

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Promoting Telehealth in Rural America) WC Docket No. 17-310
)

REPLY COMMENTS OF INCOMPAS

INCOMPAS, by its undersigned counsel, hereby submits these reply comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) *Notice of Proposed Rulemaking* in its proceeding on improving rural healthcare provider access to modern communications services through the Rural Healthcare Program (“RHC”).¹

I. INTRODUCTION & SUMMARY

Given the challenges that rural Americans face in gaining access to quality health care, INCOMPAS, the Internet and competitive networks association, supports the Commission’s decision to examine and improve the Rural Health Care (“RHC”) Program. For the second funding year in a row, the demand for RHC funding has exceeded the program’s \$400 million cap, and INCOMPAS appreciates the opportunity to provide comment on the Commission’s proposals and how competition can control program costs and eliminate waste, fraud, and abuse. INCOMPAS, which advocates on behalf of participants in the RHC Program, recognizes that demand for service in the program is increasing because rural health providers need high-speed broadband to provide life-saving care and meet their obligations to their patients. As various

¹*Promoting Telehealth in Rural America*, WC Docket No. 17-310, Notice of Proposed Rulemaking and Order, FCC 17-164 (rel. Dec. 18, 2017) (“NPRM”).

stakeholders described in their comments, the migration to electronic health records and the introduction of services such as improved imaging capabilities and high-definition MRIs have led to the drastic increase in health care providers (“HCP”) bandwidth needs. Addressing concerns with the RHC Program now will ensure that the program’s benefits can be “fully realized across the nation.”²

The record in this proceeding indicates concern that the Commission’s well-intentioned proposals, particularly with respect to setting benchmarks to identify “outlier” funding requests, could lead to market distortions and inappropriate price regulation in markets where providers are already competing and offering the lowest prices. INCOMPAS, like others, urges the Commission to adopt a market-based approach where competition between providers prevents rate manipulation and ensures the affordability and reliability of service.

II. THE COMMISSION’S PROPOSALS TO CONTROL OUTLIER COSTS USING OBJECTIVE BENCHMARKS AND RATE REGULATION SHOULD BE RECONSIDERED IN FAVOR OF A MARKET-BASED APPROACH.

In the NPRM, the Commission seeks comment on a proposal to establish objective benchmarks to control costs in the RHC’s Telecom Program. These benchmarks are intended to “identify outlying funding requests” and ensure the efficient distribution of the program’s limited funding.³ These benchmarks would be determined and published by USAC to provide guidance on the bidding and selection process. If a funding request exceeds the benchmark, service providers would then be required to “justify the underlying costs in the rural rate presented in the

² *Id.* at ¶ 4.

³ *Id.* at ¶ 42.

funding request” as part of an enhanced review conducted by USAC.⁴ As part of this evaluation, USAC would also be required to set the urban rate “based on the highest urban rate for an identical or similar service.”⁵

INCOMPAS shares the concerns of others in the record that believe this subjective regulatory approach would “distort market outcomes” by introducing price regulation into markets that may already be competitive⁶ and unnecessarily burden service providers.⁷ As discussed in the NPRM, the Commission maintains a statutory duty pursuant to Section 254(h)(1)(A) to subsidize the difference between urban and rural rates for telecommunications services. It remains unclear what methodology the Commission or USAC could use under the current proposal that would ensure that the Commission is meeting its statutory obligations. The Commission’s consideration of a rebuttable presumption that “support levels above a benchmark will not result in rates that meet the Act’s ‘reasonably comparable’ standard” would likely fail this statutory duty as it allows USAC to establish artificial benchmarks based on information that it does not already collect and which might not be readily attainable by service providers or HCPs.⁸ Instead, INCOMPAS urges the Commission to foster a competitive marketplace that, as

⁴ *Id.* at ¶ 49. The Commission also proposes, as an alternative, to allow USAC to conduct an investigation of the average rural rates of the selected carrier, as well as the rates other service providers charge for commercial customers, in order to limit the rural rate “to the lowest market rate it can find for identical or similar services in the rural area.”

⁵ *Id.* at ¶ 52.

⁶ *See* Comments of the United States Telecom Association, WC Docket No. 17-310 (filed Feb. 2, 2018), at 8 (USTelecom Comments”).

⁷ *See* Comments of NCTA—The Internet & Television Association, WC Docket No. 17-310 (filed Feb. 2, 2018), at 6-7 (“NCTA Comments”).

⁸ NPRM at ¶ 43.

service providers like TeleQuality Communications state, “help provide a check on outlier pricing.”⁹ Competition continues to be the most effective way to ensure that providers are bidding for RHC Program funds in a cost efficient manner at rates that reflect the true cost of providing service.

In fact, where competition exists and healthcare providers are able to engage in a competitive bidding process, a clear motivation exists for providers to offer the lowest rural rate. Therefore, the Commission should not adopt its proposal for USAC to scrutinize rates above any benchmarks set where there are competitive bids for service. In the context of the RHC Program, where a competitive bidding process is used, there should be a recognition that multiple bidders work to restrain pricing. In these cases, a high rural rate may be a reflection of rurality, geography, distance, or topography, and any rates above the benchmark should not be concerning. INCOMPAS supports TeleQuality Communications’ suggestion to establish a rebuttable presumption that the rural rate proffered by a RHC Program applicant is correct if multiple vendors bid on a request for service.¹⁰

The Commission’s cost justification proposals may also act as a deterrent to participation in the program as it will burden service providers with new administrative costs. As NCTA indicates, the additional costs of preparing for the enhanced review process would be borne not just by the winning service provider, but by all prospective service providers participating in the

⁹ Comments of TeleQuality Communications, LLC, WC Docket No. 17-310 (filed Feb. 2, 2018), at 13 (“TeleQuality Comments”). *See also* Comments of General Communications, Inc., WC Docket No. 17-310 (filed Feb. 2, 2018), at 29 (explaining that competitive bidding in an open market is “the best protection against a healthcare provider being overcharged” on a rural rate).

¹⁰ *Id.* at 13.

bidding process.¹¹ Current and prospective participants in the program may determine that the enhanced review process is too complex and the bidding process is too costly and elect not to participate.

Furthermore, INCOMPAS urges the Commission to abandon its primary and alternative proposals to allow USAC to set benchmarks or establish rural or urban rates. We agree with USTelecom's reservations about allowing USAC to "oversee complex price regulations, which are far outside their field of expertise or authority."¹² According to the association, USAC's participation "will generate uncertainty, complexity and risk for both Telecom Program beneficiaries and their service providers."¹³

Instead, to the extent that the Commission takes the unadvisable approach and moves forward with a benchmark or rate setting process, the Commission—not USAC—should take the lead. The Commission, with its expertise in rate setting and market analysis, would be better suited to first examining the issue of rural-urban rate manipulation by conducting a thorough survey. Based on that information, the Commission could determine a rate methodology, subject to public input, that could be applied to the RHC Program. This approach would be preferable to allowing USAC to make subjective rate determinations for the RHC Program, particularly because USAC lacks the resources and pricing experts to determine market-reflective

¹¹ See NCTA Comments at 7. NCTA also reminds the Commission that a service provider's prepared materials for the enhanced review process may contain confidential business information and that mitigating the risk of disclosure of this information would require additional costs.

¹² USTelecom Comments at 8.

¹³ *Id.* at 8. See also TeleQuality Comments at 16 (asserting that directing USAC to establish benchmarks or rural rates "is fraught with pitfalls" and that lengthy disputes that would arise over how USAC's rates were calculated).

benchmarks and rates. Additionally, the Commission is best positioned to address concerning claims made by USTelecom that, in the continental United States, the standard rate for non-mileage based telecommunications services is comparable for rural and urban areas.¹⁴ This assertion, offered without sufficient proof, complicates the Commission's RHC reform efforts and requires a thorough investigation of the rural-urban price structure. The Commission should offer parties an opportunity to comment on the current rural-urban price structure, and review its findings before setting benchmarks or making any presumptions on pricing of services.

III. ENCOURAGING AND ENABLING MORE COMPETITION WILL REDUCE INEFFICIENCIES IN THE RHC PROGRAM.

In this proceeding, the Commission has been repeatedly encouraged to enable more competition in the RHC Program. TeleQuality Communications urges the Commission to rely on a market-based approach in order to control outlier costs in the program. By encouraging “transparency, responsiveness, and accountability in the program’s competitive bidding rules,” the Commission can rely on competing providers to minimize the difference between rates for rural and urban telecommunications services.¹⁵ We agree with NCTA that increased participation in the RHC Program will “increase health care and telemedicine availability for consumers” and ensure that “a wider variety of services are available at more cost-effective prices.”¹⁶ Indeed, enabling more competition in the program will lower service prices for HCPs, promote innovation, and provide for the availability of reliable services and features.

¹⁴ See USTelecom Comments at 12-13.

¹⁵ TeleQuality Comments at 2.

¹⁶ NCTA Comments at 6.

INCOMPAS believes that the Commission can encourage competition through added measures that promote transparency in the bidding process. First, the Commission should require HCPs to respond to service providers that have submitted valid questions or proposals during the bidding process. INCOMPAS members report that it is common for HCPs to ignore competing bids or even basic inquiries about an upcoming bid process. Second, the Commission should encourage HCPs to provide more information about an institution's telecommunications service needs in any request for proposals. Having access to additional information about the reliability needs and features that will make up the factors on which rural healthcare providers will make a selection is critical to the ability of competitive providers who may offer unique or innovative features as part of their telecommunications service. Similarly, HCPs should be encouraged to provide sufficient information detailing the bidding process and the services and features that will be the focus of their selection process on USAC's required competitive bidding forms, including Forms 461 and 465.

Promoting a competitive market that would allow a market-based approach should also allay any concerns about the Commission's current "cost-effectiveness" standard. In the NPRM, the Commission proposes to define "cost-effectiveness" as "the lowest price service that meets that minimum requirements for the products and services that are essential to satisfy the communications needs of the applicant."¹⁷ Adopting this definition would frustrate the ability of HCPs to identify a reliable and optimum provider for their telecommunications needs. While the Commission is rightfully concerned about the potential for fraud, waste, and abuse given the agency's assessment that the current standard "places virtually no limitation on how providers make their service selections," the Commission cannot overlook that an essential criteria for rural

¹⁷ NPRM at ¶ 84.

healthcare providers is reliability. If the network of the lowest-priced service provider suffers outages or jitter, then ability of the healthcare provider to offer life-saving treatment could be jeopardized. INCOMPAS recommends following the competitive bidding structure used in E-rate, where price is a primary factor, but schools and libraries are not required to select the lowest-priced service. Adopting a cost-effectiveness standard where price is a “weighted” factor, but HCPs have the latitude to select a service provider based on the availability of other factors—such as quality of service—should balance the Commission’s goals of program efficiency with competitive choice.

Finally the Commission can encourage competition by streamlining the administration and application process of the RHC Program so as to encourage more providers to participate. INCOMPAS supports the Commission’s proposal to condense the RHC Program application process to use four forms instead of the current seven.¹⁸ The record also includes proposals, that INCOMPAS endorses, that would give RHC participants access to the same sets of information as participants in the E-rate program, including submitted applications¹⁹ and the addresses of all HCPs participating in the RHC Program.²⁰

IV. THE COMMISSION SHOULD CONSIDER PROPOSALS TO EXPEDITE USAC FUNDING DECISIONS, INCLUDING A “SHOT CLOCK.”

The Commission must address the ability of USAC to make timely and predictable funding decisions in accordance with its statutory obligations under Section 254. The Commission is required to advance universal service, including the RHC Program, through

¹⁸ *Id.* at ¶¶ 96-97.

¹⁹ *See* TeleQuality Comments at 12.

²⁰ *See* NCTA Comments at 9 (describing the E-rate Entity Download method).

“specific, predictable, and sufficient Federal and state mechanisms.”²¹ In each of the past two funding cycles, eligible participants have experienced delays in the application process, and HCPs still do not have a funding commitment for FY 2017 nine months after the start of the funding year. While securing program funding is the primary concern of HCPs, eligible participants also value the certainty that comes with receiving a regular funding commitment and the assurances that gives them to budget and plan for these vital services. As USTelecom explains, this has put service providers in the precarious position of delivering services “with little or no incoming revenue in return” and forced some healthcare providers “to postpone their service start dates.”²² INCOMPAS agrees with TeleQuality Communications that “timely commitments should be one of the Program’s primary goals” and urges the Commission to ensure that future funding commitment delays are avoided.²³

To that end, INCOMPAS supports USTelecom’s proposal to establish a “shot clock” for USAC decisions on RHC Program funding requests.²⁴ USTelecom’s recommended course of action, including “establishing a consistent year-to-year schedule of funding period windows” and releasing all funding decisions by June 1, should prevent the funding commitment delays associated with the last two funding cycles and provide the funding predictability that the statute requires.²⁵ The New England Telehealth Consortium contends that before funding requests

²¹ 47 U.S.C. § 254(b)(5).

²² USTelecom Comments at 21.

²³ TeleQuality Communications Comments at 23.

²⁴ See USTelecom Comments at 20-21.

²⁵ *Id.* USTelecom’s “shot clock” proposal would give an HCP adequate time to communicate USAC’s funding decision to its selected service provider well in advance of the start of (*cont.*)

exceeded the cap “it was not uncommon for USAC to process [Funding Commitment Letters] in 30 to 60 days” therefore it should be possible for USAC to issue a “provisional funding award notice” to all applicants even if a *pro rata* factor still needs to be calculated.²⁶ Finally, INCOMPAS agrees with USTelecom’s proposal to require USAC to provide “periodic updates on its progress” as it processes applications for funding.²⁷ Applicants for FY 2017 program funds have been operating in the dark throughout the funding cycle and have had their requests for guidance and information routinely ignored. Requiring periodic updates would add transparency to the program and alert participants that their application is being processed and evaluated.

V. CONCLUSION

For the reasons stated herein, INCOMPAS urges the Commission to adopt the recommendations in its reply comment, as it considers the issues raised in the NPRM.

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March 5, 2018

the funding cycle on July 1. This will increase the likelihood that the service provider will be prepared to deliver service at the beginning of the funding year.

²⁶ Comments of New England Telehealth Consortium, WC Docket No. 17-310 (filed Feb. 2, 2018), at 6-7 (suggesting the imposition of a 90-day processing deadline for RHC applications).

²⁷ USTelecom Comments at 21.