

**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: June 30, 2017

Released: June 30, 2017

By the Commission:

I. INTRODUCTION

1. In this Order, we waive, *sua sponte*, on this one-time basis our rules to assist remote Alaskan health care providers (HCPs) impacted by the Rural Health Care Program pro-ration. This order creates a path for service providers in remote Alaska to reduce the cost of service to affected HCPs by waiving Commission rules that could otherwise serve as unnecessary roadblocks to relief. As discussed below, we find that special circumstances present good cause for this waiver.

II. BACKGROUND

A. Pro-Ration of Certain Funding Year 2016 Requests

2. The Rural Health Care (RHC) Program has a cap of \$400 million per funding year to provide support for telecommunications and broadband services to eligible HCPs through the Telecommunications (Telecom) and Healthcare Connect Fund (HCF) Programs.¹ Under the Telecom Program, eligible HCPs and consortia may apply for discounts for eligible telecommunications services. Meanwhile, the HCF Program provides support for high-capacity broadband connectivity to eligible HCPs by providing a 65 percent discount on all eligible expenses.

3. For the first time in its history, qualifying demand for RHC Program support exceeded the RHC Program cap during funding year 2016. By operation of the Commission's "pro-ration" rule,² qualifying funding requests filed during the second filing window period for funding year 2016³ were "pro-rated" so that total program commitments would not exceed the funding cap. In practice, eligible funding requests for services filed during the second filing window were pro-rated so HCPs received 92.5 percent of the qualifying amounts sought.⁴

¹ 47 CFR § 54.765(a).

² 47 CFR § 54.765(f).

³ See *Wireline Competition Bureau Provides a Filing Window Period Schedule For Funding Requests Under the Telecommunications Program and the Healthcare Connect Fund*, Public Notice, 31 FCC Rcd 9588, WC Docket No. 02-60 (WCB 2016). All qualifying funding requests received prior to the second filing window received full funding commitments.

⁴ See Universal Service Administrative Co. (USAC), Rural Health Care Program Funding Information, <https://usac.org/rhc/funding-information/default.aspx?pgm=telecom> (last visited June 23, 2017).

B. Impact in Remote Alaska

4. Alaska's large size, varied terrain, harsh climate, isolated populations, and lack of infrastructure are well-known challenges.⁵ In remote parts of the state, in particular, these challenges can translate into high costs of service, including high healthcare-related communications services. The RHC Program support helps to reduce the costs of these services, indeed "the Program is essential for allowing providers to deliver affordable, world-class care to those living in rural and Bush communities, while saving patients the high costs associated with travel to urban medical centers."⁶

5. Although the 2016 pro-ration of RHC Program support applied equally to HCPs across the country, its impact has been especially severe in remote Alaska. Commission staff analysis shows that the average effective increase in price paid by an HCP in the continental U.S. by virtue of the pro-ration was approximately 11 percent, whereas in remote Alaska it was approximately 648 percent.⁷ HCPs in Alaska will be required to absorb a substantially larger portion of the cost of the services they receive. Potential non-payment and service disruptions to HCPs could ensue, with significant public health consequences.

III. DISCUSSION

6. We waive our rules to the extent described herein to create a path for HCPs located in remote Alaska to benefit from any voluntary price reduction(s) that their service providers elect to undertake for services rendered based on qualifying funding requests submitted during the second filing window period for the 2016 funding year.⁸ For purposes of this Order, we adopt the definition of remote areas of Alaska used in the *USF/ICC Transformation Order*.⁹

7. Generally, the Commission's rules may be waived under Section 1.3 of the rules for "good cause shown."¹⁰ The Commission may exercise its discretion to waive a rule where (a) the particular facts make strict compliance inconsistent with the public interest, (b) special circumstances warrant a deviation from the general rule, and (c) such deviation will serve the public interest.¹¹ In making these determinations, the Commission may consider evidence of hardship, equity, and more effective implementation of overall policy on an individual basis.¹²

⁵ See *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 10139, 10141 (para. 5) (2016).

⁶ Letter from Sen. Lisa Murkowski, Sen. Dan Sullivan, & Rep. Don Young to FCC Chairman Ajit Pai, et al., WC Docket No. 02-60 at 1 (Apr. 11, 2017).

⁷ For example, according to the Kodiak Area Native Association, the pro-ration resulted in "a nearly ten-fold increase over the portion of the cost of services" that it is already responsible for paying. See Letter from Andy Teuber, President and CEO, Kodiak Area Native Association, to FCC Chairman Ajit Pai, et al., WC Docket No. 02-60 at 1-2 (May 24, 2017). In real-terms, this means "an additional \$349,138, which [the Kodiak Area Native Association] did not budget or anticipate." *Id.*

⁸ At the same time, we direct USAC, the Fund Administrator, to modify any of its processes (e.g., to receive information regarding a price revision) to the extent necessary to execute this one-time waiver. For purposes of program administration and integrity, this order shall be time-limited. Parties shall have 90 days to take advantage of the relief provided herein.

⁹ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17835, paras. 529 n. 876 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

¹⁰ 47 CFR § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹¹ *Northeast Cellular*, 897 F.2d at 1166.

¹² *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

8. Due to the unique circumstances presented by the impact of the pro-ration on HCPs in remote Alaska, as well as the extreme disproportionate hardship that it represents, we believe that a one-time, limited waiver is appropriate and in the public interest. The need to pro-rate RHC Program support for the first-time ever brought an unexpected new payment obligation to HCPs. The HCPs in remote Alaska were disproportionately affected because of the high costs of service in their remote locations. For example, the average increase in an HCP's out-of-pocket payment in the continental U.S. by virtue of the pro-ration was \$1,553, whereas in remote Alaska it was \$28,597. These costs are not simply financial, they also pose an unexpected threat to the provision of health care service in the state.¹³

9. For all eligible HCPs in remote Alaska that received funding commitments associated with the second filing window period for funding year 2016, we waive our rules to allow service providers to voluntarily reduce their rates on this one-time basis, while holding constant the pro-rated support amount contained in the HCPs' funding commitment letters.¹⁴ Because USAC will continue to provide the support amount contained in its funding commitment letter, any reduction in the service provider's price will automatically reduce the unexpected cost burden imposed on the HCP due to the funding year 2016 pro-ration. While the HCP must continue to contribute its original obligation,¹⁵ if a service provider opts to provide a price reduction, the benefit of that reduction will flow directly to the HCP. Put simply, by holding constant the previously committed RHC Program support amount, we create a voluntary path for service providers to help minimize the impact of the funding year 2016 pro-ration upon remote-Alaskan HCPs.

10. To illustrate how such a pricing reduction would work in practice, we provide the following example in connection with the Telecom Program. First, assume that a service provider's rural rate is \$1000 and the corresponding urban rate is \$100. In this scenario, the HCP would be expected to contribute \$100 towards the costs of the service and receive a funding commitment from USAC in the amount of \$900. After the pro-ration, however, an HCP would receive a funding commitment letter in the amount of \$832.50, which represents 92.5 percent of the \$900 in RHC Program support that would have been available to it in the absence of pro-ration. Depending on the terms of its contract, the HCP may be responsible for the difference between the urban rate it was expecting to pay (\$100) and any shortfall in funding (\$67.50) that arose because of the pro-ration. Pursuant to this order, the amount of the pro-rated funding commitment will not change and \$832.50 in RHC Program support will be available, but the service provider may reduce the rate for the services to offset the shortfall in funding up to \$67.50.

11. Similarly, for the HCF Program, we will hold the amount of RHC Program support announced in an HCP's funding commitment letter constant irrespective of any price reduction undertaken by the service provider, as a result of the instant waiver. Here again, the HCP will remain responsible for its 35 percent share of the original cost of service. To the extent that a service provider elects to offer a price reduction, it will again flow to the benefit of the HCP.¹⁶

¹³ See, e.g., Letter from LaTesia Guinn, Executive Director, Bethel Family Clinic, to FCC Chairman Ajit Pai, et al., WC Docket No. 02-60, at 1 (May 1, 2017) ("In our case, [the pro-ration] means we will be responsible for paying an additional \$3750 per month, which we did not budget or anticipate, in addition to the portion of the cost of services that we are already responsible for paying under the rules of the rural health care support mechanism. This increase alone is the same as a full time staff salary of which we may need to consider cutting one staff just so that we can maintain our access.").

¹⁴ Provided, of course, that the service was rendered.

¹⁵ This relief remains bounded by an HCP's requirement to contribute, at a minimum, the applicable urban rate (for the Telecom Program) or its original 35% share of costs against its qualifying funding request (for the HCF Program). In other words, the floor established by the HCP's original payment expectation absent pro-ration will remain in place.

¹⁶ For example, if the service price is \$1000, the HCP would normally be responsible for 35 percent of the total cost of all eligible expenses (\$350) and be eligible for support equal to the remaining 65% on the cost of eligible expenses (\$650). See 47 CFR 54.633(a). With the 92.5 percent pro-ration, the support amount is reduced to

(continued....)

12. We find that a waiver is necessary to remove any regulatory obstacles that could otherwise prevent a service provider from voluntarily reducing its service price(s) to the benefit of HCPs. Specifically, to implement this approach, we waive our support calculation rules that would otherwise be triggered by a reduction in service price.¹⁷ We waive any other requirement, to the extent necessary, in these special circumstances to effectuate the relief granted, including restrictions on ineligible sources of funding,¹⁸ certification requirements,¹⁹ pro-rata requirement to the extent any interpretation of that rule might suggest the need to pro-rate the newly lowered price,²⁰ and restrictions on evergreen contracts.²¹

(Continued from previous page)

\$601.25 and the HCP could be responsible for the shortfall of \$48.75 in addition to its \$350 share. Our waiver clears the way for a service provider to voluntarily offer a price reduction to offset any shortfall amount for which the HCP could be responsible.

¹⁷ Section 54.607 of our rules specifies how a service provider's rural rate is to be determined and justified. A service provider may be concerned that lowering its price, even pursuant to the terms of the instant order, might imply that the rate contained in an HCP's previously submitted funding request was not derived in conformance with section 54.607 of our rules. Consequently, we waive section 54.607 of our rules only to the extent that a price reduction consistent with this order should not in and of itself be treated as evidence that the initial rural rate submitted by the HCP violated section 54.607. See 47 CFR § 54.607. Section 54.609 sets forth options by which universal service support under the Telecom Program is to be calculated. See 47 CFR § 54.609. To the extent that a price adjustment made, pursuant to the instant order would necessitate a commensurate change in the support amount, we waive this requirement to the extent necessary to hold a carrier's support amount constant.

¹⁸ Section 54.633(b) makes clear that "direct payments from vendors or other service providers" are considered to be ineligible funding sources in connection with a health care provider's contribution toward eligible expenses. See 47 CFR § 54.633(b). While we do not waive an HCP's contribution requirement, to the extent a pricing adjustment by the service provider might be construed as a payment from an ineligible source, we waive this rule for the narrow purposes described herein. Similarly, section 54.643(a)(6)(iii) requires a consortium applicant to provide "evidence of a viable source for the undiscounted portion of supported costs." See 47 CFR § 54.633(a)(6)(iii). Here again, to remove any doubt on behalf of service providers about the permissibility of offering a pricing adjustment, we waive this rule for the narrow purposes described herein.

In addition, sections 54.603 and 54.642 set forth the competitive bidding requirements for the Telecom and HCF Programs, including the fair and open bidding requirements for HCF. See 47 CFR §§ 54.603, 642. To the extent a reduction in the amount owed by the HCP is inconsistent with our competitive bidding requirements, including our "fair and open" requirements, we waive those requirements, provided there is no *quid pro quo* involved.

¹⁹ Section 54.645(b) requires a health care consortium leader or HCP and its vendor to certify to the accuracy of invoices submitted to the Administrator. See 47 CFR § 54.645(b). We recognize that, depending on billing and reconciliation processes, a service provider and/or HCP may not be positioned to certify the accuracy of invoices filed with the Administrator in the event of a price adjustment. As a result, we waive our invoicing certification rule for the narrow purpose of providing the path to relief described herein.

²⁰ Section 54.675(f) sets forth the process by which pro-rata reductions to RHC support are to be undertaken in the event total demand during a filing window period exceeds the total remaining support available for a funding year. See 47 CFR § 54.675(f). We waive this rule to the extent that any interpretation of the rule might suggest the need to pro-rate the newly lowered price.

²¹ Section 54.642(h)(4) sets forth guidance as to the designation of certain contracts as "evergreen" for RHC support purposes. See 47 CFR §§ 54.642(h)(4). The benefit of having a contract be deemed "evergreen" is that the same contract may be used in subsequent years without being rebid for the life of the contract. Typically, a contract modification must undergo additional competitive bidding if the modification is a "cardinal change" or exceeds the scope of the original contract, even if the contract has been deemed evergreen. To the extent a pricing adjustment consistent with the terms of the instant order is considered a "cardinal change" that might have necessitated the contract to be rebid, we provide a limited one-time waiver to our evergreen contract requirements with regard to any such price change. We note, however, that any changes to a previously deemed evergreen contract that are made as a result of the instant waiver are only permissible in the context described in this order. In future funding years, determinations about whether a "cardinal change" has been made to a previously deemed evergreen contract will be based on the original contract.

We also waive the E-rate lowest corresponding price rule, but only to the extent necessary to prevent any price reductions exercised pursuant to this order from setting the lowest corresponding price for E-rate purposes.²² Finally, we direct the Wireline Competition Bureau and USAC to take any steps necessary to implement this order.²³

13. We conclude that any potential cost to the RHC Program that could result from this order will be minor and is outweighed by the benefits of our action. We note that this waiver imposes no additional or new costs on the RHC Program, because it merely maintains funding levels at already committed amounts. To the extent the Fund could otherwise benefit from reductions in universal support outlays corresponding to a service provider's voluntary price reduction, we find the impact to be controlled and within reasonable bounds. First, the pathway set forth in this order is voluntary in nature. Second, our relief is highly localized and geographically limited to only those HCPs located in remote areas of Alaska, thereby circumscribing the potential financial impact. Finally, any impact to the Fund will be further mitigated because we retain the HCP's obligation to contribute its previously committed share of HCF costs or the urban rate, as applicable.

14. We reiterate that we remain committed to the integrity of the program, to guarding against waste, fraud, and abuse, and to ensuring that funds disbursed through the RHC Program are used for appropriate purposes. Notwithstanding any voluntary pricing reduction undertaken pursuant to this order, service providers and HCPs will remain subject to all of our rules relative to justifying the original funding commitment.²⁴ Our action here 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 Commission rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or in a manner inconsistent with the statute or the Commission's rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. We retain the discretion to evaluate the uses of monies disbursed through the RHC Program and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred and whether recovery is warranted. We will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies. Finally, we note that our waiver does not supersede a carrier's obligations under tariff.²⁵

IV. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED, that pursuant to the authority contained in sections 1-4, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 254, and 403, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that this Order IS ADOPTED.

16. IT IS FURTHER 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, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that sections 54.511(b), 54.603, 54.607(b), 54.609, 54.633(b), 54.642, 54.643(a)(6)(iii), 54.645(b), 54.675(f) of the Commission's

²² See 47 CFR § 54.511(b). See also 47 CFR § 54.500. Section 54.511(b) of our rules concerns the Schools and Libraries Program and prohibits "[p]roviders of eligible services" from submitting bids to or charging schools or libraries "a price above the lowest corresponding price." We waive this requirement to the extent necessary to prevent any price reductions exercised pursuant to this order from setting the lowest corresponding price for E-rate purposes.

²³ See *infra* n. 8.

²⁴ In addition, the Commission's record retention rules will apply to any documentation related to pricing modifications undertaken pursuant to this order. See 47 CFR §§ 54.619(a), (d), 648(b).

²⁵ See, e.g., 47 U.S.C. § 203(c).

rules, 47 C.F.R. § 54.511(b), 54.603, 54.607(b), 54.609, 54.633(b), 54.642, 54.643(a)(6)(iii), 54.645(b), and 54.675(f) ARE WAIVED to the limited extent provided herein.

17. IT IS FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary