July 22, 2019

Chairman Ajit Pai
Commissioner Mike O'Rielly
Commissioner Brendan Carr
Commissioner Jessica Rosenworcel
Commissioner Geoffrey Starks
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* in WC Docket No. 17-310

Dear Chairman and Commissioners:

The SHLB Coalition and the stakeholders listed below very much appreciate the Federal Communications Commission's (FCC's) effort to improve the policies and operation of the Rural Health Care (RHC) program. We know that the staff worked diligently to put together the draft Report and Order and agreed to several meetings with us on these issues. Unfortunately, the proposed Report and Order released on July 11, 2019, leaves open too many issues and raises too many new questions that deserve to be addressed before being adopted. We fear that, as currently drafted, the Report and Order may not accomplish the Commission's goal of improving the program. As set forth below in more detail, the draft is likely lead to another round of funding delays and inconsistent decision-making. The FCC should undertake much more analysis to understand the impact of the proposed changes on health care providers and broadband providers before making a final decision.

Therefore, we respectfully ask the Commission to re-draft the proposed Order as a Further Notice of Proposed Rulemaking and request expedited comment on these proposals. In the alternative, we respectfully ask you to postpone consideration of the proposed Report and Order until at least the September open Commission meeting so that stakeholders can work with the Commission to resolve the many open issues raised in the draft document.

A major source of concern with the draft Report and Order is the proposal to delegate rate-setting authority to the Administrator of the Universal Service Administrative Company (USAC). We have great respect for the USAC management and staff, but USAC does not have the expertise or the operational systems in place to engage in the detailed rate-setting called for in the draft Order. It is one thing for USAC to gather and publish rate information, as proposed in the original NPRM.[1] But it is another thing altogether for USAC to be charged with

[1] In the NPRM, USAC's role in establishing the rural rate appeared to be more ministerial. The Commission proposed to have USAC collect and aggregate the prior year's Telecom program, E-rate data and any other publicly available rate data. USAC would post this data on its website. Then, the **service provider** would develop an

evaluating, comparing and making judgments about rates, services, terms and conditions and technologies. Among other decisions, the draft Report and Order would delegate to USAC the responsibility to decide:

- what services are "similar";
- how to account for price variations depending on the length of contracts and volume discounts;
- whether services are symmetrical or asymmetrical and when that even makes a difference to the customer;
- whether the services are dedicated or "best efforts";
- differences among transmission technologies (fiber, satellite, etc.); and
- how funding should be prioritized if demand continues to exceed the cap.[2]

All of these decisions will have the effect of policy judgments, or, at the very least, interpretation of the Commission's rules, which is prohibited under Commission rule.[3]

Also, we recognize that the Order attempts to clarify the proposed definitions of rural areas, but there remain several significant problems with the rural categories. For instance, the draft Report and Order groups areas that are supposed to be comparable into different tiers. The areas within those tiers in some cases are not comparable, and there is no avenue to address that flaw. For instance, some extremely remote areas that are not accessible by roads may have much higher costs than other extremely remote areas. It does not appear that the Commission has gathered the data or analyzed the impact of these rural definition on the program. The Commission should conduct this analysis *before* it adopts these new rules, not afterwards.[4]

Furthermore, there are several small towns that would be considered urban under the proposed rural groupings. If the Commission is determined to use census designations (instead of our suggested RUCA codes), we suggest that it:

- recognize the use of "micropolitan areas" and "metropolitan areas" as defined by the census bureau in 2003,[5] and

- use census blocks rather than census tracts as the unit of measure to accommodate for the comparatively large area of rural census blocks which can be as much as 1,500 times the area of an urban census block.

We thus propose revised definitions of rurality as follows:

- *Extremely rural* – counties entirely outside of a Core Based Statistical Area;

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average rural and urban rate for the relevant service based on a combination of its own price data and that found on USAC's website. See the NPRM in this docket, para. 69.

[2] To the extent that the FCC staff is not equipped to engage in this rate-setting process, the FCC could retain the services of former state regulatory officials.

[3] 47 C.F.R. § 54.702.

[4] We also note that the Commission's proposed maps to identify the areas that fall into these rural categories are difficult to read, and there does not appear to be any independent source for these maps that stakeholders could use to determine which area applies to each health care site.

[5] https://www.census.gov/topics/housing/housing-patterns/about/core-based-statistical-areas.html

- *Rural* – census block within a Micropolitan Statistical Area but the census block does not contain any part of an urban area or cluster;

- *Less Rural* – census blocks within a Micropolitan Statistical Area, plus census blocks within a Metropolitan Statistical Area but the census block does not contain any part of an urban area or cluster; and

- *Urban* – all other non-rural areas.

In addition, the draft Order instructs USAC to calculate benchmark rates using formulas that have not been identified in advance and that could have a significant impact on the level of funding provided to health care providers. It is also unclear how these rate decisions could be reviewed or appealed if they are performed by USAC rather than by the FCC. Delegating this authority to USAC also could be inconsistent with the Administrative Procedures Act.

Furthermore, the proposed rate-setting framework does not ensure that this rate-setting exercise will be transparent and accurate. There must be a review process in advance to make sure that the formulas are accurate and use the appropriate data for each rural tier and urban area.[6]

With respect to the Healthcare Connect Fund, we also have many questions and concerns:

a. The draft Order states that the minimum percentage of rural members in a consortium will increase if the Commission must prioritize funding in one year because demand exceeds the cap. Increasing the consortia majority rural requirement might lead to disruptions in access to discounts for rural sites involved in a consortium as it tries to meet an increased percentage requirement. Is it really necessary to increase the consortia majority rural requirement since the new tier-prioritization rules should ensure the that most rural sites receive the bulk of the discounts? What if the notice regarding prioritization of funding is not released until after an applicant has already submitted its application with a certain percentage of rural applicants? Will applicants have time to add more rural applicants, or must they remove urban members? Or will funds be de-allocated? Will the minimum rural percentage for consortia decrease if demand falls below the cap in future years? If the tier-based approach is not enough, will there be analysis each year to determine whether the program has sufficient funds to meet its goals?

b. Discouraging consortia through increasing the majority-rural requirement will likely result in increased administrative burden on USAC due to the need to work directly with many small healthcare providers, resulting in increased administrative costs. Will the RHC program funding allow for additional administrative costs so that USAC is adequately staffed?

c. There is much confusion around the operation of the $150 Million "sub-cap" for

[6] We also note that USAC just recently issued an RFP to retain a third-party to review USAC's RHC operations. While this is a positive development, we believe it lends credence to our view that USAC's operations may require updating before asking USAC is designated to engage in even more complex rate-setting responsibilities.

multi-year contracts and up-front expenses. For instance, if demand is greater than the cap, will the FCC truncate multi-year applications going forward (as the Commission did for FY 2018 funding) and consider only the first year of these requests? Further, while we appreciate indexing the $150M sub-cap for inflation going forward, why shouldn't the inflationary adjustment be calculated from 2012 when the sub-cap was created (similar to how the FCC adjusted the overall cap on the RHC program to reflect inflation since 1997 when the cap was first adopted)? Will funding carried forward from prior years apply to the $150M sub-cap as well?

Of course, it would be easier to address many of these issues if the FCC were to increase the overall cap on the program. Section 254 says that funding for all the Universal Service programs must be "sufficient", but the demand for FY 2018 was $667M, well above the FY 2018 cap of $591M. Indexing the cap to inflation will not keep pace with the demand for more and better broadband in rural and medically underserved communities.[7] We expect that this demand will continue to increase in the future due to the closure of rural hospitals, the need to transmit electronic medical records, and the increase in FDA approval of digital health care platforms, services and equipment. We urge the Commission to re-visit and increase the overall funding level for the RHC program to ensure that it has "sufficient" funding going forward.

Finally, we again suggest that the Commission and USAC should work with stakeholders on a collaborative basis to address these problems. In the past, the Commission and USAC have too often adopted procedures that are out of step with the marketplace or that do not reflect the applicants' real-world experience. The SHLB Coalition and the parties listed below have appreciated the opportunity to have regular conference calls with USAC RHC personnel regarding existing operations over the last few months. We would like to build upon this progress by working with the Commission and USAC on the development of these new rules and procedures as well. A collaborative process could lead to a more streamlined application review process and lead to faster decision-making that will benefit everyone, especially rural health care patients and providers.

Sincerely,

John Windhausen, Jr.
Executive Director
Schools, Health & Libraries Broadband (SHLB) Coalition
jwindhausen@shlb.org
(202) 263-4626

[7] See, https://intouchhealth.com/whats-driving-telehealth-growth-in-2019/. ("The global market for telehealth is growing fast. The industry is expected to reach around $40 billion this year, with a [CAGR] of 25% over the last five years.")

Dave Kirby
President
North Carolina Telehealth Network Association (NCTNA)

Brian Thibeau
President
New England Telehealth Consortium
Connections Telehealth Consortium

Tom Reid
Project Coordinator
Southern Ohio Health Care Network

Allison Orwig - Project Director
Don Kelso - Executive Director
Indiana Telehealth Network
Indiana Rural Health Association

Ray Timothy
CEO
Utah Education and Telehealth Network

Dan Holdhusen
Director, Government Relations
Sanford/Good Samaritan Society

Deborah Sovereign
Owner
Kellogg & Sovereign