

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

In the Matter of )
Rural Health Care Support Mechanism ) WC Docket No. 02-60
Promoting Telehealth in Rural America ) WC Docket No. 17-310

ORDER

Adopted: April 12, 2022

Released: April 12, 2022

By the Chief, Wireline Competition Bureau:

1. By this Order, the Wireline Competition Bureau (Bureau) extends the waiver of sections 54.604(a) and 54.605(a) of the Commission’s rules, which set forth the requirements that health care and service providers participating in the Telecommunications (Telecom) Program of the Rural Health Care (RHC) Program use the database of rates (Rates Database) to calculate urban and rural rates, for health care and telecommunications service providers seeking support in the State of Alaska for RHC Program funding year 2023. The Bureau previously waived use of the Rates Database in Alaska for funding years 2021 and 2022 in the Alaska Database Waiver Order. Our actions are intended to ensure that health care and service providers in Alaska will receive sufficient Telecom Program support for funding year 2023, while the Commission further examines an effective rate determination mechanism for the Telecom Program.

I. BACKGROUND

2. The Commission’s RHC Program consists of two component mechanisms: (1) the Telecom Program; and (2) the Healthcare Connect Fund (HCF) Program. The Telecom Program subsidizes the difference between the rates in the health care provider’s rural area and rates for comparable services available in urban areas within the health care provider’s state. The HCF Program promotes the use of broadband services and facilitates the formation of health care provider consortia that include both rural and urban health care providers by providing a flat 65% discount on an array of advanced telecommunications and information services.

3. In the Promoting Telehealth Report and Order, the Commission directed the Universal Service Administrative Company (USAC) to create a database of urban and rural rates within each state

1 47 CFR §§ 54.604(a), 54.605(a) (2019).

2 See Promoting Telehealth in Rural America, WC Docket No. 17-310, Order, 36 FCC Rcd 791, at 791, para. 2 (WCB 2021) (Alaska Rates Database Waiver Order).

3 See Promoting Telehealth in Rural America, WC Docket No. 17-310, Further Notice of Proposed Rulemaking, FCC 22-15, at 8, para. 15 (Feb. 22, 2022) (Further Notice).

4 See 47 U.S.C. § 254(h)(1)(A); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9093-161, paras. 608-749 (1997) (Universal Service First Report and Order).

5 See 47 U.S.C. § 254(h)(2)(A); 47 CFR §§ 54.611, 54.612; Rural Health Care Support Mechanism, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16680-81, paras. 1-3 (2012) (Healthcare Connect Fund Order).

that would be used to calculate median rural and urban rates for functionally similar services in the state within a health care provider's applicable rurality tier.<sup>6</sup> In 2019, the Commission received several petitions for reconsideration of the *Promoting Telehealth Report and Order* arguing (among other things) that the Rates Database would not accurately reflect the diverse challenges of providing telehealth services in Alaska.<sup>7</sup> After the Rates Database was made available to the public on July 1, 2020,<sup>8</sup> initial rural rate calculations revealed significant anomalies that may have resulted in Alaskan health care providers receiving inadequate and inconsistent Telecom Program support.<sup>9</sup>

4. A primary assumption underlying the creation of the Rates Database and associated rurality tiers was that, in general, the cost to provide services increases as the level of rurality increases and overall rates tend to increase (while rates per megabit per second tend to decrease) as bandwidth increases.<sup>10</sup> In Alaska, however, the Rates Database often generates a lower rural rate for more rural health care providers and higher bandwidths, and higher rural rates for less rural areas and lower bandwidths. In some instances, the rates calculated in the Rates Database for the Rural Tier in Alaska are higher than rates in the Extremely Rural Tier.<sup>11</sup>

5. Due to the significant anomalies that exist in the Rates Database for the State of Alaska, on January 19, 2021, the Bureau waived the requirement to use the Rates Database for determining rural rates for health care providers in the State of Alaska for funding year 2021 and for funding year 2022.<sup>12</sup>

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<sup>6</sup> *Promoting Telehealth in Rural America*, Report and Order, 34 FCC Rcd 7335, 7372-73, para. 78 (2019) (*Promoting Telehealth Report and Order*); 47 CFR §§ 54.604(b) (2019) (determining the urban rate); 54.605(b) (determining the rural rate). Under the Commission's rules, the rurality tiers are defined as Less Rural, Rural, Extremely Rural, and Frontier. Less Rural areas are those in a Core Based Statistical area that contains an urban area with a population of 25,000 or greater but are within a specific census tract that itself does not contain any part of a Place or Urban Area with a population of greater than 25,000. Rural areas are those that are within a Core Based Statistical Area that does not have an Urban Area with a population of 25,000 or greater. Extremely Rural areas are those that are entirely outside of a Core Based Statistical Area. Frontier areas are located in Alaska only, in areas outside of a Core Based Statistical Area that are inaccessible by road as determined by the Alaska Department of Commerce, Community, and Economic Development, Division of Community and Regional Affairs. 47 CFR § 54.605(a)(1) (2019).

<sup>7</sup> See, e.g., Alaska Communications Petition for Reconsideration, WC Docket No. 17-310 at 4 (filed Nov. 12, 2019) (raising concerns that the Rates Database did not provide sufficient funding for the most remote health care providers in Alaska); State of Alaska, Office of the Governor Petition for Reconsideration, WC Docket No. 17-310 at 4-5 (filed Nov. 12, 2019) (noting geographic challenges to serving Alaska health care providers related to resources and infrastructure).

<sup>8</sup> See *Wireline Competition Bureau Provides Guidance on the Implementation Schedule for Reforms Adopted by the Rural Health Care Program Promoting Telehealth Report and Order*, WC Docket No. 17-310, Public Notice, 34 FCC Rcd 11983, 11985 (WCB 2019) (*Promoting Telehealth Implementation Public Notice*).

<sup>9</sup> See USAC Rural Health Care Telecom Program Rates Database, <https://rhc.usac.org/ratesdb/#/ratesSearch> (last visited April 12, 2022).

<sup>10</sup> See *Further Notice* at 6, para. 10.

<sup>11</sup> The rural rate in the Rates Database for a 15 Mbps dedicated service data connection in Alaska is currently \$16,042 for the Rural Tier but \$4,165 for the Extremely Rural Tier. See USAC Rural Health Care Telecom Program Rates Database, <https://rhc.usac.org/ratesdb/#/ratesSearch> (last visited Apr. 12, 2022).

<sup>12</sup> *Alaska Rates Database Waiver Order*, 36 FCC Rcd at 791, para. 2. In the *Alaska Rates Database Waiver Order*, the Bureau waived section 54.605(a) for funding year 2022 unless the Commission separately addressed pending petitions for reconsideration of the *Promoting Telehealth Report and Order* by January 19, 2022. *Id.* To provide certainty to applicants and service providers on the rates available for funding year 2022 when competitive bidding for funding year 2022 began on July 1, 2021, the Bureau extended the waiver granted in the *Alaska Rates Database Waiver Order* through funding year 2022 regardless of when the pending petitions for reconsideration are resolved. *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Order, 36 FCC Rcd 7051, at 7056, para. 12 n.39, (WCB 2021) (*Nationwide Rates Database Waiver Order*).

The Bureau then expanded the waiver granted in the *Alaska Rates Database Waiver Order* to apply to rural and urban rates nationwide, delaying implementation of the Rates Database for all health care providers that apply for Telecom Program support.<sup>13</sup> Under these waivers, health care providers could use urban and rural rates approved in the previous three funding years or, if no such rates were available, could determine urban and rural rates using one of the three available methods in the Commission's previous rules for funding year 2021 and funding year 2022.<sup>14</sup>

6. On February 18, 2022, the Commission adopted a Further Notice of Proposed Rulemaking (*Further Notice*) which, among other reforms to promote efficiency and increased participation in the RHC Program, seeks comment on various methods for determining support in the Telecom Program including revisions to the Rates Database and alternative rate determination mechanisms.<sup>15</sup> The *Further Notice* specifically seeks comment on mechanisms that adequately account for the unique geography and topography in Alaska.<sup>16</sup>

## II. DISCUSSION

7. Generally, the Commission's rules may be waived or suspended for good cause shown.<sup>17</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>18</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>19</sup> Waiver of the Commission's rules is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.<sup>20</sup> We find that such special circumstances exist and that it would serve the public interest to waive the requirements that health care and telecommunications service providers in Alaska use the Rates Database to calculate urban and rural rates in the Telecom Program through funding year 2023. In funding year 2023, Alaskan health care providers and service providers will continue to use the processes for determining rural and urban rates that they used for funding years 2021 and 2022.

8. *Rural and Urban Rates Waivers.* We waive sections 54.605(a)<sup>21</sup> and 54.604(a)<sup>22</sup> for all health care and telecommunications service providers in the State of Alaska that apply for Telecom Program support in funding year 2023.<sup>23</sup> The inconsistencies in the Rates Database and potential significant reductions in levels of support combined with Alaska's uniquely challenging geography qualify as special circumstances meriting a waiver to give the Commission time to further examine a more reliable, predictable, and effective method of determining urban and rural rates. This action ensures

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<sup>13</sup> See *Nationwide Rates Database Waiver Order*, 36 FCC Rcd at 7051, para. 1.

<sup>14</sup> See 47 CFR § 54.607 (2019). Health care providers and their service providers were continue to use Method 1, Method 2, or Method 3 to calculate rural rates, using the same processes for submission and review of rates that applied for funding year 2020. See *Nationwide Rates Database Waiver Order*, 36 FCC Rcd at 7057-58, 7059-60, paras. 16-17, 23.

<sup>15</sup> See *Further Notice*.

<sup>16</sup> See *Further Notice* at 5, 7, 8, paras. 9, 12, 16.

<sup>17</sup> 47 CFR § 1.3.

<sup>18</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>19</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

<sup>20</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>21</sup> 47 CFR § 54.605(a) (2019).

<sup>22</sup> 47 CFR § 54.605(a).

<sup>23</sup> See *Alaska Rates Database Waiver Order*, 36 FCC Rcd at 791, para. 2; see also *Nationwide Rates Database Waiver Order* 36 FCC Rcd at 7056-57, paras. 13-15.

that telecommunications service providers in Alaska will continue to receive reliable and cost-effective RHC Program support to provide critically important telecommunications services to Alaska health care providers.

9. We also recognize that, in some instances, the Rates Database produced anomalous urban and rural rates for Telecom Program participants outside of Alaska.<sup>24</sup> In the *Further Notice*, the Commission sought comment on how to manage the transition from the current rate determination rules to the new rules resulting from the rulemaking, including whether to extend the nationwide waiver of the Rates Database for funding year 2023.<sup>25</sup> We will continue to evaluate options for the transition period, including comments in response to the *Further Notice*, and will address the nationwide urban and rural rates determination rules for the Telecom Program before the start of competitive bidding for funding year 2023.

10. *Establishing Rural Rates.* The processes allowing the use of previously-approved rural rates for funding years 2021 and 2022 established in the *Alaska Rates Database Waiver Order* will apply for funding year 2023.<sup>26</sup> Alaskan health care providers and their service providers may continue to use Method 1, Method 2, or Method 3 to calculate rural rates, using the same processes for submission and review of rates that applied for funding year 2020.<sup>27</sup> As a reminder, these methods for calculating the rural rate are sequential. Method 1 must be used unless the carrier is not actually charging non-health care provider customers rates for the same or similar services in the rural area where the health care provider is located.<sup>28</sup> Method 2 generally must be used if Method 1 cannot be used.<sup>29</sup> Finally, where there are no tariffed or other publicly available rates charged by other carriers for same or similar services in the rural area where the health care provider is located, or if the carrier reasonably determines that the rural rate calculated under Method 2 is unfair, then the carrier may seek approval of a cost-based rural rate under Method 3.<sup>30</sup>

11. We also continue to find that it is in the public interest to allow the use of a rural rate for funding year 2023 that has been approved for the same service at the same facility in recent funding years. In the *Alaska Rates Database Waiver Order* we permitted use of approved rural rates from funding years 2018, 2019, and 2020.<sup>31</sup> We now extend that time period to include funding years 2021 and 2022, so that RHC Program participants may use rural rates approved in the five funding years prior to funding year 2023. Permitting the use of previously-approved rural rates will both reduce administrative burdens and avoid repeating problems with cost-based rate submissions that have been resolved in the course of previous years' rate approval processes.<sup>32</sup> If more than one such rate has been approved, the rural rate

<sup>24</sup> See *Nationwide Rate Database Waiver Order*, 36 FCC Rcd at 7056, paras. 13-14.

<sup>25</sup> *Further Notice* at 23, para. 63.

<sup>26</sup> See *Alaska Rates Database Waiver Order*, 36 FCC Rcd at 795-96, paras. 12-13.

<sup>27</sup> See 47 CFR § 54.607 (2019).

<sup>28</sup> See 47 CFR § 54.607(a) (2019).

<sup>29</sup> See 47 CFR § 54.607(b) (2019) (“If the telecommunications carrier serving the health care provider is not providing identical or similar services in the rural area, then the rural rate shall be the average of 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.”).

<sup>30</sup> See 47 CFR § 54.607(b) (2019) (“If there are no tariffed or publicly available rates for such services in that rural area, or if the carrier reasonably determines that this method for calculating the rural rate is unfair, then the carrier shall submit for the state commission’s approval, for intrastate rates, or the Commission’s approval, for interstate rates, a cost-based rate for the provision of the service in the most economically efficient, reasonably available manner.”).

<sup>31</sup> *Alaska Rates Database Waiver Order*, 36 FCC Rcd at 795-96, para. 13.

<sup>32</sup> *Id.*

must be the most recently approved rate for that facility/service combination.<sup>33</sup> As stated in the *Nationwide Rates Database Waiver Order*, service providers are not required to re-calculate rural rates when new information becomes available.<sup>34</sup> We clarify that, for all funding year 2022 and funding year 2023 funding requests nationwide, the most recently approved rate for a facility/service combination is the most recently approved rate on the date the health care provider submits its FCC Form 465. In the event that a service provider receives approval of new rural rates in the time between submission of the FCC Form 465 and submission of the funding request on FCC Form 466, the most recently-approved rural rate at the time of the FCC Form 465 submission would be applicable. If there is no approved rate for a particular facility/service combination, the health care provider and its carrier may use rural rates approved for the same or similar services to the facility with the same or similar geographic characteristics.<sup>35</sup> The health care provider or service provider should submit these rural rates to USAC with documentation showing that the rural rates were previously approved.<sup>36</sup> If no such comparable rates are available, the rural rate must be established using one of the preexisting methods.<sup>37</sup>

12. *Establishing Urban Rates.* The processes allowing the use of previously-approved rates for determining urban rates for funding years 2021 and 2022 established in the *Nationwide Rates Database Waiver Order* will also apply for Alaskan healthcare and service providers for funding year 2023.<sup>38</sup> As with rural rates, we extend the time period for previously-approved urban rates to include rates approved for the same service at the same facility within the past five funding years.<sup>39</sup> If more than one such rate has been approved, the urban rate must be the most recently approved rate for that facility/service combination.<sup>40</sup> If there is no approved urban rate for a particular facility/service combination, the health care provider may use an urban rate approved for the same or similar services to a facility with the same or similar geographic characteristics.<sup>41</sup> The health care provider or service provider should submit these urban rates to USAC with documentation showing that the urban rates were previously approved. If no such comparable rates are available, the urban rate must be established using the preexisting rule.<sup>42</sup> Finally, in the rare event in which there is no previously-approved urban rate for the particular facility/service combination or for the same or similar services to a facility with the same or similar geographic characteristics, we direct USAC to use the urban rate generated by the Rates Database instead of denying the health care provider's funding request.

13. We are committed to guarding against waste, fraud, and abuse in the Universal Service Fund (USF) programs, including the Rural Health Care Program. Although we grant the limited waivers described herein, program participants and service providers remain otherwise subject to audits and investigations to determine compliance with USF program rules and requirements. We will require USAC to recover funds through its normal process that we discover were not used properly. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the USF programs and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred, and that recovery is warranted. Additionally, in the event we discover any improper activity resulting

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<sup>33</sup> See *id.*

<sup>34</sup> *Nationwide Rates Database Waiver Order*, 36 FCC Rcd at 7058, para. 19.

<sup>35</sup> See *Alaska Rates Database Waiver Order*, 36 FCC Rcd at 795-96, para. 13.

<sup>36</sup> See *id.*

<sup>37</sup> See 47 CFR § 54.607 (2019).

<sup>38</sup> See *Nationwide Rates Database Waiver Order*, 36 FCC Rcd at 7059, para. 23.

<sup>39</sup> See *id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 7060, para. 23.

<sup>42</sup> See 47 CFR § 54.605 (2019).

from our action today, we will subject the offending party to all available penalties at our disposal, and will direct USAC to recover funds, assess retroactive fees and/or interest, or both. We remain committed to ensuring the integrity of the Rural Health Care Program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

### III. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED that pursuant to the authority 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, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, that sections 54.604(a) and 54.605(a), of the Commission's rules, 47 CFR §§ 54.604(a), 54.605(a), ARE WAIVED to the extent provided herein.

15. 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

Trent B. Harkrader  
Chief  
Wireline Competition Bureau