January 19, 2023

SUBMITTED ELECTRONICALLY VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Ex Parte Filing
Promoting Telehealth in Rural America, WC Docket No. 17-310

Dear Madam Secretary:

Pursuant to the Federal Communications Commission's ex parte rules, I hereby submit the following summary of our January 17, 2023 conversation with Justin Faulb in Commissioner Starks's office, our January 18, 2023 conversation with Danielle Thumann in Commissioner Carr's office,[1] and our January 18, 2023 conversation with Marco Peraza in Commissioner Simington's office to discuss the Order on Reconsideration, Second Report and Order, Order, and Second Further Notice of Proposed Rulemaking in the above-listed docket (Draft Order) (FNPRM).

The following individuals participated in the following calls along with the undersigned:

January 17, 2023 Call:
- Justin Faulb, Chief of Staff and Legal Advisor for Wireline and National Security, Office of Commissioner Geoffrey Starks;
- John Windhausen, Jr., Executive Director, SHLB;
- Gina Spade, Principal, Broadband Legal Strategies, LLC; and
- Jeffrey Mitchell, Principal, Mitchell Law, PLLC;

January 18, 2023 Call:
- Danielle Thumann, Legal Advisor, Office of Commissioner Brendan Carr;
- John Windhausen, Jr., Executive Director, SHLB;
- Gina Spade, Principal, Broadband Legal Strategies, LLC; and
- Jeffrey Mitchell, Principal, Mitchell Law, PLLC;

[1] We note that we were unable to cover all topics listed herein during the call with Danielle Thumann. However, we submit them now for her further consideration.

January 18, 2023 Call:

- Marco Peraza, Wireline Advisor, Office of Commissioner Nathan Simington;
- John Windhausen, Jr., Executive Director, SHLB;
- Gina Spade, Principal, Broadband Legal Strategies, LLC; and
- Jeffrey Mitchell, Principal, Mitchell Law, PLLC;

The participants in the call made the following points:

The Schools, Health & Libraries Broadband Coalition (SHLB) is pleased that the Commission is taking action in the draft Order and FNPRM on certain items that its members have supported to improve the Rural Healthcare Program (RHC Program).[2] SHLB estimates that it advocates for policies on behalf of approximately 50 - 75% of RHC Program applicants. To continue to improve the program, we believe that there are several important suggestions and additional topics that the Commission should address in the draft Order and FNPRM.

SHLB requests that the Commission add or revise the following items in the draft Order:

1. **The Commission should continue using the rate methodology process it has successfully used for the past few years, instead of reverting to prior rules that were burdensome, confusing and caused significant delay.**

   In the Telecommunications Program, the Commission should allow parties to use previously approved rates (by adopting the rate methodologies currently in place under the Waiver Orders[3]) until the Commission adopts new rules for urban and rural rate methodologies. In 2019, the Commission adopted rules directing USAC to establish a database for urban and rural rates (Rates Database) to determine the RHC Telecom Program subsidy. SHLB applauds the Commission's decision to eliminate the Rates Database in the draft Order because of the anomalies that were identified in the Rates Database for both the urban and rural rates. However, SHLB explained that it is

[2] SHLB filed comments in the above-listed docket, covering multiple topics. *See* Comments of the Schools, Health & Libraries Broadband (SHLB) Coalition, *In the Matter of Promoting Telehealth in Rural America*, WC Docket No. 17-310 (Apr. 14, 2022) (SHLB Comments) https://www.fcc.gov/ecfs/document/104150125127386/1; *see also* Reply Comments of the Schools, Health & Libraries Broadband (SHLB) Coalition, *In the Matter of Promoting Telehealth in Rural America*, WC Docket No. 17-310 (May 16, 2022) (SHLB Reply Comments) https://www.fcc.gov/ecfs/document/10516257736972/1.

[3] *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Order, 36 FCC Rcd 791 (WCB 2021); *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Order, 36 FCC Rcd 7051 (WCB 2021); *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Order, DA-22-402 (WCB 2022); and *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Order, DA-22-580 (WCB 2022) (Waiver Orders).

concerned about the Commission's proposed decision to revert to its previous rural rate rules while the Commission considers a new method to identify rural and urban rates.

As an initial matter, the previous rules had ceased functioning as originally intended, given the evolution of the telecommunications marketplace since the program began 25 years ago. As the Commission stated in its 2019 RHC order, "the current system of Telecom Program rate determinations results in wasteful spending, fraud, and abuse as reflected in recent enforcement actions; is not serving the statute as intended; and is causing a significant drain on the limited resources of the Telecom Program,"[4] and "under existing Telecom Program rules, the process of determining the urban and rural rates is cumbersome, and the current system lacks transparency."[5]

The Commission was correct to attempt to replace and update those rules. As such, it does not make sense to use those rules in the interim. Contrary to the statement in the draft order, reinstating the previous rules will not result in "administrative efficiency."[6] In fact, for the last few years the Commission used those rules, the program was plagued by uncertainty, shifting requirements, delayed funding commitments and disbursements, and numerous appeals of USAC decisions. As the Commission previously noted in 2019, USAC "[c]onducting such investigations [of rate determinations] on a case-by-case basis for thousands of Telecom Program funding requests filed each year is a laborious, time-intensive task in a program where the speed of funding decisions may determine vital outcomes."[7]

Even though the Rates Database was not the correct approach, the flaws in the current implementation of those rules still exist and would still cause problems for program participants **throughout the country.**

- Many service providers do not have other commercial customers that are receiving the same or similar services so Method 1 rates would not be available.
- It is extremely difficult to identify rates from services charged by other service providers for the same or similar services.
    - It is difficult to identify comparable services. Most services are not tariffed because they are deregulated. Even when rates charged by other carriers are available for a specific bandwidth, in the E-rate or RHC database for example, it is impossible to determine if the services are actually comparable. Neither the E-rate nor the RHC databases provide the level of

[4] *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Report and Order 34 FCC Rcd 7335, ¶ 13 (2019) (*Promoting Telehealth Report and Order*).

[5] *Promoting Telehealth Report and Order* at ¶ 11.

[6] Draft Order at ¶ 14.

[7] *Promoting Telehealth Report and Order* at ¶ 13.

detail regarding service quality level, mileage from the point of presence, or any of a number of other factors that affect pricing that would allow carriers to determine if the service was actually comparable.
    - The Commission has required pricing for end-to-end services, which is often not available in tariffs.[8] It is impossible to identify such a price when multiple carriers are necessary to provide the connection because no one carrier could provide the entire comparable rate.
    - In some instances, USAC has disallowed rates that are lower than the rate determined using Method 2 and has questioned whether all possible carriers' rates have been included, causing a delay in approval or even denials of the proposed rural rates.
- Method 3, likewise, is burdensome and time-consuming for service providers and the Commission. For interstate rates, service providers would have to develop cost studies, submit those to the Commission, and wait for approval of the rates – a process that can take more than a year. It is likely many rates will have to be reviewed and approved by the Commission because it will be difficult, if not impossible, to establish rates under Methods 1 and 2, as described above.
    - There are no existing standards for how this analysis will be conducted by the Commission. The Commission has sought comment on this issue but does not have existing rules.

Instead, SHLB asked that the Commission retain the status quo while it seeks comment on a new approach. That would allow applicants to use "previously approved" rates as detailed in the Wireline Competition Bureau's Waiver Orders. SHLB explained those rules have been working well, and have resulted in greatly improved application processing times.

SHLB understands the Commission does not want to rely on those rates indefinitely, but, as described above, returning to the old rules, and switching between multiple methodologies (status quo, old rules, new rules) in the span of three or four years will cause much greater harm. The draft order speculates that using previously approved rates could "lead to considerable waste." Instead of decreasing prices, however, SHLB noted that the current record inflation might lead to higher prices. In any case, there is no doubt that a reversion to past rules would create confusion, turmoil and additional burden on applicants, service providers, USAC and the FCC without any corresponding benefit.

At a minimum, the Commission should continue the use of previously approved rates under the Waiver Orders through FY 2024, instead of FY 2023. The statutory principles

[8] *See, e.g.*, Public Notice, "The Wireline Competition Bureau Provides Guidance Regarding the Commission's Rules for Determining Rural Rates in the Rural Health Care Telecommunications Program," WC Docket No. 02-60, DA 19-92, 34 FCC Rcd 533 (2019), at 4.

for universal service programs require the programs to be predictable–that will not be the case if the Commission moves forward with this plan.

2. **SHLB asked that the Commission clarify that rates in evergreen contracts approved during the pendency of the Waiver Orders should be acceptable for the entire term of the evergreen contract, including voluntary extensions, even if the Commission reverts to its old rules.**

3. **SHLB asked that the Commission clarify that all of the directives in the Waiver Orders apply through the end of the use of the previously approved rates.**

4. **The Commission should provide a "safe harbor" when it is difficult to find comparable rates in urban areas by allowing the use of a higher-speed bandwidth charged in an urban area to be used as the comparable urban rate for a lower-speed bandwidth in a rural area.** The Commission proposes to retain its definition of "similar services" to include non- telecommunications services that deliver the same or similar functionality as the requested service and services with advertised speeds 30 percent above or below the speed of the requested service. Often, lower-speed or atypical (150 Mbps, for example) bandwidths are not offered in urban areas. At present, if no comparable urban rate is identified, then the applicant will receive no support at all. For example, if the rural area's service is 20 Mbps and the health care provider cannot identify an urban rate for a 20 Mbps service, they should be able to use the urban rate for a 100 Mbps service. In general a higher speed service should cost more than a slower speed service, which should reduce the difference between the price of the rural and urban rates and reduce the amount of support to be disbursed. This safe harbor would therefore allow the healthcare provider to receive some funding without harming the RHC program while making it easier for program participants to identify relevant rates.

5. **The Commission should direct USAC to copy service providers on USAC information requests, in addition to funding commitment letters.** USAC is revising its RHC systems and this request should be able to be implemented during that process. It will help ensure that service providers are aware of inquiries from USAC so that they can help their applicants respond to USAC quickly and accurately.

6. **SHLB believes allowing service providers to initiate the invoicing process and allowing "bulk uploads" should reduce the burden on rural health care providers.** While it is important to ensure that invoicing in the Telecom Program can be based on actual charges rather than anticipated charges, this could be accomplished by directing USAC to update its systems rather than through Telecom program rule changes and the creation of a new form.

7. **The Commission should correct and modify paragraph 31 in the draft Order to clarify that there is no current mechanism in place to adjust an Evergreen contract**

start/end date after the issuance of a Funding Commitment Letter (FCL). Additionally, the Commission should determine if modification of section 54.624 of the rules is necessary to allow changes of Evergreen contract dates after an FCL has been issued. If it determines that modification of section 54.624 is not necessary, the Commission should direct USAC to create a mechanism to allow modification of Evergreen contract dates to match actual installation and the start/end of a contract. Given potential questions around the logistics of such a mechanism, we suggest that the Commission ask for further discussion and comments in the FNPRM to determine and clarify the solution options as well as the feasibility and administration of such a mechanism.

Although the draft Order (in para. 31) states that there is currently a process in place to modify/change Evergreen contract dates once an FCL has been issued, SHLB members have alerted us that such a mechanism does not exist. During the funding request review window, USAC will ask if the estimated installation date submitted during the 462 filing window is still accurate or if there is an actual installation date. They will accordingly change the funding start date from the estimated to the actual if that date is known at that time. Many times, however, the circuit is not installed by the time an FCL is issued, so the actual contract term hasn't yet begun. USAC issues an FCL with a best estimate for the circuit start date and assigns the Evergreen endorsement based on this estimation. Once that occurs, the Evergreen contract dates are set and there is no current process in place to submit a correction when the applicant maintains the actual circuit start date along with the true contract start and end dates that correspond with the installation/start date. Applicants will then have Evergreen contract endorsements that expire (anywhere from a couple of months to a year or more) before the actual contract ends.

Ultimately, this creates confusion for applicants because they may be bidding for services when the prior contract is still active for many months (or even over a year or more). They also may not understand why they need to go back out to bid for services that were already bid and are still in that active contract. Additionally, the implementation of SD-WAN technology has proven to be a much lengthier process than prior technologies, which furthers the need for a mechanism to modify the Evergreen contract dates. For example, it is commonplace for an SD-WAN installation to take 9 to 18 months, depending on the size of the HCP network. In those instances, applicants have listed an estimated installation date for the circuits on the Form 462 and Network Cost Worksheet. The contract start/end dates are also estimated to coincide with the estimated installation date. If the SD-WAN network takes longer than anticipated, the Evergreen contract end date may be off by many months or more.[9]

[9] For example: If the HCP has a three-year contract in Fund Year 2023 (from July 1, 2023-June 30, 2024), the estimated circuit installation date may be entered on the Network Cost Worksheet as 10/1/2023. Contract Start/End dates are contingent upon circuit installation, so information is entered into the 462/NCW as starting on 10/1/2023 and ending on 9/30/2026. The Funding

A question was raised about the functionality of a mechanism to change an Evergreen contract start/end date for contracts that have various expiration dates based on the installation date of each individual circuit in the contract. SHLB does recognize that managing multiple start/end dates for each circuit in a contract as part of the Evergreen endorsement could have the potential to create an unduly burdensome task for USAC staff as well as for healthcare providers. It is our understanding that applicants have been working with a singular contract start/end date in the RHC Programs (regardless of the number of circuits on the contract) and thus would propose a process to modify the singular start/end date for funding/bid purposes should circuit installation be delayed, which delays the actual contract start/end dates as dictated legally by the service provider's binding agreement with the healthcare providers. The Commission could ask for clarification of this process/mechanism in the FNPRM.

8. **The Commission should revise the current deadline for submitting Corrective SPIN changes from the service delivery deadline (June 30) to the invoice deadline (October 28). Alternatively, if the Commission believes that additional notice and comment is necessary to revise the current deadline, we request that this item be included in the FNPRM**. In the Report and Order released August 20th, 2019, the Commission adopted SPIN change rules and procedures for Operational and Corrective SPIN changes modeled after the E-rate program. The rules require that all SPIN changes be submitted by the service delivery deadline for the respective funding year. Because of the nature of Correctional SPIN changes, this creates a recurring hardship for applicants, which we believe will subsequently result in individual annual waiver requests to the Commission.[10]

   Aside from true typos, we generally encounter two commonly recurring situations which drive the need for a corrective SPIN change: mergers and acquisitions, and service providers with multiple indistinguishable SPINs. First, mergers and acquisitions can occur at any time during the funding year and even after the service delivery deadline. Second, some providers have multiple SPINs, with the exact or similar names, created and used for internal business/billing account coding. These SPINS are identified and

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Commitment Letter is issued with the dates entered for circuit installation and contract start/end dates, but the circuit installation is delayed significantly and doesn't start until 8/1/2024. The Evergreen contract dates should be moved to match the installation date and contract term, making the corrected Evergreen contract term from 8/1/2024-7/31/2027. Currently, the Applicant is forced to go out to bid again for Fund Year 2026 for services beginning 10/1/2026 when in fact, the actual contract doesn't end until 7/31/2027 – a fund year earlier than they would if the Evergreen contract dates were adjusted to match actual installation.

[10] *See, e.g.*, Waiver Request from Hendrick Health System et. al, *In the Matter of Rural Health Care Support Mechanism*, WC Docket No. 02-60, (filed Nov. 30, 2022) https://www.fcc.gov/ecfs/document/12011520017783/1.

known only to the provider. Providers do not review the SPINs assigned to funding requests until invoicing paperwork is submitted by the applicant. As such, the healthcare provider is not aware of the need for the Correctional SPIN change until *after* a service provider has rejected an invoice submitted to USAC. In many instances, this occurs after the service delivery deadline, resulting in the inability to submit a Corrective SPIN change within the current deadline rules. A such, moving the deadline for Corrective SPIN changes to October 28, the invoice deadline, would correct this problem and allow sufficient time for USAC to process the SPIN change request and invoicing to be resubmitted, without the request of a waiver to the Commission.

9. **SHLB suggests that the Commission should provide guidance to USAC about how consortia network common costs will be allocated in the event the overall program cap is hit.** SHLB recommends the Commission direct USAC to use each consortium's urban-rural percentage for that allocation and that urban network common costs be classified as Priority 7 and that rural common costs be classified as Priority 1.

SHLB requests that the Commission add the following items to the draft FNPRM:

1. **The Commission should seek further comment on the appropriate size of the HCF internal cap**. Specifically, the Commission should consider whether the apparent migration of HCPs from the Telecom Program to the HCF justifies a larger internal cap.

2. **The Commission should take further comment on whether to broaden the definition of "rural" in the RHC Program to include one or more other federally recognized definitions.**[11] SHLB understands there are healthcare providers currently classified as non-rural when in many significant respects they are in fact rural. Due to the settled application of the current definition of "rural", we support adding additional criteria to determine what constitutes a rural provider. This would avoid the possibility of taking away rural status from any currently eligible entities.

3. **The Commission should take further comment on whether to revise the Healthcare Connect Fund to include larger discounts based on the rurality of healthcare providers.** Rather than maintaining the flat 65% discount in the HCF, we suggest using discount tiers to recognize and correlate to the rurality of a healthcare provider's location.[12]

4. **Finally, the FNPRM represents an important opportunity to begin to develop a record on the many new developments in this area of cybersecurity.**[13] SHLB

[11] *See* SHLB Comments at 6-9 and SHLB Reply Comments at 6-7.

[12] *See* SHLB Comments at 9-12 and SHLB Reply Comments at 8-9.

[13] *See generally* Andrea Fox, *Top 10 privacy and cybersecurity stories of 2022*, Healthcare IT News (Dec. 29, 2022), https://www.healthcareitnews.com/news/top-10-cybersecurity-stories-

discussed the growing number of cybersecurity attacks against health care providers.[14] SHLB recognizes that cybersecurity in healthcare is a multi-dimensional issue and that, unlike the E-rate Program, the RHC program does not cover costs for internal hospital networks. Notwithstanding, as healthcare and other industries move data and network operations into the cloud, the distinction between internal and external networks is becoming less pronounced.

In addition, the HCF program currently provides support to consortia for software and hardware "that supports network management, maintenance, and other network operations."[15] USAC recognizes, for example, that the HCF can support services provided by "Network Security [Managed Services Providers]" to consortia.[16] We noted, however, that USAC may not have clear guidance regarding whether specific cybersecurity services, such as intrusion detection, are covered under these existing rules. If necessary, the Commission could seek comment through the FNPRM on the scope of existing rules.

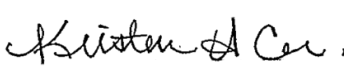
2022; Katie Adams, *What We Learned From Cybersecurity Attacks in Healthcare in 2022*, MEDCITY NEWS, (Dec. 18, 2022), https://medcitynews.com/2022/12/what-we-learned-from-cybersecurity-attacks-in-healthcare-in-2022/; Rebecca Torrance, *Cyberattacks top list of 2022 health tech hazards alongside supply chain problems, damaged infusion pumps*, FIERCE HEALTHCARE (Jan. 20, 2022), https://www.fiercehealthcare.com/tech/cyberattacks-top-list-2022-health-tech-hazards-ecri-report-alongside-supply-chain-problems.

[14] *See* Heather Landi, *Relentless cyberattacks are putting financial pressure on hospitals: Fitch Ratings*, FIERCE HEALTHCARE (Jul. 26, 2021) ("A historic jump in the number and severity of cyber assaults on hospitals during the last 18 months will cause "material revenue and expense pressures" on nonprofit hospitals and health systems"), https://www.fiercehealthcare.com/tech/relentless-cyber-attacks-are-putting-pressure-hospital-finances-fitch-ratings; *see also, e.g., Kevin Collier, Ransomware attacks on hospitals take toll on patients, NBC News* (Nov. 7, 2022), https://www.nbcnews.com/tech/security/ransomware-attacks-hospitals-take-toll-patients-rcna54090; Fred Gamble, *Nashville hospital investigating data breach within computer system*, KSLA NEWS 12 (Dec. 30, 2022), https://www.ksla.com/2022/12/30/nashville-hospital-investigating-data-breach-within-computer-system/; Samantha Liss, *CommonSpirit Health confirms it was hit by ransomware attack* (Oct. 13, 2022), https://www.healthcaredive.com/news/commonspirit-health-ransomware-cyberattack/634011/; Kevin Collier, *Major hospital system hit with cyberattack, potentially largest in U.S. history*, NBC NEWS (Sep. 28, 2020), https://www.nbcnews.com/tech/security/cyberattack-hits-major-u-s-hospital-system-n1241254; *Update: After cybersecurity threat, Arkansas Children's Hospital systems getting back online*, FOX16 (Mar. 10, 2020), https://www.fox16.com/news/local-news/fbi-investigating-cybersecurity-threat-at-arkansas-childrens-hospital/.

[15] *See* 47 C.F.R. § 54.613(a)(1)(i), (iv) (excluding from eligibility hardware and software that does not directly support these things).

[16] *See* https://www.usac.org/wp-content/uploads/rural-health-care/documents/handouts/HCF-Program-Examples-of-Common-Products-and-Services.pdf (last visited Jan. 19, 2023).

Sincerely,



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