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October 18, 2013

SENT VIA EMAIL

Mr. Craig Davis
Vice-President, Rural Health Care Division
Universal Service Administrative Company
2000 L Street NW, Suite 200
Washington, DC 20036

**Re: Application of Cardinal Change Doctrine in the
Rural Health Care Telecommunications Program**

Dear Craig:

I am writing on behalf of General Communication, Inc. (“GCI”) to address USAC’s apparent change of practice regarding bandwidth upgrades requested by our health care provider (“HCP”) customers pursuant to multi-year “evergreen” agreements that clearly contemplated such upgrades. Contrary to Federal Communications Commission (“FCC” or “Commission”) orders, USAC now appears to be treating all bandwidth upgrades as *per se* cardinal changes, without any review or analysis of the bidding and contracting documents. As a result, USAC has started revoking evergreen status from these agreements or denying the bandwidth upgrades outright as a competitive bidding violation. In either case, USAC’s actions force an unnecessary re-bid process that imposes significant administrative burdens on HCPs (and on USAC), disrupts the expectations both parties had when entering into the multi-year agreement, and delays the installation of requested bandwidth upgrades, directly affecting HCPs ability to provide medical care in these remote communities.

USAC’s approach undermines the HCPs’ ability to reduce and manage costs through term and volume discounts that are often included in multiyear contracts, because neither the HCP nor the service provider can be assured that USAC will honor the contract for the entire term if and when the HCP needs bandwidth upgrades. This inflexible approach will cause HCPs to enter into costly single-year contracts or multiyear contracts for high bandwidth volumes that may be excessive during the first part of the contract. Either result will raise RHC program costs and hamper HCPs’ ability to implement new telehealth technologies, to expand telehealth installations, and to implement electronic healthcare records systems.

The apparent practice of automatically treating bandwidth upgrades as *per se* outside of the original contract – a policy which has not been previously or consistently applied – contradicts long-standing FCC rules and orders that require a fact-specific analysis of whether the requested upgrade constitutes a cardinal change.¹ By automatically denying or revoking evergreen without

¹ See *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on

analysis of the underlying facts, USAC is disregarding the scope of the original procurement, the service provider's specific offer of services, and the provisions of the actual contract between the parties – each a relevant factor when considering whether a cardinal change in the contract has occurred and a re-bid is thus required.² It is also inconsistent with the training guidance USAC has provided to HCPs. We respectfully ask that USAC (1) reconsider its apparent practice with regard to requests for bandwidth upgrades and apply the correct cardinal change standard prospectively and (2) where appropriate, reconsider on its own motion recent prior cases where the cardinal change standard was not correctly applied. We note, however, that in making these requests for USAC to review the legality of its practices and to conform them to FCC orders, we are not initiating an appeal of any specific requests, and we reserve the right to do so, whether before USAC or the FCC, at our election.

General Background

A current five-year master service agreement between GCI and Yukon-Kuskokwim Health Corporation (“YKHC”) provides facts that illustrate the problems with USAC’s current approach.³ We provide these facts to provide an illustrative but concrete context for this discussion of bid and contracted-for bandwidth upgrades, and the appropriate, and fact-specific, nature of the cardinal change rule – which is wholly at odds with what appears to be USAC’s *per se* practice.

In April 2011, YKHC posted Form 465s on USAC’s website seeking services for over 40 YKHC affiliated HCPs across Alaska. A representative Form 465 indicated:

YKHC's service needs involve the transmission of health care data and the provision of health care services between and among YKHC locations in southwestern Alaska, as well as between YKHC facilities and locations outside of the YKHC service region. These needs include but are not limited to the transmission of patient records, including electronic medical records (EMR); high-resolution medical images, including computed tomography (CT) scans and picture archiving and communications systems (PACS) images; telemedicine consultations, including telepsychiatry services; and the provision of Internet access and related services. YKHC's service needs require reliable bandwidth capability at speeds that meet or exceed T-1 levels or higher.

Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 5318, 5425-5426, ¶¶ 227-29 (1997) (*Fourth Order on Reconsideration*) (and cases cited therein); *see also* *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Sixth Order on Reconsideration in CC Docket No. 97-21 and Fifteenth Order on Reconsideration in CC Docket No. 96-45, 14 FCC Rcd 18756, ¶ 59 (1999) (*Fifteenth Order on Reconsideration*) (reaffirming applicability of cardinal change doctrine to RHC program); *Rural Health Care Mechanism*, WC Docket No. 02-60, ¶ 261 (2012) (*HCF Order*) (reaffirming and extending cardinal change doctrine to Healthcare Connect Fund (“HCF”)).

² *See, e.g., AT&T Communications v. Wiltel*, 1 F.3d 1201, 1205 (Fed. Cir. 1993) (“The [appropriate] analysis . . . focuses on the scope of the entire original procurement in comparison to the scope of the contract as modified. Thus a broad original competition may validate a broader range of later modifications without further bid procedures.”).

³ GCI has other evergreen agreements potentially affected by the issues discussed in this request. As indicated, GCI intends to pursue any necessary appeals of individual FRNs separate from this request.

Prior to receipt of competitive bids, YKHC made available to all potential bidders a network diagram and a detailed list of network requirements that applied to all the YKHC locations. These requirements included the following (emphasis added):

YKHC Network Requirements (WAN)

1. Bandwidth speeds that meet or exceed the equivalent of a T-1 (1.5 Mbps) or higher.
2. *Ability to increase bandwidth as needed within 48 hours of notification.*

* * * *

YKHC Internet Requirements

1. Bandwidth speeds that meet or exceed the equivalent of a T-1 (1.5 Mbps) or higher.
2. *Ability to increase bandwidth as needed within 48 hours of notification.*

GCI submitted a proposal and, on September 1, 2011 (well after the expiration of the 28-day waiting period), YKHC and GCI entered into the contract for the services requested by YKHC (GCI Contract Number HC-320) (the “YKHC Contract”). The contract has a five-year term, defined the scope “Services” to be provided as including MPLS and Internet access services at different bandwidths and using different delivery methods identified in “Attachment A: *Services, Prices and Schedules*” to the contract (page 1), and specifically provided (in Section 13 of the contract):

It is the intention of the Parties that the bandwidth quantity of different sites will change as the medical services of the sites change, and that the service delivery method for sites initially served by satellite will change to DeltaNet delivery when this service becomes available. Prices will also change if, for whatever reason, the delivery method is changed. Any changes in service delivery or pricing will be done under the Change Order Process. The prices for different bandwidth and delivery methods are shown in Attachment A.

Attachment A identifies pricing for service at the initial bandwidth levels for each YKHC HCP based on the method of service delivery (*e.g.*, Satellite, DeltaNet terrestrial microwave, Terra-SW fiber) (pages 12-16), and provides a change order process (pages 17-18).

USAC issued numerous funding commitment letters (“FCLs”) to YKHC HCPs for MPLS or Internet access service at specified bandwidths. Each initial FCL indicated that the underlying contract (*i.e.*, the YKHC Contract) was evergreen and that “for the life of the contract . . . you do not need to re-compete *the service(s) identified above . . .*” (emphasis added).

Subsequent to these initial FCLs, certain YKHC HCPs have executed change orders to obtain upgraded bandwidth pursuant to the contract provisions noted above. Initially, these bandwidth changes were funded without impact to the contract’s evergreen status; more recently, however, USAC has been changing the contract’s status from evergreen to “month-to-month” and subsequently denying the requests outright as a competitive bidding violation. Because these more recent determinations were made after June 2, 2013, the last day to submit a Form 465 in

time to receive full funding for FY 2013, RHC funding is not available for the upgraded circuits after July 1, 2013 (the start of FY 2013). USAC's funding denials provide the following explanation:

The HCP has violated the 28-day competitive bidding rule as required by the Federal Communications Commission rule section 54.603(b)(3), which states The health care provider shall wait at least 28 days from the date on which its FCC Form 465 is posted on the website before making commitments with the selected telecommunications carrier(s).

As a result of USAC's actions, affected HCPs face immediate service downgrades.

Applicable Rules

Determining whether an HCP can upgrade bandwidth under an evergreen contract without initiating a new competitive bidding process requires consideration of whether such a change represents a "cardinal change" to the contract.⁴ Cardinal change is a federal doctrine that considers whether a contract change is minor – *i.e.*, whether the change is "within the scope of the original contract."⁵ As the Commission has explained: "Ordinarily a modification falls within the scope of the original contract if potential offerors reasonably could have anticipated [the modification] under the changes clause of the contract."⁶ And further: "The cardinal change doctrine recognizes that a modification that exceeds the scope of the original contract harms disappointed bidders because it prevents those bidders from competing for what is essentially a new contract."⁷

Significantly, a key case referenced by the FCC in illustration of the cardinal change doctrine involves a telecommunications services contract in which the court held that a substantial increase in bandwidth did not represent a cardinal change. In that case, the federal government had procured 45 Mbps T3 circuits from a carrier pursuant to a competitively bid contract to provide telecommunications services at specifically referenced transmission rates that did not exceed 1.5 Mbps (*i.e.*, T1).⁸ The court explained:

T3 is the next generation of dedicated transmission service. T3 conveys the same voice or data information as the other forms of dedicated transmission service, but at a higher rate of speed. The higher capacity T3 circuits convey information twenty-eight times faster than the T1 technology. In the interim between the original procurement and the [contract] modification, T3 became commercially available on a widescale. In light of the contractor's obligations to propose improvements to keep the Government's telecommunications technology

⁴ See *HCF Order*, ¶ 261 ("[I]n the Primary Program an HCP must post a Form 465 and undergo a new competitive bidding process whenever it seeks to add services, make cardinal changes, or renew or extend the contract[.]").

⁵ See *Fourth Order on Reconsideration*, ¶ 227.

⁶ *Id.*

⁷ *Id.*, ¶ 228.

⁸ See *AT&T*, 1 F.3d at 1204.

in step with technology advances, T3 falls within the scope of the . . . contract.⁹

The Court also concluded that the T3 circuits represented the same “service” as the T1 circuits – *i.e.*, they were both a dedicated transmission service.¹⁰ Finally, the Court held that an important factor in determining whether the contract change was cardinal was whether potential bidders were adequately advised of the potential that next generation dedicated transmission service (*i.e.*, T3 circuits) “would reasonably fall within the scope of the contract.”¹¹

In a similar vein, when the Commission articulated the “cardinal change” rule with respect to service modifications in RHCP (and E-rate) contracts, the Commission specifically used the cardinal change doctrine as the guide to delineate when additions of lines would be permissible as a minor modification, and when it would require re-bid.¹² If the Commission had meant to *per se* exclude service upgrades, there would have been no need to articulate the role of the cardinal change doctrine because all additions of lines would have been *per se* impermissible.

Furthermore, there is no relevant distinction between evergreen and month-to-month contracts here. In its discussion of evergreen contracts in the *HCF Order*, the Commission expressly stated: “[S]ervice upgrades will be permitted as part of an evergreen contract if the contemplated upgrades are proposed during the competitive bidding process, and the contract explicitly provides for the possibility of service upgrades.”¹³ Nothing in that Order indicates that the FCC intended this statement about service upgrades to be confined to the Healthcare Connect Fund, and did not also reflect the Commission’s application of the cardinal change doctrine to evergreen contracts generally.¹⁴

Discussion

GCI can document many previous cases of USAC approving requested bandwidth upgrades without revocation of a contract’s (including the YKHC Contract’s) evergreen status. However, whether long-standing or recent, any automatic treatment of bandwidth upgrades is clearly at odds with the cardinal change doctrine as adopted by the FCC in 1997 and recently reaffirmed.

⁹ *Id.* at 1206.

¹⁰ *See id.* at 1206-07.

¹¹ *Id.* at 1207 (the court concluded that the solicitation, which included a “Service Improvements” clause, provided reasonable notice to potential offerers).

¹² *Fourth Order on Reconsideration*, ¶¶ 224-229.

¹³ *HCF Order*, ¶ 263.

¹⁴ We recognize that the FCC in the *HCF Order* denied GCI’s request to formally adopt a site and service substitution program for the Primary program. *See HCF Order*, ¶ 315 n.745. In doing so, however, the Commission simply noted that such a change was not properly proposed in the notice leading up to the *HCF Order*. *See id.* In addition, the site substitution process adopted in the HCF provided for “guaranteed” approval of site or service substitutions in cases under a consortium master services agreement where the total amount of the FCL is not affected. *See id.*, ¶ 315. Here, GCI is not seeking guaranteed approval for bandwidth upgrades but rather case-by-case determinations that conforms to the cardinal change standard. *Cf. Fifteenth Order on Reconsideration*, ¶ 59 (directing USAC to implement cardinal change doctrine for Primary program consortia applications over apparent USAC objections).

The cardinal change rules, which date back nearly to the RHCP's inception, require a fair consideration of the facts around each requested contract modification. At a minimum this should include an assessment of both the scope of the procurement, and the scope of the contract itself.¹⁵ More specifically, this should include (1) examination of the original request for services and related documentation to see whether potential bidders were on notice that the contract would encompass the proposed modification and (2) review of the contract to determine whether the requested modification was contemplated by the parties including whether the contract provides a change order process. There is no indication USAC has been performing any review of these criteria at all in connection with the bandwidth upgrades that have been denied or placed in "month-to-month" status.

USAC's apparent practice of automatically treating bandwidth changes as *per se* cardinal changes requiring new competitive bids and new Form 465s is also at odds with relevant case law. For example, the *AT&T* case helpfully addresses how the cardinal change analysis should be performed in a telecommunications context involving bandwidth upgrades. The court held that the scope of the contracted-for service is determined with reference to the original solicitation and to the contract itself.¹⁶ Such an analysis is by its very nature case-by-case. In the illustrative YKHC example, USAC never inquired with respect to bid documents necessary to examine these criteria.¹⁷

If one assumes – as was the case – that the YKHC network requirements document was in fact distributed to all potential bidders, then a fair reading of the YKHC procurement materials and the YKHC Contract shows that (1) potential bidders were reasonably on notice that the resulting contract would provide for increases in bandwidth and (2) GCI and YKHC contracted for MPLS (and Internet) service at multiple bandwidths, expected bandwidth upgrades as medical needs

¹⁵ See *Fourth Order on Reconsideration*, at ¶¶ 227-28 (recognizing as relevant the reasonable expectations of potential bidders and the scope of the contract being modified).

¹⁶ See *AT&T*, 1 F.3d at 1206-07 (contract review board erred by too narrowly interpreting RFP language governing services improvements and by employing a fixed definition of "service" when the contract at issue employed the term "service" in different ways).

¹⁷ We are not aware of any program requirement that prevents service providers from supplementing the information on the Form 465, provided such information is made available fairly to all potential bidders. See *HCF Order*, ¶ 232 ("all potential bidders and service providers must have access to the same information and must be treated in the same manner."); *id.*, fn. 594 ("this does not prohibit applicants from seeking additional information about particular products or services during the competitive bidding process, or potential vendors from supplying it."). In addition, the YKHC Form 465 comports with USAC training guidance regarding the Form 465 description of services (emphasis in original):

1. Form 465

- We recommend you do NOT request a specific telecom service and/or bandwidth
-- TOO SPECIFIC: We need a T1 line
- Instead you should describe the needs of the HCP:
-- PREFERRED: We need to be able to transmit data and medical images
- Being too specific locks you into receiving that service type only

See <http://www.usac.org/res/documents/RHC/training/2011/Competitive-Bidding-Webinar.pdf> (last checked, Oct. 17, 2013).

changed, and provided a change order mechanism to promptly (within 48 hours) provide for upgrades needed by HCPs. With potential bidders on notice of the 48-hour bandwidth upgrade requirement, it cannot be said that competitive harm would occur if USAC funded upgrades during the five-year term of what it otherwise determined to be a valid evergreen contract.

The *AT&T* case is also instructive on the specific issue of whether the YKHC bandwidth upgrades should be considered a “new service” that requires rebidding. The court there held that a substantial increase in bandwidth – exceeding by a factor of 28 the highest bandwidth provided for in the RFP or the contract – was not a new service that required a new competitive bid.¹⁸ While there are distinct facts in *AT&T* case not present here, the situation here is clearer, requiring less interpretation of a much less complex service request and contract. Indeed, here YKHC explicitly requested the “[a]bility to increase bandwidth as needed within 48 hours of notification” to which GCI proposed specific bandwidths and pricing which were accepted by YKHC. In the *AT&T* case, the upgraded T3 bandwidth was not even mentioned in the solicitation or in the initial contract – much less specific pricing provided – but the court still held the change to the upgraded circuits was not a cardinal change.

AT&T makes clear that the language in the solicitation and the contract ultimately determines the nature and scope of the service that was contracted for. In the YKHC example, YKHC explicitly sought services that would include multiple bandwidths (“T-1 levels or higher”) and that would allow for bandwidth upgrades within 48 hours after a request from the HCP. In addition, the YKHC Contract explicitly defines the contracted-for “Services” to include all of what is clearly set forth in its Attachment A, which includes MPLS service at bandwidth levels ranging from 1.5 Mbps to 200 Mbps. And critically, the YKHC Contract has a clear statement of mutual intent to meet the growing medical needs of HCPs by facilitating 48-hour bandwidth upgrades.

USAC’s advice to HCPs in its training materials also would be irrelevant if all service upgrades required a new Form 465 and 28-day competitive bidding. In its materials, USAC advises HCPs, “We recommend you do NOT request a specific telecom service and/or bandwidth,” because “Being too specific locks you into receiving that service type only.”¹⁹ If all service upgrades, including specifically increases in bandwidth, are a cardinal change requiring a new Form 465 and a new receipt and evaluation of competitive bids, then there would be no reason why a HCP should avoid being locked in to a specific telecom service or bandwidth, other than that the HCP may have erred in its evaluation of what it needed at that particular moment. Put differently, treating all bandwidth upgrades as *per se* cardinal changes is functionally equivalent to specifying in the Form 465 that the HCP needed a 5 Mbps service: if it needs to change to a 6 Mbps service, it then needs to file a new Form 465 and conduct a new competitive bid.

Thus, USAC’s automatic conclusion that the change orders for additional bandwidth are new contracts for services that must be subject to a new Form 465 and new competitive bid evaluation cannot be reconciled with the FCC’s cardinal change doctrine.

¹⁸ See *id.* at 1207 (contract defined Dedicated Transmission Services as the “service” at issue).

¹⁹ See n. 17.

Conclusion

USAC's apparent policy that all bandwidth changes are *per se* cardinal changes that require re-bidding, even for a contract that was already determined to be evergreen when the changes are within the scope of the bidding and contract, is at odds with established FCC rules governing the cardinal change doctrine. Accordingly, we request USAC (1) review current and future bandwidth upgrades on a case-by-case basis, and (2) reconsider previous bandwidth upgrades for which USAC did not conduct such a case-by-case analysis. In doing so, USAC should reinstate evergreen status where it has been inappropriately removed.

Respectfully submitted,



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