

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
APPROVING IN PART, DISSENTING IN PART**

Re: *Promoting Telehealth for Low-Income Consumers*, WC Docket No. 18-213; *COVID-19 Telehealth Program*, WC Docket No. 20-89.

Without reservation, I support the first part of this item, which establishes the emergency COVID-19 Telehealth Program pursuant to clear authority provided by Congress under the CARES Act. As our nation engages in a heroic fight against COVID-19, our lawmakers are trying to do everything they can to ensure health care providers have what they need to deliver critical telehealth services to patients. While the \$200 million COVID-19 Telehealth Program provides considerable discretion to staff and is short on details, this framework is arguably appropriate given our current emergency situation and has been blessed by Congress.

In contrast, the second part of the item—based on the very limited time I have had to review it—seems to have been half-cooked and rushed out the door to take advantage of the current crisis, even though there's barely anything about it that's expedited or related to COVID-19—other than the means of its adoption. It would be one thing to excuse the Connected Care Pilot Program's extremely weak legal footing—which Congress could have supplied but either wasn't asked for or specifically chose not to provide—or its scant details and total lack of economic analysis if the program were truly going to help fight COVID-19. And, while it is indeed being spun as targeting the awful pandemic causing devastation to people around the world, it seems hard to imagine how any of its funding could be distributed anytime soon, based on the timelines in the item.

I did not want my serious reservations over the Pilot to jeopardize the timely adoption of the urgent COVID-19 Telehealth Program and therefore requested that Commissioners be allowed to vote for the two items separately. Doing so would allow Commissioners to adopt the COVID-19 funding infusion in an expeditious manner, while enabling us to properly vet and thoroughly consider the Pilot Program. For specious reasons, that request didn't carry the day and Commissioners were asked to register our votes for the combined item on a hurried basis, which eliminated the opportunity to suggest edits, let alone properly digest the item. This was not a prudent or effective policymaking process, in my opinion.

Caught in a difficult position, I have been left with no choice other than to dissent with respect to the Pilot. While it's possible that with some tweaks and revisions, the program could have been modified to earn my approval or a concurrence, the current version needs more work. Perhaps it never would have satisfied my principles of fiscal conservatism, but I would have at least been willing to make a good faith effort to get to yes.

For one, I am certainly troubled by an across-the-board 85 percent discount rate, which seems to make no sense for a program designed to fund both urban and rural applicants and has no relationship to applicants' means. Further, that rate appears to have been picked either randomly, or for no other reason than having been used in the 2007 Rural Health Care Pilot Program, which, unlike this Pilot, was created to fund network deployment. This lack of rigor is beneath the Commission's standard.

Moreover, it's bad enough when the federal government runs a "beauty contest" to distribute funding, but the lack of even a points system here is completely unacceptable. Who are we to criticize other agencies for skewed evaluation frameworks or technology bias, when we ourselves are about to run a \$100 million program with zero objective criteria for how applications will be evaluated? This dearth of transparency and accountability appears very problematic, and certainly sets a bad precedent.

And, that's apart from the legal problems this item faces. First, the draft plays incredibly fast and loose with section 254(h)(2)(a), stretching the meaning of "competitively neutral rules" beyond recognition and inventing an interpretation of "health care providers" that would never fly with this Commission in the schools and libraries context. I also disagree with past Commission interpretations that claimed we had the authority to cover urban providers or even run a pilot program at all. Again, we

could have worked with Congress to address existing limitations, if lawmakers were on board; for example, consider that the Commission was only able to expand the Rural Health Care program to cover skilled nursing facilities through Congressional action. But, endorsing past mistakes without such a blessing is not something I can condone. Working with Congressional representatives—even if results may take longer than desired—is a privilege, not a penalty, and would have provided a much more appropriate foundation for such a program.

Further, as raised by commenters, as well as the Department of Health and Human Services (HHS), the program would blatantly violate the federal Anti-Kickback Statute. While the item apparently recognizes this problem, its only response is that applicants should “speak to their compliance experts,” which doesn’t seem quite adequate.

Finally, I strongly object to the program’s “neither here nor there” funding source. Presumably to avoid taking money away from any of the four existing USF programs, or at least the optics of doing so, the item would fund the program via “general” USF funding, thus necessitating a higher contribution factor and increased burdens for ratepayers. But that sets an incredibly fiscally reckless precedent; now, the FCC can simply obfuscate the USF sub-caps whenever these constraints turn out to be inconvenient. It also completely belies the claim made by many in response to the USF cap proceeding, that as long as all four USF programs had individual caps, there was no need for an overall USF budget. If we can take ratepayer money to establish a new program outside of the four existing ones, then there aren’t any real constraints on USF spending after all, and this item unwittingly makes the case for an overall USF cap.

In the end, while I applaud Chairman Pai and the FCC for moving forward with the COVID-19 program expeditiously, I cannot endorse the decision to rush the Connected Care Pilot out the door in its current state. Therefore, I have voted to approve in part and dissent in part.