

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

In the Matter of )
Request for Waiver by )
Finger Lakes Community Health on behalf of NY )
Community Broadband Partnership )
Rural Health Care Universal Service Support ) WC Docket No. 02-60
Mechanism )

ORDER

Adopted: March 12, 2020

Released: March 12, 2020

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we deny a request for waiver from Finger Lakes Community Health (FLCH) on behalf of NY Community Broadband Partnership (NYCBP) of the three-year limitation on a multi-year funding commitment for a funding year (FY) 2015 funding commitment in the Rural Health Care (RHC) Program’s Healthcare Connect Fund Program.1 We deny the request because: (1) FLCH has not demonstrated special circumstances that would compel grant of the waiver; and (2) grant of the waiver would not be in the public interest as it would extend the limitation on multi-year funding commitments beyond three years, thereby potentially creating additional strain on the already-limited pool of funding for upfront payments and multi-year funding commitments, and potentially inhibiting the availability of RHC funding for all program participants.

II. BACKGROUND

2. The RHC Program and Rules. The RHC Program has two component programs: (1) the Telecommunications Program (Telecom Program), which permits eligible health care providers to apply for discounts to defray the high cost of eligible telecommunications services in rural areas2 and (2) the Healthcare Connect Fund Program, which supports the delivery of broadband services and development of state and regional health care networks.3 Eligible health care providers may apply for support for eligible services by filing either an FCC Form 466 (Telecom Program) or an FCC Form 462 (Healthcare Connect Fund Program) with the Universal Service Administrative Company (USAC) after completing a competitive bidding process and selecting the most cost-effective service offering.4 After reviewing the applications, USAC will issue a funding commitment letter (FCL) to the health care provider setting forth, among other things, the amount of funding approved and the start and end dates of the funding

1 Finger Lakes Community Health Request for Waiver at 1 (filed June 13, 2019) (FLCH Waiver Request).

2 Rural Health Care Support Mechanism, WC Docket No. 02-60, Order, 34 FCC Rcd 4136, 4136, para. 2 (2019) (FY 2018 Demand Order).

3 See id.

4 See id. at 4139, para. 10. See also 47 CFR §§ 54.603(b)(4); 54.615(a); 54.643 (2015-2018).

commitment, i.e., the dates within which charges for the requested service and/or equipment will be eligible for support.<sup>5</sup>

3. RHC Program applicants are generally required to complete this process annually, with funding approved on a funding year-by-funding year basis.<sup>6</sup> The funding year begins on July 1 and ends on June 30 of the following calendar year.<sup>7</sup> In the Healthcare Connect Fund Program, however, applicants that have entered multi-year contracts may request a multi-year funding commitment for a period of up to three years when they file their FCC Form 462.<sup>8</sup> If approved, invoices for services delivered pursuant to the underlying multi-year contract may be submitted for the term of the three-year commitment without requiring the applicant to initiate a new competitive bidding process or submit yearly requests for funding.<sup>9</sup>

4. Funding for the RHC Program is currently capped at \$605 million, plus annual adjustments for inflation.<sup>10</sup> A maximum of \$150 million may be committed for Healthcare Connect Fund Program funding for requests seeking support for non-recurring upfront payments and multi-year commitments.<sup>11</sup> If, after a filing window period closes, demand exceeds either the overall RHC Program funding cap or the \$150 million upfront/multi-year cap in a particular funding year, the Commission currently requires USAC to prorate funding requests to ensure that commitments do not exceed the relevant caps.<sup>12</sup>

5. *FLCH's Funding Request and Request for Waiver.* On August 6, 2015, FLCH filed an FCC Form 462 seeking RHC Program support under the Healthcare Connect Fund Program for services provided by Time Warner Information Services, LLC for FY 2015 pursuant to a contract that it signed with Time Warner Cable on July 29, 2015.<sup>13</sup> The services under the contract were scheduled to be installed on September 1, 2015, and the contract was originally scheduled to expire on July 28, 2018.<sup>14</sup> On September 1, 2015, USAC approved this funding request and issued a multi-year funding

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<sup>5</sup> See *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16803, paras. 300-02 (2012) (*Healthcare Connect Fund Order*).

<sup>6</sup> See *id.* at 16787, para. 249. In FY 2015, the annual cap for the RHC Program was \$400 million.

<sup>7</sup> 47 CFR § 54.675(b) (2015-2018). Effective October 11, 2019, this section has been re-codified as 47 CFR § 54.600(a).

<sup>8</sup> See 47 CFR § 54.644(a) (2015-2018). Effective October 11, 2019, this section has been re-codified as 47 CFR § 54.620; see also *Healthcare Connect Fund Order*, 27 FCC Rcd at 16794, para. 296 (explaining that while multi-year contracts are permitted in both programs, multi-year funding commitments are only permitted in the Healthcare Connect Fund, and in the Telecom Program applicants must apply for support on an annual basis.).

<sup>9</sup> 47 CFR §§ 54.675(e), 54.644 (2015-2018).

<sup>10</sup> 47 CFR § 54.675(a)-(b); *Wireline Competition Bureau Announces E-Rate and RHC Programs' Inflation-Based Caps for Funding Year 2020*, CC Docket No. 02-6, WC Docket No. 02-60, Public Notice, DA 20-263 (rel. Mar. 12, 2020).

<sup>11</sup> See *id.*

<sup>12</sup> 47 CFR § 54.675(f) (2015-18). Beginning in FY 2020, if demand exceeds the cap, USAC will use a prioritization system to determine which funding requests are funded and which are denied. See *In the Matter of Promoting Telehealth in Rural America*, WC Docket No. 17-310, Report and Order, 34 FCC Rcd 7335, 7385-7403, paras. 107-143 (2019).

<sup>13</sup> FCC Form 462 Funding Request No. 15680111 (certified Aug. 6, 2015).

<sup>14</sup> Letter from Universal Service Administrative Company to Mary A. Zelazny, Finger Lakes Migrant Health Care Project, Inc. at 1 (Sept. 1, 2019) (*FY 2015 Funding Commitment Letter*).

commitment letter with a start date of September 1, 2015 and an end date of June 30, 2018.<sup>15</sup> There was a delay in installing the services, however, so services were not installed until January 25, 2016. Because of the installation delay, the contract end date was extended until January 25, 2019. FLCH contends that for a period of time it was not aware of the contract end date extension, but its waiver request does not indicate when FLCH actually learned about the extended end date.<sup>16</sup>

6. On July 16, 2018, FLCH emailed USAC asking that USAC extend the end date for its funding commitment from June 30, 2018 to January 25, 2019, the extended contract end date.<sup>17</sup> USAC responded to FLCH's email on July 20, 2018, and declined to extend the end date because USAC is "unable to adjust contract endorsement dates from old funding commitments."<sup>18</sup> In response, FLCH filed an appeal with USAC on July 23, 2018, again requesting an extension of the end date of its funding commitment and arguing that the delayed installation and revised contract end date prevented it from using the funds committed under the 2015 FCL fully by the commitment end date.<sup>19</sup> USAC dismissed FLCH's appeal on April 23, 2019 on the grounds that extending the end date of the funding commitment required a waiver of three-year limitation on multi-year commitments in the Commission's rules, which USAC did not have the authority to waive.<sup>20</sup> On June 13, 2019,<sup>21</sup> FLCH filed a request for waiver with the Commission of the three-year limitation on multi-year commitments to extend the funding end date for the FY 2015 commitment from June 30, 2018, to January 25, 2019, explaining that an extension would allow it to use any undisbursed committed funding under the FY 2015 multi-year FCL.<sup>22</sup>

### III. DISCUSSION

7. We deny the request for waiver because there are no special circumstances that warrant extending the multi-year funding commitment beyond the limit of three years codified in section 54.644 for the funding request at issue and such an extension would not be in the public interest.<sup>23</sup> An extension of a multi-year commitment would undermine the Commission's ability to predictably fund cost-effective services. It would also be inappropriate here because with better diligence on its part, FLCH likely could have received RHC Program support for the period of time after the commitment expired by filing an application for it. Generally, the Commission's rules may be waived for good cause shown.<sup>24</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>25</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>26</sup> Waiver of the Commission's rules is appropriate only if both (1) special circumstances warrant a deviation from

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<sup>15</sup> Letter from Universal Service Administrative Company to Rachel Mehlenbacher, Consortium Program Coordinator, NY Community Broadband Partnership at 2 (Apr. 23, 2019) (*USAC Notice of Dismissal*).

<sup>16</sup> FLCH Waiver Request at 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; *USAC Notice of Dismissal* at 1.

<sup>20</sup> *USAC Notice of Dismissal* at 3.

<sup>21</sup> While the Request for Waiver is dated May 10, 2019, it was filed with the Commission in the Electronic Comment Filing System on June 13, 2019.

<sup>22</sup> FLCH Request for Waiver at 1.

<sup>23</sup> 47 CFR § 54.644 (2015-18).

<sup>24</sup> 47 CFR § 1.3.

<sup>25</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>26</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

the general rule, and (2) such deviation will serve the public interest.<sup>27</sup> FLCH's waiver request meets neither requirement.

8. Special circumstances do not warrant a deviation from the general rule in this case. FLCH argues that a waiver is appropriate to allow it to receive RHC Program funding for the period that ran from the end of FY 2017 through the extended contract expiration date in light of the fact that it was originally unaware of the contract end date extension. However, FLCH has not demonstrated that extraordinary relief is appropriate here. FLCH was on notice that its funding commitment end date was June 30, 2018 and could have applied in FY 2018 without filing an appeal with USAC. FLCH does not specify exactly when it became aware of the contract end date extension, or explain why it would not have been possible to file a timely FY 2018 funding request for RHC Program support for that period during the March 1, 2018 to June 30, 2018 application window.<sup>28</sup> Health care providers are responsible for knowing and understanding contract terms. Failure to either understand, or monitor the status of, a contract end date or contractual term permitting an extended end date when there is a delay in installation, cannot serve as the basis for a waiver.<sup>29</sup>

9. Furthermore, granting a waiver here would not be in the public interest because it would increase expenditures for multi-year commitments, which could limit the availability of funding for other services supported by the RHC Program. In 2018, because of the significant demand from multi-year commitments, Commission had to suspend the rule permitting multi-year funding commitments in the Healthcare Connect Fund Program.<sup>30</sup> In light of the strain that multi-year commitments have placed on the availability of RHC Program funding in recent years, we do not believe it is in the public interest to grant a waiver request that would set a precedent for imposing additional strain on the RHC Program by extending multi-year commitments beyond three years.

10. Additionally, we find that allowing multi-year commitments to extend beyond three years, as contemplated by FLCH's waiver, could cause health care providers to overpay for services. In establishing a three-year limitation for multi-year commitments in the RHC Program, the Commission struck a balance between allowing applicants and the Universal Service Fund (Fund) to reap the benefits of long-term contracts, namely reducing administrative burdens on applicants and the Fund, and ensuring that applicants were not locked into long-term contracts that could prevent health care providers from pursuing more cost-effective options in the future.<sup>31</sup> Permitting health care providers to extend funding

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<sup>27</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>28</sup> Prior to FY 2016, applicants could submit their applications during the initial filing window and then USAC would accept and process applications on a rolling basis for a funding year until June 30 of the following calendar year. In 2016, the Commission set filing windows for applicants to apply for funding and directed USAC to no longer process applications on a rolling basis. *Wireline Competition Bureau Provides a Filing Window Period Schedule for Funding Requests Under the Telecommunications Program and the Healthcare Connect Fund*, WC Docket No. 02-60, Order, 31 FCC Rcd 9588, 9588, paras. 5-6 (2016) (*WCB Provides a Filing Window Period Schedule*). In FY 2018, the first filing window opened on March 1, 2018 and closed on June 30, 2018. See 47 C.F.R. § 54.675 (2015-18). No subsequent filing window opened because the cap was met after the first filing window closed. *WCB Provides a Filing Window Period Schedule*, 31 FCC Rcd at 9588, para. 10 (explaining that if the cap is not met after the initial window, USAC shall open a second window according to the filing window schedule).

<sup>29</sup> See *Healthcare Connect Fund Order*, 27 FCC Rcd at 16806, paras. 311-12 (explaining that major changes to contract terms require rebidding and that program participants must determine whether such changes are material to the terms of the contract).

<sup>30</sup> See *id.* at para. 8.

<sup>31</sup> *Healthcare Connect Fund Order*, 27 FCC Rcd at 16801-02. The Commission also found that a three-year limit was consistent with the Commission's requirement that upfront payments averaging more than \$50,000 per site be amortized over at least three years. See *id.*

commitments beyond three years would thwart that balance by creating the risk that health care providers with funding commitments that extend beyond three years might not initiate new competitive bidding processes in search of bids for more cost-effective services, causing them to continue to pay outdated rates when lower rates might be available. We therefore find that grant of FLCH's waiver would not be in the public interest.

#### **IV. ORDERING CLAUSES**

11. ACCORDINGLY, IT IS ORDERED, 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 sections 0.91, 0.291, 1.106, 54.644(a), and 54.720(a) of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.106, 54.644(a), 54.720(a), that the Request for Waiver filed by Finger Lakes Community Health on behalf of New York Community Broadband Partnership IS DENIED.

12. IT IS FURTHER ORDERED that, pursuant to the authority delegated in section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Ryan B. Palmer  
Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau