

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Rural Health Care Support Mechanism) WC Docket No. 02-60

ORDER

Adopted: October 12, 2017

Released: October 12, 2017

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. Consistent with precedent, we waive, *sua sponte*, on this one-time basis, sections 54.603, 54.615, and 54.642 of the Commission’s rules under the Rural Health Care (RHC) Telecommunications and Healthcare Connect Fund (HCF) Programs to enable rural health care providers (HCPs) who have entered into service contracts with Network Services Solutions, LLC (NSS) to select a replacement service provider without initiating a new competitive bidding process.¹ We find that the particular facts and circumstances of this matter, including the imminent loss of service by these HCPs, warrant a waiver of our rules requiring applicants to seek competitive bids for eligible communications services and select the most cost-effective offering. Accordingly, we direct USAC to process applications submitted in response to this waiver expeditiously and pursuant to the direction provided herein.

II. BACKGROUND

2. Rural Health Care Program Rules and Requirements. Under the RHC universal service support mechanism, eligible HCPs and consortia that include eligible rural HCPs may apply for discounts for eligible communications services.² To receive support, an applicant must first solicit bids for eligible services by posting an FCC Form 465 or Form 461 to USAC’s website for carriers to review.³ Applicants must review all bids submitted in response to the FCC Form 465 or Form 461 and wait at least 28 days before entering into a service agreement with the selected service provider.⁴ Once an applicant has selected a provider and entered into a service contract, the applicant must submit its request for discounts to USAC by filing an FCC Form 466 or FCC Form 462.⁵ By submitting these forms, the applicant

¹ See *Rural Health Care Universal Service Support Mechanism*, Order, 32 FCC Rcd 1328 (Wireline Comp. Bur. 2017) (*NSS Waiver Order*) (waiving the Commission’s competitive bidding rules to enable certain rural HCPs to select a replacement service provider for Network Services Solutions, LLC, to avoid unnecessary disruptions in service).

² 47 CFR § 54.601. Currently, the rural health care universal service support mechanism consists of three programs, the Telecommunications (or Primary) Program, the Healthcare Connect Fund Program, and the Rural Health Care Pilot Program. See 47 CFR. §§ 54.600, *et seq.*

³ 47 CFR §§ 54.603, 54.642; FCC Form 465, Rural Health Care Universal Service Mechanism, Description of Services Requested and Certification Form, OMB 3060-0804 (July 2014) (FCC Form 465); FCC Form 461, Rural Health Care Universal Service Healthcare Connect Fund, Request for Services, OMB 3060-0804 (July 2014) (FCC Form 461).

⁴ 47 CFR § 54.603(b)(3); 47 C.F.R. § 54.642(g).

⁵ FCC Form 466, Rural Health Care Universal Service Mechanism, Funding Request and Certification Form, OMB 3060-0804 (July 2014) (FCC Form 466); FCC Form 462 Instructions, Rural Health Care Universal Service Healthcare Connect Fund, Request for Funding, OMB 3060-0804 (July 2014) (FCC Form 462 Instructions).

verifies the type of services ordered and certifies that the selected service provider is the most cost-effective.⁶ After reviewing the funding requests, USAC issues funding decisions in accordance with the Commission's rules.⁷

3. HCP participants in the RHC Program generally provide health care in rural and remote areas, where doctors and specialists are often unavailable. These HCPs rely on communications services to deliver life-saving telemedicine. For many HCPs, these critical services would be unaffordable without the RHC subsidy.

4. Over the last several years, NSS has provided communications services to HCPs participating in the RHC Telecommunications and/or HCF Programs. As a reseller of communications services, NSS contracts with other service providers to provide the underlying facilities that NSS then uses to deliver services to its HCP customers.⁸ NSS is currently in Chapter 7 bankruptcy proceedings in Reno, Nevada, and recently asked the bankruptcy court for permission to discontinue services to all of its customers.⁹ On October 3, 2017, the bankruptcy court granted NSS's request, and as a result, service for NSS customers may be terminated at any time.¹⁰

III. DISCUSSION

5. Generally, the Commission's rules may be waived for good cause shown.¹¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹³ Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹⁴

6. Based on the facts and circumstances of this matter, we find good cause to waive the Commission's competitive bidding rules to the extent described herein. A limited waiver of our rules is appropriate and in the public interest because it will enable NSS's HCP customers to continue to receive support from the RHC Program upon switching to another service provider. In the absence of such a waiver, these HCPs would be ineligible for vital RHC support without repeating the competitive bidding

⁶ See FCC Form 466; FCC Form 462.

⁷ See 47 CFR. §§ 54.600 *et seq.*

⁸ See *In the Matter of Network Services Solutions, LLC, Scott Madison*, File No. EB-IHD-150001913, NAL/Acct. No.: 201732080001, FRN: 0014290357, FCC 16-158 at paras. 21-22 (rel. Nov. 4, 2016) (noting that AT&T provided the underlying telecommunications services to various HCPs served by NSS).

⁹ See *In the Matter of Network Services Solutions, LLC*, Notice of Hearing on Motion for Order Authorizing Rejection or Executory Contracts with Carriers and Customers, Chapter 7 Case, Case No.: BK-N-17-50309-gwz, United States Bankruptcy Court for the District of Nevada (dated Sept. 22, 2017); *In the Matter of Network Services Solutions, LLC*, Motion to Convert of Dismiss Case Pursuant to 11 USC § 1112(b), Chapter 11 Case, Case No.: BK-N-17-50309-gwz, United States Bankruptcy Court for the District of Nevada (dated July 17, 2017); *In the Matter of Network Services Solutions, LLC*, Voluntary Petition for Non-Individuals Filing for Bankruptcy, Chapter 11 Case, United States Bankruptcy Court for the District of Nevada (dated Mar. 20, 2017).

¹⁰ See *In the Matter of Network Services Solutions, LLC*, Order Granting Motion for Order Authorizing Rejection or Executory Contracts with Carriers and Customers, Chapter 7 Case, Case No.: BK-N-17-50309-gwz, United States Bankruptcy Court for the District of Nevada (dated Oct. 5, 2017).

¹¹ 47 CFR § 1.3. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

¹² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹³ *Id.* at 1166.

¹⁴ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

process. Requiring NSS's HCP customers to engage in additional competitive bidding would disrupt their ability to receive continuous communications services and create undue hardship through no fault of the HCPs' own. The Commission is committed to avoiding unnecessary disruptions in service to the public.

7. To ensure continuous service for the affected HCPs, we therefore waive sections 54.603, 54.615, and 54.642 of the Commission's rules to allow providers to enter into new service contracts, without having to initiate a new competitive bidding process. We emphasize that this waiver is limited in scope. We apply this waiver only to those HCPs currently receiving service from NSS as part of a pending Funding Year 2017 request, or to those HCPs in an on-going multi-year contract with NSS for which a funding request is pending or has been committed. We also permit NSS's HCP customers whose funding requests were denied by USAC to select a new service provider under the terms of this waiver, provided the reason for USAC's denial was based on an error or deficiency on the part of NSS, and not the HCP. Finally, the waiver is limited to service provided to the HCP for the period between the release of the instant order until the end of Funding Year 2017 (i.e., June 30, 2018). We conclude that a waiver in the instant case is consistent with the public interest, both in terms of facilitating the vital health care services provided by many of these HCPs and the statutory goal of increasing access of rural HCPs to telecommunications, advanced telecommunications, and information services.¹⁵ In sum, the option provided by this waiver encompasses all HCPs receiving or seeking RHC-funded services from NSS for FY 2017, subject to any relevant state or local requirements (if any) regarding service provider changes.¹⁶

8. Given the unique circumstances presented here, we direct USAC to allow the affected HCPs to select a new service provider without filing a new FCC Form 465 or FCC Form 461, and initiating a new competitive bidding process. Once the HCP has selected a new provider and entered into a service contract, it must submit an FCC Form 466 or FCC Form 462 to USAC to verify the services ordered. The services ordered with the new provider must be eligible for support and must be the same as or similar to the services originally requested from NSS.¹⁷ Consistent with RHC Program rules, the HCP must provide all relevant supporting documentation with its FCC Form 466, or FCC Form 462.¹⁸ For

¹⁵ See 47 U.S.C. § 254(h)(1)(A) and (h)(2)(A).

¹⁶ For the reasons explained here and below, this waiver is structured consistent with objectives previously identified as bearing on the evaluation of service provider changes in the rural health care context. See *Requests for Review of Decisions of the Universal Service Administrator By Hospital Networks Management, Inc. Manchaca, Texas, et al.*, Order, 31 FCC Rcd 5731, 5374, para. 5 (WCB 2016) ("An applicant [under the rural health care support mechanisms] may change service providers in the middle of a contract without initiating a new competitive bidding process, if such a change is permitted under state and local laws and the terms of the contract are for the same or lower price"). Cf. *Request for Review of the Decision of the Universal Service Administrator by Copan Public Schools, Copan, Oklahoma, et al.*, Order, 15 FCC Rcd 5498 (2000) (*Copan Order*) (in the E-rate context, allowing an applicant to change service providers post-funding commitment where the applicant determines that such a change is allowed under its state and local procurement rules and under the contract between the applicant and its original provider, and the funding request does not exceed the amount originally requested). The Commission takes no position herein on the contractual rights or obligations of the various parties.

¹⁷ See, e.g., 47 CFR §§ 54.605, 54.607 (permitting carriers to receive reimbursement for the difference between the urban and rural rates for "similar services"). See also Rural Health Care Mechanism, WC Docket No. 02-60, Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking, 18 FCC Rcd 24546, 24563 at para. 33 (2003) (concluding that services are "similar" if they are functionally similar from the perspective of the end-user).

¹⁸ See 47 C.F.R. §§ 54.609(a)(2), 54.643. Under RHC Telecommunications Program rules, the urban rate "shall be a rate no higher than the highest tariffed or publicly-available rate charged to a commercial customer for a functionally similar service" in any city with a population of 50,000 or more in that state. See 47 CFR § 54.605(a), (b). The rural rate "shall be the average of the rates actually being charged to commercial customers, other than health care providers, for identical or similar services provided by the telecommunications carrier providing the service in the rural area in which the health care provider is located." See 47 CFR § 54.607(a). If the

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purposes of completing the FCC Form 466 for support under the Telecommunications Program, NSS HCPs may use an urban rate provided on USAC's website that is in the HCP's state and corresponds most closely to the services contained in the HCP's funding request. Alternatively, the HCP may provide a different urban rate that it deems to be more suitable but still meets Program requirements.¹⁹ If the HCP provides an urban rate that is not reflected on USAC's website, the HCP must provide documentation supporting that rate with its new FCC Form 466. Given the limited duration of this waiver, we strongly encourage HCPs to use the rates on USAC's website, in order to expedite the process as much as possible. Further, consistent with the direction provided in the *NSS Waiver Order*, we also direct USAC to ensure that each re-submitted funding request is capped at the amount that was originally requested for that service.²⁰ We emphasize that any RHC support provided pursuant to this waiver shall only cover the time period between the date on which the HCP submits a new FCC Form 466, or FCC Form 462 and the end of Funding Year 2017 (i.e., June 30, 2018). We also remind any HCP covered by this waiver that the same pro-ratio factor will apply to any new funding request filed pursuant to this waiver as would have applied to the original funding request. To the extent any HCP covered by the instant waiver seeks to receive support for Funding Year 2018 and beyond (i.e., from July 1, 2018-June 30, 2019, and any subsequent funding years), the HCP must initiate a new competitive bidding process in compliance with RHC Program rules.

9. We emphasize that the Commission is committed to guarding against waste, fraud, and abuse, and ensuring that funds disbursed through the RHC Program are used for appropriate purposes. This waiver does not affect the authority of the Commission or USAC to conduct audits or investigations to determine compliance with RHC Program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or the Commission's rules, such proceedings can reveal instances in which universal service funds were disbursed improperly or in a manner inconsistent with the statute or the Commission's rules. To the extent the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. We emphasize that the Commission retains the discretion to evaluate the uses of monies disbursed through the RHC Program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that recovery is warranted. The Commission remains committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under the Commission's procedures and in cooperation with law enforcement agencies.²¹

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telecommunications carrier does not provide similar or identical service in the rural area where the HCP is located, "the rural rate shall be the average of the tariffed and other publicly available rates, not including any rates reduced by universal service programs, charged for the same or similar services in that rural area over the same distance as the eligible service by other carriers." See 47 CFR § 54.607(b). If there are no such tariffed or publicly available rates, or the carrier "reasonably determines that this method for calculating the rural rate is unfair," the carrier must submit its rural rate to the state commission (for intrastate rates) or the FCC (for interstate rates) for approval. See 47 CFR § 54.607(b), (b)(1), (b)(2). Pursuant to HCF Program rules, applicants must provide supporting documentation for the services ordered and the rates for those services, among other items. See 47 CFR § 54.643.

¹⁹ See USAC website, Rural Health Care, Urban Rates Search, <http://usac.org/rhc/telecommunications/tools/UrbanRates/search.asp> (last visited Oct. 10, 2017).

²⁰ See *NSS Waiver Order*, 32 FCC Rcd at 1332, para. 8; Filing Window Public Notice; USAC website, Rural Health Care, Funding Windows for Funding Year 2016, <http://usac.org/rhc/tools/additional-filing-windows.aspx#prorated> (last visited Oct. 10, 2017).

²¹ Because the Schools and Libraries Universal Service Support Mechanism (informally known as the E-rate program) already has a procedure in place that allows E-rate applicants to change service providers if their selected service providers are unable to provide contracted services, a similar waiver may not be necessary for E-rate applicants impacted by NSS's service problems. E-rate program rules permit applicants to initiate service provider identification number (SPIN) changes for specified reasons (e.g., the service provider went out of business or is unable to perform) after a funding commitment has been issued. See Schools and Libraries Universal Service

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IV. ORDERING CLAUSES

10. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to sections 0.91, 0.291, 1.3 and of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, that sections 54.603, 54.615, and 54.642 of the Commission's rules, 47 CFR §§ 54.603, 54.615 and 54.642, ARE WAIVED to the limited extent provided herein.

11. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Monteith
Chief
Wireline Competition Bureau

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Support Mechanism; A National Broadband Plan for Our Future, Sixth Report and Order, 25 FCC Rcd 18762, 18802, para. 91 (2010). Applicants must have a legitimate reason for the SPIN change and be able to demonstrate why the current service provider is unable to continue with the service contract. *Id.*; see also *Copan Order*.