telehealth R&O* at 7365-68, ¶¶ 59-67.

provider is permitted to charge the beneficiary.[6] However, if the Commission intends to regulate service provider rates via USAC's calculated median rural rates, then USTelecom identifies material errors or omissions in the R&O that the Commission should reconsider on review.[7]

The Commission's new rural rate-setting rules presume that service providers submit bids in response to healthcare providers' FCC Form 465 postings. Under this presumption, a service provider could tailor its bid so that its proposed rates for Telecom Program-eligible services do not exceed USAC's calculated "rural rates." But, this has not been the experience of USTelecom's members and the Commission's own data demonstrate that this is not the case.[8] Instead, many USTelecom members typically learn that their customer is a Telecom Program participant only after the fact, when USAC sends them a copy of the Funding Commitment Letter and support schedule. When this occurs, healthcare providers are obtaining service from the carrier via a tariff, guidebook, or state master agreement. In some cases, the healthcare provider obtains service via a contract that may still be under term or, more commonly, expired years earlier and the healthcare provider continues to obtain service on a month-to-month basis. After reviewing the draft R&O[9] and based on its members' experience described above, USTelecom asked the Commission to revise the draft to permit service providers to charge a higher "rural rate" than USAC's median rate in limited circumstances without having to follow the burdensome proposed waiver process.[10]

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[6] As discussed below, extreme variations in cost among communities in Alaska that are grouped within the same rurality tier will necessitate a different approach in that state, since many healthcare providers would be unable to pay the additional unsupported cost of the service.

[7] 47 C.F.R. § 1.429; *see also*, *Griffin Licensing*, Memorandum Opinion and Order, 29 FCC Rcd 9680, ¶ 4 (2014).

[8] *Telehealth R&O* at 7367-68, ¶ 65 (noting that of the total 7,357 Telecom Program funding requests in Funding Year 2017, 6,699 requests – or 91 percent – included no bids).

[9] *See In the Matter of Promoting Telehealth in Rural America,* Report and Order, WC Docket No. 17-310, FCC-CIR 1908-03 (*Draft Telehealth R&O).*

[10] Letter from B. Lynn Follansbee, USTelecom, to Marlene Dortch, FCC, WC Docket No. 17-310, at 1-2 (filed July 25, 2019) (July 25 *Ex Parte* Letter).

Specifically, USTelecom sought a carve-out from the waiver process so that service providers could charge Telecom Program customers rates that exceed USAC's median rates in the following limited circumstances: (1) the rates are contained in tariffs or guidebook offerings and the service provider has at least one non-RHC or E-rate retail customer purchasing the same or similar service out of the tariff or guidebook at the same undiscounted rate as the Telecom Program participant, (2) the rates are contained in a state master agreement that went through a competitive bidding process, or (3) these rates are the same or lower than rates paid by non-RHC or E-rate retail customers for the same or similar service.[11] The Commission rejected USTelecom's proposal in a footnote with little discussion.[12] USTelecom respectfully disagrees with the Commission's decision and we urge it to reconsider USTelecom's proposal.

First, the Commission's R&O may have the effect of impermissibly prohibiting service providers from charging healthcare provider customers their tariffed rates. USTelecom's members have some number of healthcare providers that continue to order telecommunications services out of state tariffs. In the event a tariffed rate exceeds USAC's calculated median "rural rate" for that healthcare provider, the Commission's rules would require the service provider to charge its customer some rate *below* the tariffed rate. Absent Commission preemption, which the Commission did not do in its R&O, such a result violates state law and must be reversed on review.[13] As it did with its E-rate program, the Commission should conclude that it did not intend to "require carriers to base [their rates charged to Telecom Program beneficiaries] on rates that may not lawfully be offered under state law."[14] Thus, if a healthcare provider obtains

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11 *Id.*
12 *Telehealth R&O* at 7367, n.181.
13 To the extent a healthcare provider is ordering out of a Commission tariff, the Commission's R&O similarly violates the Commission's rules and the Communications Act to the extent it could require a service provider to charge some below-tariff rate. *See, e.g.,* 47 U.S.C. § 203(c).
14 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, DA 98-1581, at para. 4 (CCB 1998).

service out of a carrier's tariff, the carrier must be permitted to charge the healthcare provider customer that tariffed rate, regardless of USAC's calculated median rural rate for that service. To the extent USAC's median rural rate is less than the carrier's tariffed rate, then that difference should only affect the amount of support the healthcare provider may receive.

Second, post-detariffing, service providers like USTelecom's members have made telecommunications service rates publicly available through guidebooks/service guides. These guidebooks are found on service providers' websites and the published rates are available to any interested, qualifying party – healthcare and non-healthcare customer alike. In its July 25 *Ex Parte* Letter, USTelecom acknowledged that the Commission was rightfully concerned that certain service providers may have created sham guidebook offerings or tariffs with artificially high rates that no retail customer would ever purchase from unless the customer was a healthcare provider receiving massive discounts via the Telecom Program.[15] In response, USTelecom suggested that the Commission limit the exceptions to its general waiver requirements, described above, to those service providers that can demonstrate they have at least one retail customer not supported by the Commission's RHC or E-rate mechanism purchasing the same or similar service out of the guidebook or tariff at the same undiscounted rate as the Telecom Program participant.

Third, USTelecom suggested this same approach for Telecom Program participants obtaining service via contract. The service provider should be permitted to charge the Telecom Program customer the contract rate as long as the service provider provides the same or similar service to a non-RHC or E-rate-supported retail customer at the same or higher rate.

Finally, if a healthcare provider purchases service from a state master contract that was awarded to the service provider via a competitive process, the service provider should be

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[15] *See* July 25 *Ex Parte* Letter at 2.

permitted to charge the healthcare provider that state-negotiated rate regardless of the median rural rate USAC calculates. It is USTelecom's members' experience that these state requests for proposals are exceptionally competitive and are awarded to the provider(s) with the lowest rates. Moreover, these statewide rates are available to any state or local governmental entity, including schools, libraries, and state agencies that are located in both urban and rural areas.

Rather than explain whether there is some reason why USTelecom's proposal fails to adequately address the Commission's concerns about some service providers creating artificially high rates for services that are purchased only by RHC customers, the Commission dismissed USTelecom's proposal by noting USAC is to include any publicly available pricing information in its median rate calculation, including rates from tariffs, guidebooks, and state master agreements.[16] The Commission's statement seems to assume that rates contained in a state master agreement, for example, would of course be lower than any USAC-calculated median rate for a Telecom Program-eligible service. If the Commission directed USAC to use only such eligible services to create its median rates, that could very well be true. However, as USTelecom discusses below, the Commission erroneously directed USAC to incorporate rates for *ineligible services* in its median rate calculation. Thus, it is impossible to predict on which side of USAC's median rate a service provider's tariffed, guidebook, or state-negotiated rate will fall.

In rejecting USTelecom's proposal, the Commission also noted that if the service provider believes USAC's median rate "would result in objective, measurable economic harm," it may pursue a waiver.[17] The Commission's response misses the point. USTelecom's proposed carve-outs are intended to be *exceptions to the Commission's new waiver requirements*. These targeted exceptions offer the necessary balance between protecting the Telecom Program from

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16 *Telehealth R&O* at 7367, n.181.
17 *Id.*

waste, fraud, and abuse via the proposed safeguards described above while addressing other reasonably foreseeable situations that involve rates that have previously been subject to competitive bidding or other forms of market discipline, even though the rates may exceed the calculated median. The Commission should not punish service providers that satisfy these alternative safeguard mechanisms by compelling them to lower their rates – rates that their non-RHC-customers pay – to some USAC-calculated median rate.

The Commission also rejects USTelecom's proposal because the Commission believes it would require USAC "to continue making rural rate determinations on a funding request-by-funding request basis, . . . contrary to our expressed goals of making rural rate determinations transparent, predictable, and administratively simple."[18] If USAC's median rate calculation framework operates as the Commission seems to believe it will, then it should be a rare occasion that a service provider that sells eligible services at competitive rates to both non-Telecom Program and Telecom Program customers would need to avail itself of any of USTelecom's exceptions to the waiver process. USTelecom is on record supporting more transparency in the Telecom Program[19] but the manner in which the Commission intends to implement the new median rural rate rules is anything but "predictable," in contravention of section 254(b)(5) of the Communications Act of 1934, as amended.[20]

As noted above, some of USTelecom's concerns with the USAC-calculated median rate regime would be addressed if the Commission were only to use USAC's median rural rates to cap the discount amount a health care provider may receive while permitting the service provider

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18 *Id.*

19 Comments of USTelecom *In the Matter of Promoting Telehealth in Rural America* Notice of Proposed Rulemaking, WC Docket No. 17-310, at 17-23 (filed Feb. 2, 2018) (urging the Commission to extend E-Rate "Best Practices" to the Rural Healthcare program and make public pricing info on healthcare providers' FCC Forms 465).

20 47 U.S.C. § 254(b)(5).

to charge its customer the difference. For example, assume a service provider's tariffed rate for a telecommunications service is $1,000/month. USAC's median rate for the rural tier where the healthcare provider is located is $800/month and the urban rate is $700/month. In this example, the Telecom Program support amount is $100/month (the difference between $800 and $700). The service provider would charge the healthcare provider its tariffed rate of $1,000 but would also provide a $100/month credit (or check) in Telecom Program support (and would obtain reimbursement from USAC for that $100/month discount). After factoring in that $100/month discount, the health care provider ultimately still owes its service provider $900/month and after the service provider obtains its $100/month in reimbursement, it is still being compensated $1,000/month as per its tariff.

Such an approach would be insufficient to address the effect of the Commission's decision in Alaska, however. Recognizing that costs of service vary more greatly within Alaska than they do elsewhere in the nation, the *R&O* created a fourth, "frontier" rural zone comprised of off-road communities to be used in determining median rural rates.[21] But, as shown in the *R&O*, this "frontier" zone covers the vast majority of the entire state, encompassing communities on the North Slope, for example, that are served by terrestrial or undersea fiber, other remote communities served only by microwave links, and small interior villages that are served only by satellite.[22] Each of these technologies significantly changes the carrier's cost of providing service, and has differing capacity constraints. Moreover, some of these communities are served by multiple middle mile service providers, bringing the competitive discipline of the market to bear on rates; many others are served only by a single bottleneck provider that faces an incentive to maximize monopoly rents.

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[21] *Telehealth R&O* at 7352, ¶ 34.
[22] *See id.* at 7353, Figure 4.

As a result, in Alaska, even within the "frontier" tier, costs-of-service vary widely, such that the *R&O*'s median rate approach – or, indeed, any approach that caps support based on a blending of disparate rural rates – will leave many healthcare providers in the state at risk of losing service. While this problem exists throughout the nation, it is this extreme disparity that makes the issue more acute in Alaska. As such, Alaska requires a different approach to setting a rural rate that is unique to Alaska. The competitive bidding process under the Telecom Program is more likely to produce affirmative responses to the Form 465 in Alaska – and often multiple bids – than is the case in the lower 48 states. In Alaska, in cases where there are multiple bids, the Commission should therefore rely on the result of that process to determine a rural rate. Only in cases where there the bidding process produces fewer than two bids should it be necessary to resort to an artificially constructed cap on support. But, above all, the Commission should reconsider the impact of the median rate calculation adopted in the *R&O*, which will risk de-funding telehealth services for the neediest rural Alaskans, contrary to the public interest.

III. The Commission Should Reconsider its Conclusion That it Lacks Authority to Account for Different Contract Terms, Volume Discounts, and Different Feature Sets When Creating Median Rates.

The Commission should reconsider its conclusion that it lacks the authority to direct USAC to account for different contract terms, volume discounts, and different feature sets when calculating the median rate for a service. In its July 25 *Ex Parte* Letter, USTelecom stated that USAC should account for these elements in establishing median rates but if USAC is unable to create different medians based on contract term, for example, then the Commission should direct it to use only month-to-month rates when establishing a median rate for a service.[23] As explained above, USTelecom's members have Telecom Program participants obtaining service

[23] *See* July 25 *Ex Parte* Letter at 2.

on a month-to-month basis despite the service provider's efforts to move these customers to 1+ year contracts, which most likely would result in lower prices to the customer. These service providers should not be penalized because of their customer's refusal to sign a contract, which would be the result if USAC were to set a median rate without regard to the contract term.[24]

In its R&O, the Commission acknowledges USTelecom's request yet asserts that the relevant statute hamstrings its ability to account for these factors when establishing median rates.[25] While not at all clear given the brevity of its response, the Commission appears to claim that because section 254(h)(1)(A) uses the term "rates charged," it cannot "remove [] discounts included in charged rates" for things like high volume and long term contracts.[26] To be clear, USTelecom did not ask the Commission, and by extension USAC, to "remove these discounts included in charged rates." To the contrary, USTelecom requested USAC to create "different medians based on contract term, for example."[27] If the Commission has the authority to direct USAC to calculate median rates, then there can be no question that the Commission also has the authority to direct USAC to create its medians in this manner, which is consistent with the statute. To the extent USAC is unable to create different medians reflecting rates with different volume discounts and different contract terms, only then did USTelecom suggest USAC create median rates using only month-to-month rates, as an example.[28] For purposes of determining the amount of support a Telecom Program participant will receive, those median month-to-month rural rates would be compared to the median month-to-month urban rates.

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24 *Id.*
25 *Telehealth R&O* at 7344, n.49.
26 *Id.*
27 *See* July 25 *Ex Parte* Letter at 2.
28 *Id.*

IV. The Commission's Decision to Delegate USAC Use Rates for Ineligible Services to Create Median Rates for Eligible Services Violates the APA and Is Arbitrary and Capricious.

USTelecom requests the Commission to reconsider its decision to direct USAC to include rates for ineligible services as part of its rate review to determine rural rates for telecommunications services.[29] In response to the draft R&O, which contained this misguided proposal, USTelecom explained that the Commission never sought comment on incorporating rates for ineligible services into the Telecom Program's rural and urban rate calculations in contravention of the APA.[30] The Commission disagrees with USTelecom's lack of notice assertion and claims that it "specifically sought comment on whether it should revise its statutory interpretation of similar services for purposes of the Telecom Program, which invariably includes the scope of services for consideration."[31]

To satisfy the rulemaking requirements of section 553 of the APA, the Commission "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."[32] For the Commission's notice to be sufficient, its final rule "must be a 'logical outgrowth' of the proposed rule in the sense that the original notice must 'adequately frame the subjects for discussion.'"[33] In other words, "the affected party 'should have anticipated' the agency's final course in light of the initial notice."[34] Here, no party could have anticipated the Commission's final decision to require its USF administrator to collect rate information for services that are categorically barred from funding under the Telecom Program

29 *Telehealth R&O* at 7345, ¶ 18.
30 USTelecom July 25 *Ex Parte* Letter at 3.
31 *Telehealth R&O* at 7345, n.55, *citing, 2017 Promoting Telehealth Notice and Order*, 32 FCC Rcd 10655-56, ¶¶ 73-78.
32 *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988).
33 *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019) (quoting *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996).
34 *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

and to use those rates to calculate a rate ceiling for eligible services above which a service provider is prohibited from charging. The record bears this out. No commenter ever addressed, let alone recommended, using rates from ineligible services to create rate ceilings for services eligible for Telecom Program support.

The Commission claims that it satisfied its APA requirements by "specifically" seeking comment in its 2017 NPRM on whether to revise its interpretation of "similar services." It cites six paragraphs from its NPRM, paragraphs 73 through 78, that purportedly gave parties notice that the Commission was going to adopt a final decision requiring USAC to incorporate ineligible services into its eligible service median rate calculation. Paragraphs 73 and 74 merely provide background on how the Commission previously interpreted "similar services" and identify shortcomings with its current safe harbor speed tiers. Paragraph 75 proposes to retain the concept of a safe harbor using bandwidth tiers but update the speeds to "ensure that each tier includes only bandwidths in a range that are '*functionally* similar as viewed from the perspective of the end user.' As with the existing safe-harbor, each tier will be made up of bandwidths within a specific range and any service within that range will be considered 'similar' for purposes of the bandwidth criterion."[35] Based on how these safe harbor bandwidth tiers have operated for more than a decade, nothing about the Commission's proposal to update its bandwidth tiers gives parties notice of the Commission's final action to direct USAC to incorporate rates for ineligible services into its median rate calculation.

Paragraph 76 requests comment on how the safe-harbor bandwidth tiers should be established and updated. The Commission provides the example of a Telecom Program customer requesting a 50 Mbps service, which, under the Commission's rules, must be a

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[35] *See 2017 Promoting Telehealth Notice and Order*, 32 FCC Rcd 10656, ¶ 75. (emphasis in original)

telecommunication service in order to be eligible for this program. In this example, the Commission suggests the tier for a 50 Mbps service would range from 35 Mbps to 65 Mbps and the "average" rural rate – not the median – would be the average rate for all services within that tier in the relevant rural area.[36] The Commission notes that if it adopts this approach of having a range of speeds within a tier, it would not have to update the tiers over time. The Commission seeks comment on what the percentage for the range should be and whether it should use something other than a percentage. Alternatively, it requests comment on updating the current bandwidth tiers to commonly purchased bandwidths and updating those tiers periodically.[37] Here again, no party could read these proposals and reasonably conclude that the Commission was seeking comment on having USAC create rate ceilings in the form of median rural rates based on ineligible services.

The Commission requests comment in paragraph 77 on whether it should include packetization as a criterion in determining whether a service is functionally similar (*i.e.*, do customers view packetized and non-packetized services as functionally similar). Finally, paragraph 78 discusses whether the Commission should establish minimum bandwidths or other minimum requirements for other service characteristics and, if so, what minimum service requirements are appropriate. The paragraph also seeks comment on whether its RHC mechanisms should support patient home monitoring services. It is similarly evident that nothing in these two paragraphs has anything to do with USAC collecting rate data for ineligible services and using those rates to create its median rural rates for eligible services.

The Commission has failed to demonstrate how any proposal contained in these six paragraphs "adequately frame the subjects for discussion" and how its final decision is a "logical

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36 *Id.* at ¶ 76.
37 *Id.*

outgrowth" of these bandwidth tier-related proposals. Because the Commission provided inadequate notice, the Commission should reconsider this decision.[38]

The Commission's decision to direct USAC to include rates for ineligible services into its rate ceiling calculation for Telecom Program-eligible services also is arbitrary and capricious and should be reversed on reconsideration. It is inequitable to service providers that have Telecom Program customers to compel them potentially to lower the rates for their *regulated* common carrier services because the median rural rate that USAC calculated using *non-regulated* and *non-common carrier* services is less. This decision is particularly unfair given that some service providers would happily sell these healthcare provider customers an information or private carriage service that may be less expensive and correspondingly reduce the demand for Telecom Program support, but the customer refuses because the Commission has deemed those services ineligible for Telecom Program discounts. Unless the Commission is going to allow service providers to decline "bona fide requests" for telecommunications services via forbearance,[39] it must direct USAC only to use rates for eligible services when calculating its median rural and urban rates.

Furthermore, the delegation itself raises the most basic issue related to this regime. Whether the task delegated to USAC is even one that USAC should be performing and whether the Commission has the authority to delegate such a role to USAC. In the R&O the Commission dismisses GCI's arguments that the Commission has impermissibly delegated an "inherently governmental function,"[40] with the rebuttal that "the Administrator carries out this function only

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38 *See Nat'l Lifeline Ass'n*, 921 F.3d at 1117 (finding that the brief period between issuance of the unpublished draft order and the public notice cutting off lobbying "was not an adequate period for eliciting meaningful comments.").

39 47 U.S.C. § 254(h)(1)(A).

40 *See* Letter from John Nakahata, Counsel to GCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-310 (Jul. 25, 2019) (*GCI July Ex Parte*).

pursuant to the Commission's rules and guidance, and subject to its review, and because the Administrator is prohibited from making policy or interpreting rules or statutes."[41] However, adopting a rule that gives USAC the authority to perform a function that is not merely administrative, whether based on guidance from the FCC or not, is still delegating to USAC an inherently governmental decision. In giving USAC the authority of determining what services are "similar," the Commission is in fact permitting USAC to make policy decisions about the entire rate that the service provider receives because what the urban and rural rates is in turn entirely dependent upon what USAC deems to be "similar." The discretion USAC is given in this instance hands USAC the task of taking on market analysis that they do not have the expertise to perform without any specific upfront guidance as the Commission notes is required by Section 54.702(c) of the Commission's rules.[42] This is a completely unprecedented shift in authority that is not supported by the rules or the statute.

V. The Commission Should Reconsider the Certification Rule Prohibiting Use of Commissioned Consultants; Alternatively, the Commission Should Clarify that the Rule Has Only Prospective Effect.

The R&O creates a new requirement, for both RHC and HCF programs, that when invoices are submitted to USAC, a service provider must certify that "[t]he consultants or third parties it has hired do not have an ownership interest, sales commission arrangement, or other financial stake in the service provider chosen to provide the requested services, and that they have otherwise complied with Rural Health Care Program rules, including the Commission's rules requiring fair and open competitive bidding…."[43] The NPRM failed to adequately raise

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[41] *See Telehealth R&O* at 7378, para 91.
[42] *See Id.* at para 91, *citing*, Section 54.702(c) of the Commission's rules provides that "[t]he Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." It further provides that "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission." 47 CFR § 54.702(c).
[43] *Telehealth R&O* at ¶ 170; 47 C.F.R. §§ 54.627(c)(3)(ii)(I) and (d)(1)(ii)(G).

this issue, and the R&O never explains why the Commission adopted this particular rule, even after USTelecom's raised the matter in the record after the draft R&O was released.[44] The certification rule as adopted is unclear about how this rule impacts service provider commission arrangements that predate Funding Year 2020. The Commission should reconsider the new rule and strike 47 C.F.R. § 54.627(c)(3)(ii)(I) and (d)(1)(ii)(G). Absent reconsideration, at a minimum, it should clarify that this rule only has prospective effect.

The Commission adopts a comprehensive rule that prohibits *applicants* from using consultants that have any financial relationship with the vendor selected by the applicant to provide the requested service.[45] The R&O also provides a non-exhaustive list of examples of prohibited actions by an applicant's consultant or outside expert. In contrast to the clear explanation of the prohibition for *applicants* -- a reasoned policy that USTelecom wholeheartedly supports -- the R&O fails to explain why it is appropriate or necessary to extend this same prohibition to *service providers*. Allowing an RHC applicant to use as *its* agent or consultant an entity with a commissioned sale relationship to the service provider plainly raises a conflict of interest, which the Commission was right to prohibit. But allowing a service provider to use *its* commissioned sales consultants to reach more RHC applicants presents no apparent conflict of interest. The R&O includes no justification why using commissioned third parties to sell to healthcare providers is somehow necessary to preserve the integrity of a fair and open competitive bidding process.

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[44] *See* July 25 *Ex Parte* Letter at 4 (explaining that an indirect prohibition of service providers use of third parties to sell to healthcare providers is unnecessary and would be disruptive to the industry, and for these reasons, should be deleted prior to adoption).

[45] *Telehealth R&O* at 7414, ¶ 170 & App. A, newly adopted 47 C.F.R. § 54.623(a)(1)(x) ("The consultants or third parties hired by the applicant do not have an ownership interest, sales commission arrangement, or other financial stake in the service provider chosen to provide the requested services, and that they have otherwise complied with the Rural Health Care Program rules, including the Commission's rules requiring a fair and open competitive bidding process.").

Before the Commission adopted the R&O, USTelecom alerted the Commission to its concerns, explaining that telecommunications service providers often use commissioned third party sellers, and although their use in RHC program sales is less common, the practice is not unreasonable, does not undermine fair and open competitive bidding, and is beneficial to the program by enabling more bids.[46] The Commission did not address USTelecom's cautions about the issue.

Overall, third party sales commission arrangements are commonplace in the telecommunications industry, especially in the small and medium sized business market that includes many healthcare institutions. Service providers rely in varying degrees on nonemployee commissioned sellers to expand their ability to reach customers. Non-employee commissioned sellers may be particularly helpful for seasonal procurements or those concentrated in a limited time window. As telecommunications industry direct employment continues to decline, service providers will only increasingly rely on non-employee individuals and firms that one would expect to be compensated at least in part by commission.[47] The Commission has never prohibited service providers from using commissioned sales agents in the RHC Program, and the NPRM did not propose to do so.[48] Many larger healthcare providers are accustomed to dealing with non-employee commissioned sellers, rather than with, or solely with, the service provider's own employees.

As telecommunications industry direct employment continues to decline, service providers will only increasingly rely on non-employee sellers and account managers –

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[46] *See* July 25 *Ex Parte* Letter at 4.

[47] The new rule's use of the term "hired" could suggest that it excludes commission-only relationships, as those firms and individuals are not strictly hired by the service provider and receive no payment if their sales efforts are unsuccessful.

[48] They have never been prohibited in E-rate, either, which is noteworthy as one of the Commission's goals in the order is to better align consultant rules between the two programs, such as by clarifying rules for applicant consultants and requiring their registration with USAC.

individuals and firms that one would expect to be compensated at least in part by commission.[49] The Commission has never prohibited service providers from using commissioned third party sellers in the RHC Program, and the NPRM did not propose to do so.[50] Many larger healthcare providers are accustomed to dealing with non-employee commissioned sellers, rather than with, or solely with, the service provider's own employees.

If the Commission insists on imposing such a rule, it should, at a minimum issue prompt clarification that the certification rule change does not apply to third party commissioned sales arrangements for services procured or commenced before the start of Funding Year 2020. The Commission should issue a short clarifying order that the certification requirement within sections 54.627(c)(3)(ii)(I) and (d)(1)(ii)(G) does not apply to "sales commission arrangements" associated with services provided before the new rule's July 1, 2020 effective date. It should make clear that service providers may certify and USAC may process related invoices, even if submitted after July 1, 2020.

The R&O states that "[o]ur new rules governing consultants and other third parties will become effective for funding year 2020," but it does not explain how the effective date will apply to pre-existing arrangements. It could be reasonably read to apply only to invoices for services commencing with Funding Year 2020. However, it could also be read to apply to invoices processed by USAC, regardless of when the underlying services were provided. In particular, the R&O does not mention how the new certification requirement applies to any existing commissioned third party sales arrangements that service providers may have for

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applications that predate Funding Year 2020. The R&O does not explicitly grandfather procurements that predated Funding Year 2020.

Through clarification, the Commission should remedy that oversight, and act promptly to confirm that the service provider certification – at least with respect to any third party "sales commission arrangement" – excludes invoices USAC may receive for services for procurements that predate Funding Year 2020.

Absent clarification, service providers and applicants face troubling uncertainty about program funding for invoices from services procured before July 1, 2020. Service providers cannot control, and cannot know in advance, when invoices will be submitted to USAC. By definition, their services are billed in arrears, and applicants routinely delay submitting invoices to USAC. Some applicants submit them monthly as received, but many provide them quarterly or even annually. Applicants may file invoices for services as much as 120 days after the service delivery deadline or the date of a revised funding commitment letter.[51] This rule applies even to multi-year service contracts, and in the HCF program, USAC may fund up to three years at a time.[52] Additionally, funding commitments from USAC are frequently delayed, often for long periods, preventing applicants from submitting invoices for payment. Four months into Funding Year 2019, all Funding Year 2019 applications are still awaiting approval, and many earlier applications are still pending.

Given this, retroactive treatment of this new service provider requirement would make certification impossible. Service providers have already paid commissions to third party sales consultants on service that applicants have not yet invoiced to USAC, including many that

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51 *See* 47 C.F.R. §§ 54.627, 54.627(a).

52 Applicants may also extend the deadline by an additional 120 days, if timely requested. 47 C.F.R. § 54.627(b).

applicants will not provide to USAC until after July 1, 2020. Service providers may have little means to identify which invoices may have RHC program commissions associated with them. Determining such information manually, months and years after the fact, is wholly impractical. And even if applicants theoretically were to submit every available invoice before July 1, 2020 – an utterly unrealistic prospect, and something the R&O does not suggest – services delivered in the months before July 1 would not yet be invoiced, or would be too newly invoiced to allow applicants time to process them.

Because service providers can know only after-the-fact whether and when an applicant/customer has submitted an invoice to USAC, they have no way to stop commissions currently being paid. Service providers could not certify invoices without researching each related account individually back to the start of service – month by month to the original service start. That would be impractical if not impossible for many service providers, and is unreasonable to expect from an order that makes no mention of retroactive effect. Moreover, none of this addresses the fact that service providers have contracts with commissioned consultants, which were entirely reasonable and lawful at the time, and which a retroactive treatment of the rule change would fail to anticipate.

If the rule change were deemed to apply to any invoice USAC receives after July 1, 2020, regardless of when services were procured, service providers will be unable to certify many, many invoices. That would lead USAC to deny applicants' expected funding, even on accounts that had received their support for the very same services on the very same invoices up to that time.[53] Applicants and service providers alike would understandably be appalled if the Commission allowed such an unreasonable and result by retroactively imposing the new rule.

USTelecom sees clarification as sufficient to resolve the problem posed by the lack of detail about how the effective date applies to commissioned sales arrangements in sections 54.627(c)(3)(ii)(I) and (d)(1)(ii)(G). Absent such clarification, the Commission would need to reconsider the effective date treatment of the rule, as retroactive application would clearly run afoul of APA requirements. It would have lacked realistic adequate notice or a reasoned explanation for either the rule change or its extraordinary retroactive application.[54] It would have been further arbitrary and capricious for making certification for many past and current Funding Year invoices impossible. This would be be unfair both to service providers who had no reason to expect the Commission in the future indirectly prohibit the third party arrangements to which they contracted long ago, as well as applicants by preventing many of them from receiving RHC program funding for the very same services previously funded. It would be doubly unfair to applicants whose Funding Year 2019 or early applications remain pending.[55]

USTelecom also seeks clarification of the certification rules that require service providers to certify under penalty of perjury that the invoiced services are "eligible" for RHC support.[56] It is not the service provider's responsibility to determine the eligibility of these services. Rather, such a determination must be made by the applicant and USAC. Furthermore, USTelecom is concerned that the rules as written will prevent service providers from issuing bills to RHC

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[53] The new rule could be read to give USAC no discretion to accept any qualification of a service provider's certification. 47 C.F.R. § 54.627(c)(3) ("Before the Administrator may process and pay an invoice, both the health care provider and the service provider must make the following certifications.")
[54] The order does not address the issue, despite USTelecom having raised it in the record. *See* July 25 *Ex Parte* Letter.
[55] The Commission should address the matter through reconsideration, but, in the alternative, it should provide the requested clarification on an expedited basis, which applicants, service providers, and USAC need.

program participants that contain non-RHC-discounted services. Billing customers for all services rendered on a single bill is the norm for carriers and is something that customers desire.

To avoid any unintended consequences and for the reasons described above, the Commission should clarify that these rules do not apply to RHC program participants. USTelecom supports the Commission's goal of harmonizing both of its RHC Programs by addressing the requirements regarding the use of consultants,[57] and streamlining forms and data collection,[58] but in this case harmonization conflicts with practical application. Seeking to align the two program creates conflict between the purpose of the rule and enabling the program to work smoothly in an already functioning marketplace.

VI. The Commission Should Do More to Harmonize Service Provider Certifications between RHC Programs

Despite the Commission's stated objective of harmonizing certification requirements between RHC programs,[59] the service provider certification rules it adopted in the R&O fall short of that goal. Of course, there are some differences between the Telecom Program and the HCF program that may justify disparate certifications (e.g., the Telecom Program's "rural rate" certification). However, most of the service provider certifications could and should use identical language. For example, the HCF service provider certifications correctly use the term "invoice form" whereas the Telecom Program service provider certifications merely use "invoice." The Commission should clarify its Telecom Program rules by inserting the word "form" after "invoice." This may be a suitable correction for an erratum.

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[59] *Telehealth R&O* at 7407-08, ¶ 156.

To the extent the Commission makes changes to its rural/urban rate calculation rules as USTelecom urges it to do above, it must make corresponding changes to its new rules. For example, section 54.627(c)(3)(ii)(E) requires the service provider to certify that its customer "paid the appropriate urban rate." As discussed above, the Commission may ultimately adopt rules that cap the Telecom Program support amount that the beneficiary may receive, *not* the amount that the service provider may charge it. In that event, the service provider will charge the customer its going rate, which may be pursuant to a state master agreement, tariff, guidebook, or contract. That going rate may not be USAC's calculated median "rural rate" such that, even after applying the Telecom Program discount, the customer may ultimately pay more than the USAC-calculated "urban rate." In any event, the Commission should clarify that the rule is not requiring the service provider to determine whether the customer is current on its payments before the service provider may certify that customer has "paid" for its service.

VII. The Commission Should Clarify its Administrative Modifications to Ensure Applicants Specify Current and Requested Bandwidth and Whether the Applicant has an Existing Contract.

The order's stated goal is to improve potentially wasteful inefficiency in the competitive bidding process, by clarifying rules, conforming Telecom Program procurement rules to the HCF rules, and aligning RHC program rules more closely and explicitly to E-rate rules (such as gift rules).[60] USTelecom supports sensible measures to make the RHC program more efficient and predictable, and to reduce potential for waste, fraud and abuse. USTelecom encourages the Commission to take a similar step by clarifying that applicants in the Telecom Program are expected to identify existing, currently discounted service and the desired service, together with bandwidth level by site, if different.

[60] *Telehealth R&O* at 7406-13 ¶¶ 153-169.

As USTelecom explained before the order was adopted, many service providers are concerned that, without this clarification, applicants will not adequately satisfy the Commission's requirement to specify the requested service and bandwidth.[61] In too many applications, applicants or their consultants simply list services with bandwidth using overly broad ranges. This practice undermines competitive procurement, and discourages bidding, by denying potential service providers basic information needed to evaluate the service request. It can also be used to undermine competitive bidding, by indirectly favoring one provider or by discouraging more cost effective commercial bids against a planned self-provisioning option. The Commission can avoid this problem simply by clarifying that applicants must list the requested service with specific bandwidth instead of broad ranges. Applicants should expect to provide such detail, and making the requirement plain through clarification is warranted.

Additionally, it is USTelecom members' experience that many RHC beneficiaries or their consultants will post a Form 461 or 465 even though there is an existing contract in place for the requested funding year. These postings can cause service providers to waste time analyzing and preparing bids when there is no real opportunity. One USTelecom member determined that more than half of all of the bids it reviewed were under contract and thus not available for bids. This member's employees were told by the applicants' consultants that the applicants were only "filing for funding," not for bidding. So that they do not waste time and resources, service providers deserve to know at the outset of the bid process whether the healthcare provider has an existing contract. The Commission should also clarify its instructions for Forms 461 and 465

[61] *See* July 25 *Ex Parte* Letter at 2.

that applicants should state clearly on their request for service bid whether they have an existing contract for the requested funding year.[62]

In addition, the Commission should modify the Form 465 to require applicants to identify the rural tier applicable to their location or, preferably, the USAC-calculated rural rate for the requested service. Requiring the applicant to specify the USAC-calculated rural rate, or at least specify the rural tier, would substantially reduce the burdens on service providers that are reviewing a Form 465 submission.

Finally, the Commission should direct USAC to put in place procedures to give service providers notice that they have been selected on a funding application and thus may be required to provide discounted services. Often, service providers are selected even when they have not bid, because the applicant has purchased service from an existing tariff or contract. Currently, a service provider may not learn that it has been selected by an applicant until USAC has approved the application, which may not occur until after the funding year has begun and the service provider has already provided service at a rate other than the one specified in the application.

VIII. Conclusion

For the foregoing reasons, the Commission should grant USTelecom's petition for reconsideration and clarification.

Respectfully submitted,

USTELECOM - The Broadband Association

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November 12, 2019

62 The Commission could simplify matters by adding a checkbox to Form 465, in particular, where an applicant would note that there is an existing contract.