



July 25, 2019

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

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

Dear Secretary Dortch:

On July 24, on behalf of the SHLB Coalition, I met with Preston Wise (legal advisor to Chairman Pai), Arielle Roth (legal advisor to Commissioner O’Rielly) and Randy Clarke (legal advisor to Commissioner Starks – by phone). The purpose of these meetings was to request that the Federal Communications Commission postpone its consideration of the proposed Report and Order on the Rural Health Care (RHC) program, as requested in our letter dated July 22, 2019.¹

As the SHLB Coalition noted in its July 22 Ex Parte letter, the Draft Order makes progress in improving the operation of the RHC program but leaves many questions unanswered. The SHLB Coalition is not seeking a long delay; postponing the decision for an additional month would be enormously helpful in allowing the Commission to work with stakeholders to improve upon the Draft Order and answer the outstanding questions that were raised in our July 22 Ex Parte letter.²

The conversations were very helpful in addressing some of our concerns. We very much appreciate that the Commission’s goal is to provide greater guidance to USAC than in the past and to remove of the ambiguity and inconsistencies in the current process. That is SHLB’s goals as well. We also appreciate that the proposed Draft Order proposes improvements to the Healthcare Connect Fund as well as the Telecom program, which SHLB recommended in our comments earlier this year.

That being said, **the Draft Order would essentially create a brand new regulatory regime affecting the entire RHC marketplace – affecting both health care providers (HCPs) and service providers.** It should not be surprising to the Commission that the stakeholders would have a variety of questions about how this new regime will operate. We encourage the Commission to clarify the following issues below *before* adopting the Draft Order so that we

¹ Letter from John Windhausen, Jr., Executive Director, Schools, Health & Libraries Broadband Coalition, to Chairman Ajit Pai, et al. FCC, WC Docket No. 17-310 (filed July 22, 2019) (SHLB July 22 Ex Parte).

² *Promoting Telehealth in Rural America*, Draft Report & Order, FCC-CIR1908-03, WC Docket No. 17-310 (Draft rel. July 11, 2019), <https://docs.fcc.gov/public/attachments/DOC-358434A1.pdf> (Draft Order).

can avoid the uncertainty that is likely to occur *after* the Order if these issues are not resolved:

- Delegation to USAC: We remain concerned that the Draft Order would delegate substantial new authority to USAC to engage in rate-setting. We recognize that USAC has been investigating rates for compliance with the rules. But this Draft Order goes a step further by directing USAC to engage in rate-setting, both for the urban and rural rates. These are activities that should not be delegated – they should be conducted by the FCC itself so that the provisions of the Administrative Procedures Act apply.³ In addition, it is our understanding that the FCC staff are much more familiar with tariffs and how to analyze them.
- Complexity of Determining the Rural Rate: SHLB Coalition members are concerned about USAC’s ability to determine the proper rates. As we noted previously, there are many variables involved. As such, it will not be an easy exercise. Tariffs filed by incumbent carriers typically have several rate elements that USAC will need to identify and add together to determine that carrier’s rural rate. For example, to calculate a rate, USAC will have to identify the various components in the rate, which may include termination charges, mileage, installation, term, volume, and class of service components, among others. In some cases, the information needed to determine a final rate is not even contained in the tariff.⁴ Some of the tariffs are hundreds of pages long and may use a different name for a similar type of service. Some tariffs expressly state the carrier will not provide services where it does not already own facilities; how will that be taken into account? All of this is even before trying to identify cable or information services that may be similar and before taking into account the quality and rate differences that may be inherent to those types of services. This data gathering exercise will be substantial and time-consuming and the analysis of this data will require even more work. With all due respect to USAC management and staff, we do not believe USAC has the resources and expertise to engage in this analysis.
- Determining the Median: USAC will then have to determine a median rate, the problems with which GCI has already noted.⁵ This is not an obvious calculation. Will USAC use a weighted median that reflects the number of circuits purchased at each price point? Will the median reflect volume and term discounts? Will the median be

³ In the alternative, rather than engaging in detailed and difficult rate-setting, the Commission could instead increase slightly the co-pay requirement for HCPs. This would increase the HCPs incentives to give great weight to price when selecting a winning bidder. For instance, by establishing a discount rate of 85% for rural entities in the HCF, more rural HCPs would have an incentive to shift to the HCF and to reduce the uncertainty that will exist with respect to rate-setting in the Telecom program. As the Commission itself noted in the Draft Order, the average discount rate outside of Alaska is 91%. HCPs may be willing to pay slightly more (15% vs. 9%) for service in return for greater certainty of a flat discount and speedier approval.

⁴ For example, in one ILEC tariff, the rural rate included a charge for mileage, in addition to other rate components. The mileage component was a per-mile charge based on the distance from the ILEC central office to the customer premises, but the tariff did not identify the location of the ILEC central offices so that the mileage could be calculated.

⁵ Letter from John T. Nakahata, Counsel to GCI Communication Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-310 (filed July 23, 2019) (GCI July 23 Ex Parte).

calculated on a per-megabit basis? It would remove a substantial amount of uncertainty if the Commission would answer these questions in this Order.

- Use of E-rate Data: Several SHLB members have noted that the quality of services provided to schools and libraries in the E-rate program is very different from the quality of service provided to rural health care providers. We question whether importing the E-rate pricing data into the RHC program is appropriate.
- Transparency: As we noted in our July 22 Ex Parte, we are concerned that USAC will not adequately and publicly identify how the rates are determined and that the Commission has not created a process by which any rates established by USAC can be challenged. The existing appeal process has not worked well, and the appeal process will be even more important if USAC's rate-setting authority is increased. Commission rules require that parties first must appeal to USAC, which can take months or even years in the RHC context.⁶ Then the party can appeal to the Commission, which also has not timely resolved appeals in many cases. It could be years before an appeal is decided by the Commission, especially if the full Commission must decide the appeals because they will present "novel" issues.⁷ Such a process does not result in the "predictability" of the program the statute requires.⁸
- Multi-year Contracts: It is not clear that the Commission has considered the interaction between rate-setting and multi-year contracts. If the rates set by USAC change every year, health care providers and service providers may have no incentive to enter into multi-year contracts, which are often beneficial for both parties.
- Rurality Maps: As other commenters have noted, the maps provided by the Commission do not allow healthcare providers to identify with specificity the areas that the Commission has designated as "urban," "rural," "less rural," and "extremely rural."⁹ We have been told that the data regarding the boundaries of these areas is publicly available, but we have not been able to identify which set of census data is the correct set of data to use. For instance, we found [this Census Bureau website](#) identifying a variety of Census Bureau maps, but none of these appear to be the correct maps for this purpose. If the Commission staff created its own map using the Census Bureau data, it would be helpful for the Commission to make available more detailed maps that stakeholders can actually review and use to provide feedback to the Commission before it votes on the Draft Order.
- Rurality Tiers: As we discussed and as contained in the SHLB ex parte letter, we believe there is merit in amending the rurality tiers to incorporate the concepts of "micropolitan areas" and "census blocks" instead of census tracts. We also encourage the Commission to create additional rurality tiers to recognize the cost characteristics in Alaska. We appreciate that the Commission staff will take another look at these ideas.

⁶ 47 C.F.R. § 54.719(a).

⁷ 47 C.F.R. § 0.291(a)(2).

⁸ 47 U.S.C. § 254(b)(5).

⁹ Draft Order at ¶¶ 21-32, 104.

- The Shifting Rural/Urban Mix for Consortia Applicants: We understand that the Draft Order proposes that, if the demand exceeds the cap, the rural/urban percentages will shift upward by 5% for the following year. There is a difficulty with the timing of this idea. Last year, the announcement that the cap was exceeded came close to the opening of the filing window for the next funding year. If this practice continues, it will make it difficult for consortia applicants to comply with the new rural/urban percentage. It takes time – perhaps 12 months or more – for a consortium applicant to adjust its membership. The amount of work that would be needed to reach the new rural percentage could include competitive bidding for adding new rural sites and/or de-allocating funding for non-rural sites and waiting for USAC approval so that they can be removed from the consortium. Some of our members believe that this change will have the unintended side effect of punishing rural healthcare providers for being part of a consortia, even though consortia have been found to benefit rural health care providers. We encourage the Commission to re-evaluate whether it is necessary to shift the minimum percentage of rural HCPs each year given that the Order would already prioritize rural HCPs when allocating funding. In the alternative, the Commission could delay the change to the rural/urban mix for one year so that consortia have time to comply with the new percentage minimum.

As we stated before, the SHLB Coalition remains committed to working with the Commission and staff in a collaborative way to resolve these issues. We appreciate your attention to our concerns.

Sincerely,



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