WILTSHIRE & GRANNIS LLP

August 28, 2013

VIA HAND DELIVERY

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

REDACTED FOR PUBLIC INSPECTION

Re: Request for Confidential Treatment of Filing of SouthEast Alaska Regional Health Consortium, WC Docket No. 02-60

Dear Ms. Dortch:

In the enclosed Request for Review and its exhibits, the SouthEast Alaska Regional Health Consortium ("SEARHC") has included detailed information regarding commercial agreements and sensitive pricing information for telecommunications services purchased by SEARHC from AT&T Corp.

SEARHC respectfully requests that, pursuant to Sections 0.457 and 0.459 of the Commission's rules, 47 C.F.R. §§ 0.457 and 0.459, the Commission withhold from public inspection and accord confidential treatment to the appendix of SEARHC's Request for Review and its exhibits because it contains sensitive trade secrets, commercial, and financial information that falls within Exemption 4 of the Freedom of Information Act ("FOIA").[1] SEARHC is voluntarily providing this information, "of a kind that would customarily not be released to the public"; therefore, this information is "confidential" under FOIA.[2] Moreover, SEARHC and AT&T Corp. would suffer substantial competitive harm if this information were disclosed.[3]

SEARHC's Appendix to its Request for Review accordingly is marked with the header "CONFIDENTIAL TREAMENT REQUESTED—NOT FOR PUBLIC INSPECTION."

In support of this request and pursuant to Section 0.459(b) of the Commission's rules,[4] SEARHC hereby states as follows:

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1 *See* 5 U.S.C. § 552(b)(4).

2 *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

3 *See National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974).

4 *See* 47 C.F.R. § 0.459(b).

1. IDENTIFICATION OF THE SPECIFIC INFORMATION FOR WHICH CONFIDENTIAL TREATMENT IS SOUGHT[5]

SEARHC seeks confidential treatment of the enclosed appendix to its Request for Review.

2. DESCRIPTION OF CIRCUMSTANCES GIVING RISE TO THE SUBMISSION[6]

SEARHC is supplying commercial agreements, invoices, and sensitive pricing information provided by AT&T Corp., as well as related filings to the Universal Service Administrative Company that also contain sensitive pricing information.

3. EXPLANATION OF THE DEGREE TO WHICH THE INFORMATION IS COMMERCIAL OR FINANCIAL, OR CONTAINS A TRADE SECRET OR IS PRIVILEGED[7]

The information for which SEARHC seeks confidential treatment contains sensitive "trade secrets or privileged or confidential commercial, financial or technical data," which would customarily be guarded from competitors.[8] The appendix to Request for Review contains commercial agreements, invoices, and sensitive pricing information that are protected by a confidentiality provision within SEARHC's agreements with AT&T Corp. Release of the information would put SEARHC in violation of its agreements with AT&T Corp.

4. EXPLANATION OF THE DEGREE TO WHICH THE INFORMATION CONCERNS A SERVICE THAT IS SUBJECT TO COMPETITION[9]

The appendix to Request for Review contains information relating to commercial agreements, invoices, and sensitive pricing information that are protected by a confidentiality agreement, and that could be used by competitors of AT&T Corp. to its disadvantage. Release of the information would put SEARHC in violation of its agreements with AT&T Corp.

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[5] 47 C.F.R. § 0.459(b)(1).

[6] *See* 47 C.F.R. § 0.459(b)(2).

[7] 47 C.F.R. § 0.459(b)(3).

[8] 47 C.F.R. § 0.457(d)(2).

[9] 47 C.F.R. § 0.459(b)(4).

5. EXPLANATION OF HOW DISCLOSURE OF THE INFORMATION COULD RESULT IN SUBSTANTIAL COMPETITIVE HARM[10]

Competitors could use AT&T's proprietary commercial and pricing information to AT&T's detriment as they would gain access to sensitive information about how AT&T provides services that is not normally disclosed to the public. Release of the information would also put SEARHC in violation of its agreements with AT&T Corp.

6. IDENTIFICATION OF ANY MEASURES TAKEN BY THE SUBMITTING PARTY TO PREVENT UNAUTHORIZED DISCLOSURE[11]

Neither SEARHC nor AT&T Corp. has distributed the information included in the appendix to SEARHC's Request for Review to the public.

7. IDENTIFICATION OF WHETHER THE INFORMATION IS AVAILABLE TO THE PUBLIC AND THE EXTENT OF ANY PREVIOUS DISCLOSURE OF THE INFORMATION TO THIRD PARTIES[12]

Neither SEARHC nor AT&T Corp. has previously disclosed the information included in the appendix to SEARHC's Request for Review.

8. JUSTIFICATION OF THE PERIOD DURING WHICH THE SUBMITTING PARTY ASSERTS THAT MATERIAL SHOULD NOT BE AVAILABLE FOR PUBLIC DISCLOSURE[13]

SEARHC requests that the appendix to its Request for Review be treated as confidential for a period of three years. This period is necessary due to the proprietary nature of the information in the enclosed in the appendix to Request for Review, and to comply with the terms of SEARHC and AT&T Corp.'s confidentiality agreement.

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[10] 47 C.F.R. § 0.459(b)(5).

[11] 47 C.F.R. § 0.459(b)(6).

[12] 47 C.F.R. § 0.459(b)(7).

[13] 47 C.F.R. § 0.459(b)(8).

9. OTHER INFORMATION THAT SEARHC BELIEVES MAY BE USEFUL IN ASSESSING WHETHER ITS REQUEST FOR CONFIDENTIALITY SHOULD BE GRANTED[14]

Release of the information would put SEARHC in violation of its agreements with AT&T Corp.

Should you have any questions regarding the foregoing information, please contact the undersigned at (202) 730-1300.

Respectfully submitted,

John T. Nakahata
Counsel to SouthEast Alaska Regional Health Consortium

[14] *See* 47 C.F.R. § 0.459(b)(9).

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

In the Matter of Request for Review of SouthEast Alaska Regional Health Consortium of Decision by Universal Service Administrator SouthEast Alaska Regional Health Consortium HCPs 10047,10048, 10049, 10050, 10051, 10052, 10053, 10054, 13013, 13014, 14977, 17789, 18012, 18152, 18417, 18418	WCB Docket No. 02-60

REQUEST FOR REVIEW AND WAIVER

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REQUEST FOR REVIEW AND WAIVER

Pursuant to 47 C.F.R. §§ 54.719 and 54.722, the SouthEast Alaska Regional Health Consortium ("SEARHC") hereby seeks review of a decision by the Rural Health Care Division ("RHC") of the Universal Service Administrative Company ("USAC" or "Administrator"). SEARHC requests that the Federal Communications Commission ("FCC" or "Commission") reverse USAC's denial of support resulting from USAC's refusal to permit SEARHC, pursuant to the Commission's *Bishop Perry Order*,[1] to correct administrative errors on its Forms 466 and 466-A for Funding Year 2011 ("FY2011") and file a new Form 466 to document mid-funding year contract changes, replacing the explanatory letter SEARHC mistakenly filed for that purpose. In the alternative, consistent with the *Bishop Perry Order*, SEARHC seeks a waiver of the deadline for filing Form 466 to permit SEARHC to correct administrative errors on

[1] *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, New Orleans, LA, et al.; Schools and Libraries Universal Service Support Mechanism*, Order, FCC 06-54, 21 FCC Rcd. 5316 (2006) ("*Bishop Perry Order*").

SEARHC's FY2011 Forms 466 and 466-A and the new Forms 466 documenting mid-funding year contract changes.

Having refused to apply the *Bishop Perry Order* to applications under the rural health care support mechanism, USAC rejected SEARHC's request on the ground that it was "not authorized" to grant such a waiver and declined to recalculate funding.[2] The Commission, however, *does* have authority to permit SEARHC to correct its error, which resulted in the denial of eligible service funding in the amount of approximately $454,714. This funding is essential to narrow the financial gap between SEARHC's resources and the unmet medical needs of Alaska Natives. SEARHC requests that the Commission grant the necessary waiver because good cause exists to do so and it would plainly be in the public interest.

I. Summary of the Facts.

SEARHC is a non-profit tribal health consortium of eighteen Alaska Native communities that seeks to meet the health and wellness needs of the Tlingit, Haida, Tsimshian, and other Native peoples of Southeast Alaska. The tribal government or governing body in each community chooses board representatives, ensuring that SEARHC maintains strong ties to the communities it serves and allowing it to incorporate traditional Native cultural practices and values into its health care delivery system wherever possible. Established in 1975 under Title V of the Indian Self-Determination and Education Assistance Act,[3] it is one of the oldest and largest Native-run health organizations in the nation. SEARHC has been responsible for management of the Community Health Aides Program established the federal Indian Health Service ("IHS") in southeast Alaska since 1976. It has operated the IHS Juneau clinic, the Ethel

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[2] Denial of Appeal from Universal Service Administrative Company to SouthEast Alaska Regional Health Consortium, dated July 1, 2013, at 3 (citing FCC Form 466, 3 (2011)), attached as ex. 1 at app. 4 ("USAC Denial of Appeal").

[3] 25 U.S.C. §§ 458aaa-1, et seq., Pub. L. No. 93-638, as amended (2000).

Lund Medical Center, since 1982, and in 1986 it took over operation of Mt. Edgecumbe Hospital in Sitka. These serve as anchor facilities for its many other regional outpatient facilities in smaller villages throughout southeast Alaska.

SEARHC is the sole healthcare provider in many of these smaller communities, where no other care is available. In addition to the Ethel Lund Medical Center in Juneau and Mt. Edgecumbe Hospital in Sitka, SEARHC operates regional ambulatory medical-dental clinics in Juneau and Sitka, sub-regional clinics in Haines and on Prince of Wales Island, and clinics and other health programs in villages throughout southeast Alaska. In addition, SEARHC established facilities in remote locations that are at least 75 miles from the nearest short-term acute care hospital or critical care hospital as lead agency for the Alaska Frontier Extended Stay Clinic ("FESC") Consortium, which was part of a pilot project by the same name. SEARHC continues to operate these facilities, which address the needs of seriously or critically ill or injured patients who, due to adverse weather conditions or other reasons, cannot be transferred to acute care referral centers, or patients who need monitoring and observation for a limited period of time. SEARHC has FESC-developed facilities at the Alicia Roberts Medical Center in Klawock and at the Haines Health Center. SEARHC programs and facilities serve a population of over 12,000 Alaska Natives and over 6,000 non-Alaska Natives.

SEARHC relies heavily on telecommunications to bring high-quality care from its primary facilities in Juneau and Sitka, which meet established national standards of excellence, to local clinics in the villages that serve remote populations. For example, SEARHC's telebehavioral health program uses secure video conferencing to communicate privately on a face-to-face basis from local clinics to providers in Sitka or Juneau. Videoconferencing services enable SEARHC community health and dental aides to obtain guidance from doctors and other

SEARHC specialists at the Sitka and Juneau facilities. Community dental aides use telecommunications facilities to transmit video from mouth cameras to dentists at SEARHC's primary facilities for expert review and guidance, as well as images from locally obtained x-rays. SEARHC also uses videoconferencing to support telepharmacy, using a licensed pharmacist at its hospital in Sitka to supervise and advise pharmacy technicians at its remote sites through videoconferencing, enabling these technicians to prepare and dispense drugs to patients in remote locations. As a unified health system, SEARHC uses telecommunications to transmit electronic health and dental records among its various locations.

Funding from the FCC's Rural Health Care Program is critical to SEARHC's ability to provide these life-saving and life-enhancing services in southeast Alaska; SEARHC would not be able to provide many of these services without the support it receives from the Rural Health Care Program. Telemedicine is an absolutely essential part of its service delivery, and the transmission of images, voice, video, and electronic health records data upon which these services rely would be extremely difficult, if not impossible, without Rural Health Care funding.

SEARHC has been hit hard by the loss of federal funding in addition to the loss of rural health care support at issue here. In March, SEARHC announced the closure of a residential substance abuse clinic in Sitka due to the sequestration federal budget cuts.[4] USAC's improper denial of RHC funding further deprives SEARHC of $454,714 in essential funds that would otherwise be used to support critical healthcare programs for Native Alaskans and American Indians in Southeast Alaska.

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[4] *See Sitka SEARHC clinic to close*, Juneau Empire, March 26, 2013, *available at* http://juneauempire.com/state/2013-03-26/sitka-searhc-clinic-close#.UhzNoH95Gtt (last accessed Aug. 27, 2013).

To better serve the needs of its healthcare providers and patients, SEARHC entered an "evergreen" contract with AT&T Corp. ("AT&T") for telecommunications services at seventeen SEARHC facilities in 2008 (the "2008 Contract"). SEARHC sought and obtained RHC support for services purchased under the 2008 Contract for funding years 2008, 2009, and 2010. Although the initial term of the 2008 Contract ended on December 3, 2011, the contract provided that its terms "shall continue in effect so long as Service is being provided hereunder."[5] In other words, the 2008 Contract was converted to a month-to-month contract after the initial term expired. SEARHC sought competitive bids for services for the 2011 Funding Year—the Funding Year covering services provided from July 1, 2011 through June 30, 2012—in September 2011. It filed Forms 465 for several of its HCPs to solicit bids for a new contract on May 27, 2011; after receiving bids, SEARHC posted a Request for Proposals ("RFP") on September 6, 2011, which it also sent to the potential vendors.[6] The RFP included an initial proposal deadline of September 30, 2011, later extended to November 11, 2011, past the twenty-eight day period for accepting bids required by the Commission's rules.[7] SEARHC received proposals from AT&T, GCI Communication Corp., and Alaska Communications Systems, and ultimately selected AT&T's proposal as the best apparent successful solution for SEARHC. SEARHC and AT&T executed a three-year contract on April 12, 2012. The 2012 Contract lowered SEARHC's telecommunications costs by approximately 35% over the previous funding

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[5] *See* AT&T Master Agreement between AT&T Corp. and SouthEast Alaska Regional Health Consortium, dated Dec. 3, 2008, preamble ("This Agreement shall become effective when signed by authorized representatives of both parties and shall continue in effect so long as Service is being provided hereunder."), attached as ex. 8 at app. 299 ("AT&T 2008 Contract").

[6] *See* SouthEast Alaska Regional Health Consortium 2011 Request for Proposal and FCC Forms 465, attached as ex. 6 at app. 124 ("SEARHC RFP and FCC Forms 465").

[7] *See* 47 C.F.R. § 54.603(b)(3). *See also* SEARHC RFP and FCC Forms 465, attached as ex. 6 at app. 124.

year. In the interim period, SEARHC continued to purchase telecommunications services from AT&T under the 2008 Contract as it sought to finalize terms on a new, more favorable contract for telecommunications services going forward. However, due to the long delay in executing the contract, AT&T agreed to retroactively apply the lower rates as of February 1, 2012, using credits on SEARHC's June invoice to make up the difference.[8]

SEARHC submitted its Forms 466 with the RHC on May 17 and 23, 2012, seeking support for services obtained for its HCPs from July 1, 2011 through June 30, 2012. Although SEARHC was obtaining service from AT&T under an evergreen contract on a month-to-month basis, it incorrectly included the nominal end-date of its initial contract with AT&T as the expiration date for purposes of Form 466 Line 31,[9] when it should have noted that the 2008 Contract was a month-to-month contract.[10] SEARHC did not note on these forms that AT&T would continue to provide service on a month-to-month basis until SEARHC requested they terminate service.

After the 2012 Contract was finalized, SEARHC sought to update its filings with the RHC. SEARHC did not understand that it was required to file a second Form 466 for each site to reflect the new 2012 Contract for the remainder of the funding year. Instead, on June 15, 2012, SEARHC submitted to USAC a "request for correction" and supporting documentation for its FY2011 Forms 466 and 466-A, including a Correction Request Worksheet.[11] SEARHC

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[8] *See* AT&T June 2012 Invoice to SouthEast Alaska Regional Health Consortium, attached as ex. 11 at app. 328 ("AT&T June 2012 Invoice").

[9] *See* SouthEast Alaska Regional Health Consortium FCC Forms 466, Line 31, attached as ex. 7 at app. 181 ("SEARHC Forms 466").

[10] *See id*.

[11] *See* SouthEast Alaska Regional Health Consortium Request for Correction, Letter to the Universal Service Administrative Company, dated June 15, 2012, attached as ex. 3 at app. 12 ("SEARHC June 15, 2012 Request for Correction").

specifically requested that USAC "update SEARHC's FY2011 466 and 466-A forms with the corrected Actual Rural Rate Per Month" that it submitted with its request.[12] The supporting worksheet detailed SEARHC's expenses by month for each circuit for the entire FY2011. SEARHC explained that new pricing under the 2012 Contract was effective as of February 1, 2012 due to its informal agreement with AT&T;[13] the worksheet noted the relevant rates for the July 1, 2011 through January 31, 2012 period, when the 2008 Contract terms were in effect, and the reduced rates for the February 1, 2012 through June 30, 2012 period, when the 2012 Contract terms were in effect. This data was further supported by the corresponding AT&T invoices. SEARHC also included relevant tax worksheets, its RFP and proposal rating sheets, as well as the 2008 and 2012 Contracts with AT&T, together with the pricing schedules. In short, SEARHC provided USAC with all the information that would properly have accompanied a new Form 466, had SEARHC filed one, as well as additional supporting materials to document the new contract. SEARHC did not receive any response from USAC informing it that the request by letter was insufficient and that it would have to file new forms.

In its initial appeal to USAC, SEARHC explained that its misunderstanding was based on past experience with RHC under previous filing rules, and that its failure to provide updated Forms 466 and 466-A was inadvertent.[14] Indeed, as noted above, SEARHC included with its request for update of its Form 466 all the information and documents that would have been

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[12] *See id.* at 2, attached as ex. 3 at app. 14.

[13] *See id.* at 3, attached as ex. 3 at app. 15; *see also* AT&T June 2012 Invoice, attached as ex. 11 at app. 328.

[14] *See* Letter of Appeal from SouthEast Alaska Regional Health Consortium to Universal Service Administrative Company, dated Jan. 25, 2013, at 4, attached as ex. 2 at app. 10 ("SEARHC Initial Appeal") (*see* infra n. 18).

included with a new Form 466, and thus demonstrated and documented its eligibility for funding for the entire 2011 Funding Year.

SEARHC did not realize its mistake until it received an email from RHC on November 5, 2012, when RHC informed SEARHC's Chief Information Officer, Bob Cita, that RHC would "end the funding on the [nominal contract expiration] date for each request" that SEARHC had included on its Forms 466.[15] At this point, RHC explained, it was "impossible for [SEARHC] to submit forms to continue any funding missed" because the funding year had already closed.[16] RHC explained to SEARHC that because its original Forms 466 identified a December 2, 2011 expiration date, it should have submitted a second set of Forms 466 for the balance of the funding year.[17]

On January 25, 2013,[18] SEARHC filed an appeal with USAC detailing the contract history and requesting either (1) that USAC recalculate the FY2011 funding based on the information contained in SEARHC's June 15, 2012 submission to grant funding for eligible services for the entire funding year, or (2) waive the June 30, 2012 submission deadline for FY2011 and grant SEARHC leave to file amended Forms 466 and 466-A in accordance with the Commission's *Bishop Perry Order*.[19]

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[15] Email from Vincent DiLollo, Reviewer, Rural Health Care Division, USAC, to Bob Cita, Chief Information Officer, SEARHC, dated Nov. 5, 2012, attached as ex. 4 at app. 25 ("RHC Email").

[16] *Id.*

[17] *See* SEARHC Initial Appeal at 3, attached as ex. 2 at app. 9. Note that USAC also failed to identify SEARHC's mistaken use of December 2, 2011 as the "expiration date" for the purpose of Form 466 Line 31, when in fact the 2008 Contract was converted to a month-to-month contract after the initial term expired.

[18] Note that the appeal was incorrectly dated January 25, 2012; it was actually submitted on January 25, 2013, and received by RHC on January 28, 2013.

[19] *See* SEARHC Initial Appeal, attached as ex. 2 at app. 6.

USAC denied SEARHC's appeal on July 1, 2013.[20] USAC concluded that the funding request would not be recalculated because it correctly processed SEARHC's Forms 466 as filed based on the information provided in those forms. USAC further explained that any change "resulting in increased funding must be made by submitting a new Form 466" pursuant to the instructions on Form 466.[21] USAC also declined to provide relief pursuant to the *Bishop Perry Order*, explaining that "[b]ecause the *Bishop Perry Order* is directed at the Schools and Libraries Support Mechanism, and not the Rural Health Care program, USAC does not have the authority to leverage this decision in relationship to the appeal at hand."[22] USAC thus rejected SEARHC's request for funding without reaching the merits of its request.

II. The Commission's Bishop Perry Order Applies Equally to the Schools and Libraries and Rural Health Care Programs.

A. Standard of Review.

The Wireline Competition Bureau reviews decisions by USAC *de novo*.[23]

B. USAC erred by limiting the *Bishop Perry Order* to the Schools and Libraries Program.

The Commission should reverse USAC's decision because it failed to properly apply the Commission's governing *Bishop Perry Order*. Ignoring the Wireline Competition Bureau's decision in *Bradford Regional Medical Center Order*,[24] USAC incorrectly concluded that the *Bishop Perry Order* "is directed at the Schools and Libraries Support Mechanism, and not the

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[20] *See* USAC Denial of Appeal, attached as ex. 1 at app. 1.

[21] *Id.* at 2, attached as ex. 1 at app. 3 (citing FCC Form 466, 3 (2011)).

[22] *Id.* at 3, attached as ex. 1 at app. 4.

[23] 47 C.F.R. § 54.723(a).

[24] *Request for Review Bradford Regional Medical Center; Rural Health Care Universal Service Support Mechanism*, Order, DA 10-1022, 25 FCC Rcd. 7221 (2010) ("*Bradford Regional Medical Center Order*").

Rural Health Care program," and therefore "USAC does not have the authority to leverage this decision in relationship to the appeal at hand."[25] That was wrong. By its own terms, the *Bishop Perry Order* applies to the Rural Health Care Program. Even if the *Bishop Perry Order* does not apply to the Rural Health Care Program on its face, the Commission previously extended the *Bishop Perry Order* to the Rural Health Care context in the *Bradford Regional Medical Center Order*. USAC's failure to apply *Bradford* was an error. Accordingly, the Commission should reverse USAC's funding denial.

The *Bradford Regional Medical Center Order* directly parallels SEARHC's situation. In that case, Bradford Regional Medical Center, a rural health care provider, improperly submitted a request for support on Form 466-A instead of properly using Form 466.[26] Although the form was timely filed, USAC did not inform Bradford of the mistake until it denied Bradford's request for funding, after the filing deadline.[27] Citing the *Bishop Perry Order*, the Commission found that the funding denial was "not warranted, given that the violation here is a minor procedural error."[28]

Moreover, the *Bishop Perry Order* itself supports the reading that it applies to both the Rural Health Care Program and the Schools and Libraries Program. In *Bishop Perry*, the Commission considered the appeals of participants in the Schools and Libraries Program who were denied funding for ministerial, clerical, procedural errors, or failure to comply with minimum processing standards.[29] Petitioners made a variety of clerical or ministerial errors:

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[25] USAC Denial of Appeal at 3, attached as ex. 1 at app. 4.

[26] *Bradford Regional Medical Center Order* at 7222 ¶ 3.

[27] *Id.*

[28] *Id.* at 7222-23 ¶ 4.

[29] *Bishop Perry Order* at 5316 ¶ 1 ("In this Order, we grant 196 appeals of decisions by the Universal Service Administrative Company (USAC) concerning the schools and libraries

they left portions of necessary forms blank, used outdated forms, or made minor errors as a result of misunderstanding the rules.[30] Other petitioners filed forms late, or failed to properly certify their forms.[31]

The Commission explained that it does "not believe that such minor mistakes warrant the complete rejection" of applicant's funding requests.[32] As the Commission noted, it is difficult for applicants to "correctly navigate the application process," which is complex and difficult, especially given that "the primary jobs of most of the people filling out these forms include school administrators, technology coordinators and teachers, as opposed to positions dedicated to pursuing federal grants."[33] The Commission granted the appeals[34] and directed USAC to change its application procedures to "inform applicants promptly in writing of any and all ministerial or clerical errors that are detected in their applications," and permit applicants to cure the errors.[35]

The Commission's decision turned on three key points. First, that "rigid compliance with USAC's application procedures does not further the purposes of section 254(h) or serve the public interest."[36] Second, that "applicants' errors could not have resulted in an advantage for them in the processing of their application," and there was "no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements."[37] And third, that "denial

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universal service support mechanism (also known as the E-rate program) denying funding due to certain clerical or ministerial errors in the application…").

[30] *Id.* at 5320-21 ¶¶ 10-11.

[31] *Id.* at 5321-5325 ¶¶ 12-20.

[32] *Id.* at 5321 ¶ 11.

[33] *Id.* at 5323 ¶ 14.

[34] *Id.*

[35] *Id.* at 5326-27 ¶ 23.

[36] *Id*. at 5323 ¶ 14.

[37] *Id.* at 5321 ¶ 11.

of funding . . . would inflict undue hardship."[38] As explained below, all of these factors are present here.

To begin, just as in *Bishop Perry*, denial of funding in this situation would not serve the purposes of Section 254. USAC denied SEARHC's funding request "[b]ecause the *Bishop Perry Order* is directed at the Schools and Libraries Support Mechanism, and not the Rural Health Care program. . ."[39] It is true that the Commission made clear that the *Bishop Perry Order* applied "in the context of the purposes of Section 254 and cannot be applied generally to other Commission rules that are procedural in nature."[40] Support under the Rural Health Care Program, however, falls squarely within Section 254, and the same statutory authority governs both schools and libraries and rural health care providers.[41] As the Commission itself explained, "section 254 directs the Commission to 'enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, *health care providers* and libraries.'"[42] The Commission was well aware that although it was considering appeals from schools and libraries, its order went further. Indeed, the Commission's citation to 47 U.S.C. § 254(h) leaves no room for doubt that the rule established in the *Bishop Perry Order* covers funding applications for "health care providers for rural areas," which are described in 47 U.S.C. § 254(h)(1)(A).

If the Commission had intended to limit the *Bishop Perry Order* to schools and libraries, while excluding rural healthcare providers, it could easily have omitted "health care providers"

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[38] *Id.* at 5323 ¶ 14.

[39] USAC Denial at 3, attached as ex. 1 at app. 4.

[40] *Bishop Perry Order* at 5319-20 ¶ 9.

[41] *Id.*

[42] *Id.* (quoting 47 U.S.C. § 254(h)) (emphasis added).

from its analysis and limited the relevant authority in its citation to 47 U.S.C. § 254(h)(1)(B) (educational providers and libraries). But the Commission did not do that. Both the express acknowledgement in the text of the *Bishop Perry Order* that it applies to "health care providers" and its citation to statutory authority that includes health care providers leaves no room for doubt: USAC erroneously construed the *Bishop Perry Order* as limited to schools and libraries. By its own terms, the *Bishop Perry Order* applies to all technical filing errors under Section 254(h) and includes rural healthcare providers as well as schools and libraries.

Accordingly, both because USAC's understanding of the *Bishop Perry Order* was in error, and because the Commission has already applied the *Bishop Perry Order* in the rural health care context, USAC's decision must be reversed.

C. SEARHC's filing error was ministerial and procedural in nature and should not result in the denial of funding.

Pursuant to the *Bishop Perry Order*, USAC should have permitted SEARHC to correct its errors because those errors were ministerial, technical, and procedural in nature and would not have resulted in SEARHC receiving more funding than the amount to which it was entitled.

SEARHC's listing of December 31, 2011 on Line 31 of Form 466, when in fact the contract continued on a month-to-month basis pending the conclusion of a new contract, was a clear ministerial error. This was the result of a simple misunderstanding: the contract did not "expire" on December 3, 2011, as SEARHC incorrectly noted its filing, but provided rather the terms "shall continue in effect so long as Service is being provided hereunder"[43] and therefore converted to a month-to-month contract. SEARHC submitted this contract to USAC's Rural

[43] *See* AT&T 2008 Contract, preamble, attached as ex. 8 at app. 299 ("This Agreement shall become effective when signed by authorized representatives of both parties and shall continue in effect so long as Service is being provided hereunder.").

Health Care Division with its June 15, 2012 letter, so this information was also available to the RHC well before the end of the funding year. In any event, because AT&T subsequently reduced the amount of its billings to the new levels, the extension of the prior contract and the execution of a new contract with lower rates resulted in SEARHC seeking less support than it otherwise would have if it had completed its initial submission correctly. As in the *Bishop Perry Order*, SEARHC's mistakes "could not have resulted in the applicant receiving more funding than it was entitled to."[44] In addition, "there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements."[45]

Moreover, as discussed above, "denial of funding requests inflicts undue hardship on the applicants."[46] By USAC's action, SEARHC's procedural mistake resulted in it losing support in FY2011 for almost seven months of funding for eligible services. This is a large sum for SEARHC, and if this funding is not secured, SEARHC will have to find other funds to cover this shortfall, which, if even possible, would come directly from funds that would otherwise support health and dental care for the Native Alaskans and American Indians that SEARHC serves.

Similarly, the fact that SEARHC incorrectly requested that USAC revise its Form 466 filings for the relevant HCPs to reflect SEARHC's new contract with AT&T rather than correctly filing a new set of Forms 466 had no impact on the amount of support that would be provided if SEARHC had filed correctly. SEARHC provided all information necessary to process its filing, including the 2012 Contract, relevant invoices, and its RFP and its rating sheets for the submitted proposals.[47] Again, this error "could not have resulted in the applicant receiving more funding

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[44] *Bishop Perry Order* at 5321 ¶ 11.

[45] *Id*.

[46] *Id*.

[47] *See* SEARHC June 15, 2012 Request for Correction, attached as ex. 3 at app. 12.

than it was entitled to," and "there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements."[48] To the contrary, relief is especially warranted here, because SEARHC reduced its costs—and its reliance on RHC funding—by seeking a new contract. Such endeavors should be supported by USAC and the Commission, not penalized. The FCC should direct USAC to permit SEARHC to file the appropriate Forms 466 for the 2012 Contract and enable SEARHC to recover its appropriate FY2011 support.

III. As in *Bishop Perry*, Strict Enforcement of the Filing Deadline Is Contrary to the Public Interest.

In the event that the Commission concludes that the *Bishop Perry Order* did not permit USAC to grant relief to SEARHC, the Commission should itself grant a waiver to SEARHC for the same reasons set forth in *Bishop Perry* and pursuant to its general waiver authority.

A. Standard of review.

The Commission has discretion to waive its own rules on a showing of good cause.[49] More specifically, the Commission has found that waiver is appropriate where (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.[50] In considering whether to waive a particular rule, the Commission should "take into account considerations of hardship, equity, [and] more effective implementation of overall policy" on an individual basis.[51]

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[48] *See Bishop Perry Order* at 5321 ¶ 11.

[49] 47 C.F.R. § 1.3.

[50] *See, e.g., Ne. Cellular Tel. Co. v. Fed. Commc'ns Comm'n*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[51] *WAIT Radio v. Fed. Commc'ns Comm'n*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). *See also id.* at 1166.

B. The Commission should waive the FY2011 deadline.

In this case, the Commission should not let SEARHC's inadvertent failure to observe the formal requirements of filing and updating its Form 466 get in the way of the broader public interest. SEARHC is a not-for-profit, charitable tribal organization providing critical federally-funded health services to Native Alaskan communities, many of which have no other healthcare alternatives. If, on the basis of an administrative error, SEARHC is denied funding to which it is otherwise entitled, it will be forced to divert funds intended for healthcare for Alaska Natives and American Indians to instead pay the outstanding balance to AT&T. This would directly and seriously diminish the provision of healthcare services to those Native Alaskan communities that literally have nowhere else to turn. SEARHC therefore respectfully requests that the Commission waive the FY11 filing deadline to allow SEARHC to file updated Forms 466 to properly document SEARHC's agreements with AT&T for services throughout the entire 2011 Funding Year.

Such a waiver would be entirely consistent with the Commission's past policy and practice. The FCC has a longstanding practice of granting waivers to allow recipients to cure clerical and ministerial errors in the context of universal service support. As described above, the FCC granted waivers to 196 applicants in the *Bishop Perry Order*, stating that relief from these types of errors promotes the "statutory requirements of section 254(h) of the Communications Act of 1934" and allows intended recipients "to realize the intended benefits" of the universal service program.[52] Accordingly, since 2006, the Commission has routinely granted waivers of its rules to allow applicants to cure clerical errors where such waivers were

[52] *Bishop Perry Order* at 5317-18 ¶ 2.

warranted by the circumstances.[53] Similarly, in its 2007 *Rural Health Care Support Mechanism Order*, the Commission voiced its intention to apply this policy of allowing filers to "cure ministerial and clerical errors on their FCC Forms and accompanying data submitted to USAC" to the RHC Pilot Program.[54]

1. Waiver is in the public interest because USAC's decision will unnecessarily directly and adversely affect the healthcare available to Alaska Natives in southeast Alaska.

SEARHC provides essential health care and dental services to Alaska Natives in remote and hard-to-serve areas of southeast Alaska. SEARHC relies on RHC support to purchase telecommunications necessary for providing high-quality care to many Alaska Native communities that would otherwise be unserved. Telemedicine is therefore an essential part of SEARHC's service delivery. SEARHC's communications requirements include the transmission of images, voice, video, and electronic health records data. SEARHC would not be able to provide many of these services without the support it receives from the Rural Health Care Program. Denial of these funds based on SEARHC's inadvertent failure to comply with a filing requirement will have a direct, substantial, and adverse impact on the Alaska Native population that SEARHC serves. The over $450,000 in support SEARHC seeks for eligible services received from AT&T represents almost seven months of USF funding. Because the error was the result of an administrative mistake and therefore not accounted for in SEARHC's budget,

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[53] *See, e.g.*, *Requests for Waiver and Review of Decisions of the Universal Service Administrator by Academy of Math and Science Tucson, AZ, et al.; Schools and Libraries Universal Service Support Mechanism*, Order, FCC 10-122, 25 FCC Rcd. 9256 (2010); *Request for Review of A Decision of the Universal Service Administrator by Hemet Unified School District Hemet, CA; Schools and Libraries Universal Service Support Mechanism*, Order, DA 09-2246, 24 FCC Rcd. 12,725 (2009); *Bradford Regional Medical Center Order*.

[54] *Rural Health Care Support Mechanism*, Order, FCC 07-198, 22 FCC Rcd. 20,360, 20,410 ¶ 97 (2007) (citing *Bishop Perry Order* at 5326 ¶ 23); *see also Bradford Regional Medical Center Order* at 7222-23 ¶ 4 (citing *Bishop Perry Order*).

SEARHC will necessarily have to reallocate funds intended for health care to make up this unexpected loss—almost half of a million dollars that would otherwise be used to support critical health care programs for Native Alaskans and American Indians in southeast Alaska.

In short, denial of SEARHC's request to correct an administrative mistake, even though SEARHC supplied all the necessary information to document its purchase of eligible services for the entire funding year and acted in good faith, would directly and adversely affect the health and well-being of the Alaska Natives and American Indians in southeast Alaska, federal beneficiaries whom SEARHC serves pursuant to its mandate under the Indian Self-Determination and Education Assistance Act.

The RHC program is intended to ensure that rural health care providers are able to obtain affordable telecommunications services on the same basis as urban providers.[55] The program is part of a crucial national effort to promote and expand the use of telemedicine and to encourage rural health care connectivity. The FCC has found, even "today, too many clinics and hospitals lack affordable access to broadband connectivity adequate to handle basic telehealth tasks, like transmitting an x-ray, MRI, or other electronic medical records, or consulting remotely with a doctor."[56] This is precisely the connectivity for which SEARHC seeks support: connectivity which provides critical links among SEARHC's remote clinics in otherwise-unserved communities and its primary facilities in Juneau and Sitka.

Telemedicine and other health care technologies, "usually grouped under the name health information technology (IT), offer the potential to improve health care outcomes while simultaneously controlling costs and extending the reach of the limited pool of health care

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[55] 47 U.S.C. § 254(h)(1)(A).

[56] *Rural Health Care Support Mechanism*, Notice of Proposed Rulemaking, FCC 10-125, 25 FCC Rcd. 9371, at 9475 (Statement of Chairman Julius Genachowski) (2010) ("*Rural Health Care Support NPRM*").

professionals."[57] Broadband, which "enables efficient exchange of patient and treatment information by allowing providers to access patients' electronic health records (EHRs) from on-site or hosted locations;" "removes geography and time as barriers to care by enabling video consultation and remote patient monitoring;" and "provides the foundation for the next generation of health innovation and connected-care solutions," is essential to this effort.[58]

As the Commission stated in its *National Broadband Plan* and reiterated in its recent *Rural Health Care Universal Service Support Mechanism Notice of Proposed Rulemaking*, its "aim [is] to encourage maximum utilization of these solutions."[59] To do so, the Commission should be willing to occasionally waive strict application of its filing rules to providers when, as here, special circumstances exist. Providers must navigate a complex system of requirements to obtain funding: they must solicit competitive bidding using Form 465, submit Form 466, the *Funding Request & Certification Form* (or 466-A, the *Internet Service Funding Request & Certification Form*), and then submit Form 467, the *Receipt of Service Confirmation Form*, to actually obtain funding. The Commission itself has noted that universal service recipients find USAC filing requirements "complicated."[60]

Without some flexibility and understanding in difficult circumstances like these, rural health care providers that might otherwise take advantage of RHC support to provide much-needed telehealth services to their constituents may shy away from obtaining costly but essential communications services. This is particularly true given that denial of funding could be ruinous for health care providers that have previously sought and received eligible services, and have

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[57] Fed. Commc'ns. Comm'n, *Connecting America: The National Broadband Plan* at 199 (2010) ("NBP").

[58] *Id.* at 201.

[59] *Id.* at 199; *see also Rural Health Care Support NPRM* at 9407-08 ¶ 92.

[60] *Bishop Perry Order* at 5316-17 ¶ 2.

planned their operations accordingly. In short, while SEARHC takes seriously its obligations to comply with filing requirements, it submits that granting a waiver to allow SEARHC to correct its unintentional mistake and correctly re-file its "request for correction" as properly updated Forms 466 and 466-A would have a more positive systemic effect on the adoption of broadband to improve the quality and delivery of health care in rural areas than insisting on formalities.

2. Special circumstances demonstrate good cause to waive the deadline to permit the filing of a revised Form 466 to correct the contract end-date and a new Form 466 for SEARHC's new contract.

Special circumstances exist in this case that support granting SEARHC a waiver of the deadline for filing a revised Form 466 that correctly identifies the 2008 AT&T Contract as month-to-month, and a new Form 466 for SEARHC's new 2012 AT&T Contract. SEARHC's failure to strictly comply with the Form 466 filing requirements should not result in the loss of almost seven months of RHC funding that is crucial to the continuing provision of telemedicine services to Alaska Natives and American Indians in southeast Alaska. Ironically, SEARHC is now effectively being penalized for seeking to reduce its reliance on RHC funding by issuing an RFP for FY2011 and reducing its costs by thirty-five percent.

SEARHC's clear efforts to comply with all deadlines and filing requirements, as well as thoroughly document its RFP process and new contract, also weigh in favor of waiver here. As SEARHC explained in its initial appeal to USAC, its misunderstanding of the filing requirements was the result of its past experience revising a Form 466 filing in 2010 under different circumstances.[61] In that instance, SEARHC was instructed *not* to file new Forms 466; SEARHC mistakenly relied on its past experience and submitted its revisions for the 2011 Funding Year by

[61] SEARHC Initial Appeal at 4, attached as ex. 2 at app. 10.

letter instead of filing a new set of Forms 466, as the current rules require.[62] Although SEARHC failed to observe the formal requirements of the Form 466 filing, it included all the information and documents needed to support its request for funding for the entire 2011 Funding Year. It filed the right information the wrong way.

And USAC did not find to the contrary—USAC simply found that *USAC* lacked the authority to provide the waiver that SEARHC sought. But the Commission has the requisite authority, and has granted waivers in similar circumstances. Most notably, in the *Bishop Perry Order* described above, the Commission granted waivers to funding applicants that were denied funding due to ministerial, clerical, procedural errors, or failure to comply with minimum processing standards.[63] Errors included those like the ones at issue here: failure to use the correct form or other minor errors as a result of misunderstanding the rules.[64] The Commission found that waiver was warranted to prevent "such minor mistakes" from resulting in the rejection of applicants' funding requests.[65] Given the "complicated"[66] application process, and the fact that those completing the applications are primarily engaged in the business of healthcare or education, not grant writing, the Commission explained that "rigid compliance with USAC's application procedures does not further the purposes of section 254(h) or serve the public interest."[67] As noted above, however, waiver was only warranted where the "errors could not have resulted in an advantage for them in the processing of their application," and there "is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program

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[62] *Id.*

[63] *See supra* at 10-12.

[64] *Bishop Perry Order* at 5320-21 ¶¶ 10-11.

[65] *Id.* at 5321 ¶ 11.

[66] *Id.* at 5316-17 ¶ 2.

[67] *Id.* at 5323 ¶ 14.

requirements."[68] The same is true here: SEARHC's errors resulted from misunderstanding of complicated filing rules, and could not have resulted in gaining any advantage for SEARHC.

The Commission has applied the *Bishop Perry Order* analysis to grant waivers in several other matters. For example, in the *Brewster Academy Order*, the Commission granted a waiver allowing amendment after the filing deadline for petitioners who filed forms identifying an incorrect Service Provider Information Number (SPIN).[69] Reasons for the incorrect filings included confusion about the rules governing which SPIN to use and difficulty looking up the correct SPIN for the relevant provider.[70] The confusion on the procedural requirements constituted special circumstances, and the Commission found "good cause exists to waive rule section 54.504(c), which requires that applications must be complete when filed, to enable these petitioners to correct the SPINs" as well as the filing deadline to permit petitioners to re-file corrected forms.[71] The Commission held clearly that "good cause exists to waive the deadline in these cases where clerical, ministerial or procedural errors led to using the wrong SPIN."[72] In another instance, the FCC reversed USAC and granted a waiver of a deadline for amendment of an E-Rate filing after finding that a submission that mistakenly requested support for one line rather than for two lines at two separate locations was a clerical or ministerial error.[73]

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68 *Id.* at 5321 ¶ 11.

69 *Requests for Review of Decisions of the Universal Service Administrator by Brewster Academy Dallas, Texas, et al.; Schools & Libraries Universal Service Support Mechanism*, Order, DA 07-2111, 22 FCC Rcd. 9185, 9187-88 ¶ 7 (2007) ("*Brewster Academy Order*").

70 *Id.*

71 *Id.* at 9189 ¶ 9.

72 *Id.*

73 *Requests for Review of Decisions of the Universal Service Administrator by Archer Public Library, Archer City, TX, et al.; Schools and Libraries Universal Service Support Mechanism*, Order, DA 08-2381, 23 FCC Rcd. 15,518, 15,520-21 ¶ 6 (2008).

Similarly, as discussed above in the *Bradford Medical Center Order*, the FCC found that improper submission by a rural health care provider of a request for support for Internet services on Form 466 instead of Form 466-A was a clerical error, and it reversed USAC and granted a waiver so that the participant could obtain USAC support.[74] This situation is similar: SEARHC mistakenly put an incorrect "expiration" date for a contract that had converted into a month-to-month contract, and then mistakenly sent a request to update its Forms 466 when it obtained a new contract with lower rates, when it should have filed a new set of Forms 466 detailing the new contract for the remainder of FY2011. SEARHC acted in good faith throughout, based its actions on previous practice, and was seeking to lower its rates for telecommunications services and reduce its reliance on RHC funding. In sum, this case presents special circumstances that justify granting the waiver that SEARHC seeks.

3. Congressional policy favors a waiver.

If additional reasons are needed to justify a waiver, SEARHC's status as a tribal health organization providing health care services pursuant to the provisions of the Indian Self-Determination and Education Assistance Act and its relationship with the Indian Health Service again weigh strongly in favor. Congress has declared that it is the "policy of this Nation, in fulfillment of its special trust responsibilities and legal obligation to Indians…to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy."[75] In furtherance of that policy, Congress has made repeated and continued efforts to provide funding and resources to "address unmet Indian health care needs."[76]

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[74] *Bradford Regional Medical Center Order*.

[75] 25 U.S.C. § 1602.

[76] Indian Health Amendments of 1992; Indian Health Care Improvement Act of 1992, S. Rep. No. 102-392, at 21 (1992), reprinted in 1992 U.S.C.C.A.N. 3943, 3963.

The Commission has the authority to grant a waiver of the filing deadline under these unique circumstances. An administrative error—made in good faith by a provider that carefully submitted all necessary information—should not frustrate the Nation's stated, and often repeated, policy to provide the best possible health care to Alaska Natives and American Indians.

CONCLUSION

For the reasons stated herein, SEARHC respectfully requests that the FCC reverse USAC's denial of funding and instruct USAC that it should permit SEARHC to correct its errors pursuant to the Commission's *Bishop Perry Order*. If the Commission determines that USAC could not have applied *Bishop Perry* to allow SEARHC to correct its errors, SEARHC asks that the Commission grant a waiver of the filing deadline to enable SEARHC to obtain funding to support eligible communications services received from AT&T. Denying relief that would allow SEARHC to obtain funding for the full 2011 Funding Year for its eligible services would result in substantial hardship to the Alaska Natives and American Indians of southeast Alaska by preventing SEARHC from committing as many resources as possible to the provision of desperately needed health care services.

Respectfully submitted,

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Appendix

SouthEast Alaska Regional Health Consortium (SEARHC) Request for Review and Waiver

Aug. 28, 2013

REDACTED FOR

PUBLIC INSPECTION