

## MEMORANDUM

**To:** California Telehealth Network Advisory Committee  
and other interested parties

**From:** Commissioner Rachelle Chong, California PUC

**Date:** January 23, 2008

**Re:** FCC Rural Health Care Support Mechanism Order No.  
FCC 07-198, in WC Docket 02-60, Adopted Nov. 16, 2007  
and released November 19, 2007

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On November 16, 2007, the Federal Communications Commission (FCC) voted to approve an Order in its Rural Health Care Pilot Program docket (WC Docket 02-60) via a decision voted on circulate, not at a noticed FCC meeting as expected. The order was released November 19, 2007, and became effective 30 days later. This is a detailed memorandum with the highlights of the Order<sup>1</sup> for the purpose of the California Telehealth Network advisory committee.

### Overview

The FCC dedicated over \$417 million for the construction of 69 statewide or regional broadband telehealth networks in 42 states and three US territories under the Rural Health Care Pilot Program (RHCPP or Pilot Program). These RHCPP networks will connect more than 6,800 public and non profit health care providers nationwide to broadband telehealth networks. These networks will include health care sites at hospitals, clinics, universities and research centers, behavioral health sites, correctional facility clinics and community health centers.<sup>2</sup>

Out of 81 applications, the FCC granted 69 qualified applications, including the application of the California TeleHealth Network for 319 proposed sites statewide. Twelve applications were denied as not meeting

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<sup>1</sup> This memorandum includes the contents of an Errata issued by the FCC as to the November 16, 2007 Order.

<sup>2</sup> FCC Press Release "FCC Launches Initiative To Increase Access to Health Care In Rural America Through Broadband Telehealth Services", November 19, 2007, and Order at para. 22.

the FCC's criteria for a Pilot Project.<sup>3</sup> **According to Appendix B of the Order, California was granted \$7,366,666.67 per year for three years, which comes out to a maximum support amount of \$22.1 million for the entire California Telehealth Network project.**<sup>4</sup> The only applicant receiving more than California was the New England Telehealth Consortium at \$8,229,672 per year for three years, or a total of \$24.6 million. The New England project proposes connecting 555 sites in three states, Vermont, New Hampshire and Maine.

A webpage on the FCC site has been established for the program at <http://www.fcc.gov/cgb/rural/rhcp.html>.

### **Program Goals and Legal Authority**

The FCC Order sets goal for the Pilot Program and describes them as “stimulat[ing] deployment of the broadband infrastructure necessary to support innovative telehealth and, in particular, telemedicine services to those areas of the country where the need for those benefits is most acute.”<sup>5</sup> As background, the existing Rural Health Care (RHC) program of the FCC historically has not achieved the benefits intended by the statute and the FCC. Although \$400 million per year has been authorized for funding this program, since the program's inception in 1998, the program generally disbursed less than 10% of the authorized funds each year.<sup>6</sup>

Legal authority for the program is derived from Section 254(h)(2)(A) of the Telecommunications Act of 1996, which calls for the FCC “to establish competitively neutral rules to enhance to advanced telecommunications and information services for health care providers.”<sup>7</sup>

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<sup>3</sup> Order at para. 22.

<sup>4</sup> This available support for each funding year of the Pilot Program is one third of the sum of the applicant's Year One and Year Two application funding requests. Order at para. 35.

<sup>5</sup> FCC Rural Health Care Support Mechanism Order (Order), FCC 07-198, in WC Docket 02-60, adopted Nov. 16, 2007, rel. November 19, 2007, para. 1.

<sup>6</sup> Order at para. 14 (citing USAC Annual Report 2006, at 5).

<sup>7</sup> Order at para. 15. Footnote 42 of the Order notes that the Fifth Circuit Court of Appeal has upheld the FCC's authority under that section to provide universal service support for “advanced services” to non-rural health care providers. *Texas Office of Public Utility Counsel v. FCC*, 18 F.3d 393, 446 (5<sup>th</sup> Cir. 1999), *aff'g in part, ref'g in part, and remanding in part*, Federal State Joint Board on Universal Service, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776 (1997).

### **Eligible “Health Care Provider” Definition**

As to the definition of “health care provder,” the FCC will use the same program definitions as used in the existing RHC support mechanism program. Section 254(h) (7) (b) defines “health care provider” as:

- (i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;
- (ii) community health centers or health centers providing health care to migrants;
- (iii) local health departments or agencies;
- (iv) community mental health centers;
- (v) non-for-profit hospitals;
- (vi) rural health clinics;<sup>8</sup> and
- (vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).<sup>9</sup>

Excluded from the list of eligible health care providers are nursing homes, hospices, other long term care facilities, emergency medical service facilities<sup>10</sup>, and pharmacies.

Only eligible health care providers and consortia that include eligible health care providers may apply for and receive discounts.<sup>11</sup>

Applicants, as well as individual health care facilities included in an application, that have been convicted of a felony, indicted, suspended, or debarred from award of federal or state contracts, or are not in compliance with FCC rules and requirements, are not eligible for discounts under the Pilot Program. If a selected participant has such an ineligible health care provider, the provider may participate but must be treated by the selected participant and USAC as if the provider was a for-profit entity and therefore ineligible to receive any support associated with its part of the Pilot Program. Any provider delinquent in debt to the FCC may not

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<sup>8</sup> The Commission has determined that dedicated emergency departments of rural for-profit hospitals that participate in Medicare constitute rural health care clinics. Order, at footnotes 52 and 223 (*citing 2003 Report and Order and FNPRM*, 18 FCC Rcd at 24553-55, paras. 13, 16.).

<sup>9</sup> Order, at para. 18.

<sup>10</sup> Although emergency medical facilities are not eligible providers for purposes of the RHC Pilot Program, Pilot Program funds may be used to support costs of connecting emergency medical service facilities to eligible health care providers to the extent that the emergency medical services facility is part of the eligible health care provider. Order, at footnote 224, and para. 109.

<sup>11</sup> Order, at para. 71.

receive universal service Pilot Program support until full payment or satisfactory arrangement to pay the delinquent debt is made. Any provider barred by General Services Administration (GSA) from receiving federal contracts, subcontracts, and certain types of federal assistance may not receive support under the Pilot Program, unless GSA determines the provider may be eligible again.<sup>12</sup>

State organizations and entities may apply for funding on behalf of consortia members, but cannot themselves receive funding for services under the Pilot Program unless it qualifies as a “health care provider” under section 254(h)(7)(b).<sup>13</sup> The FCC explains it has interpreted the term “health care provider” narrowly in the past. Despite that, however, the FCC’s rules do allow eligible health care providers to join consortia with other eligible health care providers; with schools, libraries, and library consortia eligible under Subpart F of 47 CFR Part 54, and with public sector (governmental) entities to order telecommunications services. As state organizations or entities constitute “public sector (governmental) entities,” they may join consortia under the FCC rules.<sup>14</sup>

Similarly, like state entities, other not-for-profit ineligible entities may apply on behalf of eligible health care providers as part of the consortium (e.g. consortium leaders) and function in an administrative capacity for eligible health care providers. Such not-for-profit entities may not receive funding from the Pilot Program, however.<sup>15</sup>

### **Importance of Rural Facilities In Project**

The FCC highlighted the importance of connecting rural health care providers in their pilot projects, by requiring applicants to list the health care facilities to be included in their networks and to demonstrate that they connect more than a *de minimis* number of rural health care providers through their networks.<sup>16</sup> All the selected participants met this criteria.

### **State or Regional Coordination Required**

State and regional coordination was required by the FCC to ensure efficiencies and avoid duplication of efforts or network facilities.<sup>17</sup> The

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<sup>12</sup> Order, at para. 71.

<sup>13</sup> Order, at para. 72.

<sup>14</sup> Order, at para. 72.

<sup>15</sup> Order at para. 73.

<sup>16</sup> Order, at para. 50.

<sup>17</sup> Order, at para. 53.

FCC said “one of the purposes of the Pilot Program was to encourage health care providers to aggregate their connection needs to form a comprehensive statewide or regional dedicated health care network.”<sup>18</sup>

### **Self Sustainability Must Be Assured**

The FCC stated that “a primary goal” of the Pilot Program is to ensure the long term success of rural health care networks and to prevent wasteful allocation of limited universal service funds. Thus, applicants were required to show that the proposed networks would be self sustaining by the completion of the Pilot Program.<sup>19</sup>

### **Funding**

The FCC modified the Pilot Program to allow selected participants to be eligible for funding for the approximate share of their two year program spread equally over a **three-year period**, beginning in Funding Year 2007 and ending in Funding Year 2009.<sup>20</sup> By doing so, the FCC increased available support for the 69 selected participants by \$139 million in each funding year.<sup>21</sup> Previously, the FCC had proposed a maximum of approximately \$55-\$60 million a year in grants over two years, or \$120 million maximum.<sup>22</sup>

The increased funding “will enable participants to fully realize the benefits to telehealth and telemedicine services by making universal support available for significant build-out of dedicated broadband network capacity.” Increased support also allowed the FCC to have an extensive pilot program to soundly evaluate and serve as a basis to propose to modify the existing RHC support mechanism, without rejecting any of the 69 applications.<sup>23</sup>

The FCC modified the proposed Pilot Program structure to decline to establish a funding priority system similar to the one used for the universal service schools and libraries mechanism. Previously, the FCC

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<sup>18</sup> Order, at para. 69.

<sup>19</sup> Order, at para. 54.

<sup>20</sup> The FCC will apply to Funding Year 2007 the monies USAC collected in Funding Year 2006 for the pilot program. The pilot program as not able to begin in FY 2006 due to late OMB approval. Order at para. 34.

<sup>21</sup> Order at paras. 23, 32, 34. The FCC does not move the overall \$400 million cap on RHC support mechanism. Order at fn. 84.

<sup>22</sup> Order at para. 31.

<sup>23</sup> Order at para. 32.

had proposed funding the current RHC support applications before funding any Pilot Program applications. This priority system was found to be unnecessary in the November FCC Order, given the \$100 million annual cap on funding for both the existing RHC support mechanism and the Pilot Program has been removed by the FCC. The FCC states that the expansion of the Pilot Program will ensure that both applications under the existing RHC support mechanism and under the Pilot Program will receive funding for all eligible expenses in their applications.<sup>24</sup>

### **Eligible Costs and Ineligible Costs**

The FCC set forth in great detail the kinds of costs that are allowed and not allowed to be funded. In its *2006 Pilot Program Order*, the FCC stated that funding provided under the Pilot Program would be used to support the costs of constructing dedicated broadband networks that connect health care providers in a state or region, and that connect such state and regional networks to the public Internet, Internet2, or NLR.<sup>25</sup> “*Eligible costs*” include:

1. Initial network design studies, which includes costs paid to a consultant to analyze both technical and non technical requirements and develop feasible network designs based on the analyses;<sup>26</sup>
2. Costs for deploying transmission facilities and providing access to advanced telecommunications and information services, including recurring and non recurring costs.<sup>27</sup>
3. Eligible non-recurring costs include “those for design, engineering, materials, and construction of fiber facilities or other broadband infrastructure, and the costs of engineering, furnishing (i.e., as delivered from the manufacturer), and installing network equipment.”<sup>28</sup>
4. Recurring and non-recurring costs of operating and maintaining the constructed network once operational.<sup>29</sup>

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<sup>24</sup> Order, at para. 36. Existing funding under the existing RHC support mechanism is \$41 million annually. Order, at para. 32.

<sup>25</sup> Order, at para. 74 (citing 21 FCC Rcd at 11114, para. 10).

<sup>26</sup> Order, at para. 74, and fn. 238.

<sup>27</sup> Order, at para. 74.

<sup>28</sup> Order, at paras. 74, 3.

<sup>29</sup> Order, at paras. 74, 3.

The FCC clarified that “*ineligible costs*” include “those costs not directly associated with network design, deployment, operations, and maintenance.”<sup>30</sup> It defined “ineligible costs” as follows:

Ineligible costs include costs that are not directly associated with network design, deployment, operations and maintenance. These ineligible costs include, but are not limited to:

- Personnel costs (including salaries and fringe benefits), except for those personnel directly engaged in designing, engineering, installing, constructing, and managing the dedicated broadband network. Ineligible costs of this category include, for example, personnel to perform program management and coordination, program administration, and marketing.
- Travel costs.
- Legal costs.
- Training, except for basic training or instruction directly related to and required for broadband network installation and associated network operations. For example, costs for end-user training, *e.g.*, training of health care provider personnel in the use of telemedicine applications, are ineligible.
- Program administration or technical coordination that involves anything other than the design, engineering, operations, installation, or construction of the network.
- Inside wiring or networking equipment (*e.g.*, video/Web conferencing equipment and wireless user devices) on health care provider premises except for equipment that terminates a carrier’s or other provider’s transmission facility and any router/switch that is directly connected to either the facility or the terminating equipment.
- Computers, including servers, and related hardware (*e.g.*, printers, scanners, laptops) unless used exclusively for network management.
- Helpdesk equipment and related software, or services.

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<sup>30</sup> Order at para. 3.

- Software, unless used for network management, maintenance, or other network operations; software development (excluding development of software that supports network management, maintenance, and other network operations); Web server hosting; and Website/Portal development.
- Telemedicine applications and software; clinical or medical equipment.
- Electronic Records management and expenses.
- Connections to ineligible network participants or sites (*e.g.*, for-profit health care providers) and network costs apportioned to ineligible network participants. [footnote deleted]
- Administration and marketing costs (*e.g.*, administrative costs; supplies and materials (except as part of network installation/construction); marketing studies, marketing activities, or outreach efforts; evaluation and feedback studies).<sup>31</sup>

The FCC stated that USAC may only fund eligible costs and may not fund ineligible costs or provide funding to ineligible participants.<sup>32</sup>

Existing FCC Forms will be submitted by selected participants to the universal service Fund Administrator, the Universal Service Administrative Company (USAC). The required FCC forms generally require detailed network costs worksheets to be attached as to the proposed network costs, certifications that the support will be used for the intended purposes, and letters of agency (LOA) for each participating health care provider. To be reimbursed, detailed invoices showing actual incurred costs of project build out, and if applicable, network design studies will be required.<sup>33</sup>

Pilot participants must identify and detail all ineligible costs, including costs apportioned to for-profit and other ineligible network participants or sites, in their line item network costs worksheets submitted to USAC with

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<sup>31</sup> Order at para. 75.

<sup>32</sup> Order at para. 76.

<sup>33</sup> Order at para. 4.

FCC Forms 465 and 466-A. Selected participants must clearly demonstrate that Pilot Program support amounts will not be used for ineligible costs.<sup>34</sup>

If a product contains both eligible and ineligible components, costs shall be allocated to the extent that a clear delineation can be made between the eligible and ineligible components.<sup>35</sup>

The USAC application process will require all necessary information to ensure the RHCPP funds are appropriately disbursed and to prevent waste, fraud and abuse.<sup>36</sup>

### **Competitive Bidding, Competitive Neutrality and Technology Neutrality Required**

Each eligible health care provider must participate in a competitive bidding process and follow any additional state, local or other procurement requirements to select the most cost efficient provider of services eligible for universal service support under the RHC support mechanism. The FCC reaffirmed that “the competitive bidding process is an important safeguard for ensuring universal service funds are used wisely and efficiently by requiring the most cost-effective service providers selected by Pilot Program participants.”<sup>37</sup>

Further, the FCC notes that the competitive bidding rules are consistent with section 254(h)(2)(A) of the 1996 Act because competitive bidding furthers the requirement of “competitively neutrality” by ensuring that “universal service support does not disadvantage one provider over another or unfairly favor or disfavor one technology over the other.” The Order stated, “The Commission also established (via the competitive bidding process) that the Pilot Program be technology neutral, permitting eligible health care providers to choose any technology and provider of broadband connectivity needed to provide telehealth, including telemedicine, services.”<sup>38</sup> Accordingly, bidders on selected participants’

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<sup>34</sup> Order, at para. 76.

<sup>35</sup> Order, at para. 76. If the ineligible functionality is “ancillary” to the eligible component, the costs need not be allocated to the ineligible functionality.

<sup>36</sup> Order, at para. 55.

<sup>37</sup> Order, at para. 5. See also para. 70: “we reaffirm that the competitive bidding process remains an important safeguard to ensuring universal service support is used wisely and efficiently ensuring that the most cost-effective service providers are selected by selected participants. . . .”

<sup>38</sup> Order, at para. 16.

proposals need not be eligible telecommunications carriers to receive Pilot Program funds if selected.<sup>39</sup>

### **Cost Effectiveness**

Given the rule that selected participants must comply with a competitive bidding process to select a service provider for their proposed projects, it must be certified to USAC that the service provider chosen is the most cost effective service or facility provider available. “Cost effective” is defined as “the method that costs the least after consideration of the features, quality of transmission, reliability, and other factors that the health care provider deems relevant to . . . choosing a method of providing the required health care services.”<sup>40</sup>

The FCC made clear that price is not the sole primary factor in bid selection, but must be a primary factor. Applicants need not be required to use the lowest cost technology because factors other than cost, such as reliability and quality, may be relevant to fulfill their telemedicine needs.<sup>41</sup> The FCC requires the selected participants to consider on a mandatory basis, in addition to price, the following non-cost evaluation factors: (1) prior experience, including past performance; (2) personnel qualifications, including technical excellence; (3) management capability, including solicitation compliance; and (4) environmental objectives (if appropriate). These factors may form a reasonable basis on which to evaluate whether a bid is cost effective.<sup>42</sup>

### **Nationwide Backbone Selection**

In the 2006 Pilot Program Order, the FCC indicated that the applicant had the discretion to connect that network to Internet2, National LambdaRail (NLR) or the public Internet. Internet2 and NLF are not-for-profit, nationwide network backbones, dedicated to educational, clinical and research goals.<sup>43</sup> In its February 6, 2007 Pilot Program Reconsideration Order, the FCC allowed applicants to either preselect Internet2 or National Lambda Rail as a nationwide backbone provider, or to seek competitive bids for their nationwide backbone providers through the normal competitive bidding process.<sup>44</sup>

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<sup>39</sup> Order, at footnote 47.

<sup>40</sup> Order, at para. 78.

<sup>41</sup> Order at para. 79.

<sup>42</sup> Order at para. 78.

<sup>43</sup> Order at para 16, and footnote 45.

<sup>44</sup> Order at para. 20.

## **FCC Rule Compliance**

The FCC makes clear that selected participants must submit additional information to the Universal Service Administrative Company (USAC) to ensure fund commitments and disbursements are consistent with Section 254 of the Telecommunications Act of 1996, and the Commission's rules and orders. It emphasizes the FCC's intention that Pilot Program funds are appropriately reimbursed and will prevent waste, fraud and abuse.

## **85% Funding/15% of Non-funded Costs (Eligible Sources)**

Out of the universal service fund, the FCC will fund 85% of the costs associated with the construction of the selected Pilot Projects, while 15% of eligible network costs of each Pilot Project must come from other specified sources.<sup>45</sup> The selected participants' 15% contributions must go towards eligible network costs only, as described in the Order at paras. 74-75.<sup>46</sup>

The FCC limited what source selected participants may obtain their 15% contribution of eligible network costs, in order to ensure the Pilot Program operates consistent with the program's goals and objectives and the funds are used to benefit public and non-profit health care providers. Eligible sources include: (1) the applicant or eligible health care provider participants; (2) state grants, funding, or appropriations; (3) federal funding, grants, loans or appropriations except for RHC funding; and (4) other grant funding, including private grants. If the participant cannot show its 15% contribution is from an eligible source, the participant will be denied funding by USAC.<sup>47</sup>

Ineligible sources for the 15% contribution include: in-kind or implied contributions; a local exchange carrier, or other carrier, utility, contractor, consultant, or other service provider; for-profit participants; and the existing RHC support mechanism. The FCC explained that it is limiting the sources of the 15% funds "to ensure that participating health care providers adequately invest in their network projects to ensure efficiency in both cost and design and to assume some minimal level of risk. Requiring participants to have a vested interest in the approved

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<sup>45</sup> Order, at paras. 2 and 35.

<sup>46</sup> Order at para. 77, and footnote 244.

<sup>47</sup> Order at para. 77.

network project safeguards against program manipulation and protects against waste, fraud and abuse.”<sup>48</sup>

### **Five Year Build Out Completion**

Build out of the project must be completed within five years of receiving an initial funding commitment letter (FCL), after which funding commitments in the FCC Order will no longer be available. If a participant cannot meet the five year build out deadline, the FCC intends to require the applicant to repay any Pilot Program funds already disbursed. Participants shall notify the FCC and USAC in writing upon completion of the pilot project construction and network build-out.<sup>49</sup>

### **Network Modifications**

Network modifications are allowed prior to commencing and completing the competitive bidding process, but the maximum available support amount per selected participant (e.g. \$21.1 million for the CTN) is not to be exceeded. The FCC specifically acknowledged that network design plans may be upgraded, or technology replaced or changed as less expensive network components become available. The FCC specifically stated that selected participants may be able to add health care providers to their network within the available maximum support amounts.<sup>50</sup>

### **Coordination with Certain Programs**

The FCC wants selected participants to coordinate use of the health care networks with the Department of Health and Human Services (HHS) and in particular with the Centers for Disease Control and Prevention (CDC) in case of national, regional or local health care emergencies (e.g. pandemics, bioterrorism). The FCC wants selected participants to use the funding in ways consistent with HHS’ health information technology (IT) initiatives.<sup>51</sup>

### **Public Safety and Emergency Coordination**

Selected participants shall use funding to ensure their funded projects are consistent with the HHS’ health IT initiatives in several areas: health IT standards, certification of electronic health records (EHRs),

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<sup>48</sup> Order, at para. 77. Applicants who did rely on ineligible sources may amend their applications but may not increase their amount of support they are seeking. Id.

<sup>49</sup> Order at paras. 4, 94.

<sup>50</sup> Order at para. 80.

<sup>51</sup> Order at para. 23.

personal health records, and networks, the National Interoperable Health Information Technology Infrastructure (NHIN), the National Resource for Health Information Technology and the Public Health Information Network (PHIN). Selected participants are to inform the FCC how they have complied with these initiatives. They shall coordinate in the use of their health care networks with HHS and in particular with CDC in instances of national, regional or local public health emergencies.<sup>52</sup>

## Forms

The FCC sets forth in great detail what USAC forms are to be filled out and some waivers from the usual RHC support mechanism procedures. The rules are set forth in great specificity and must be followed.<sup>53</sup>

FCC Form 465 is to be filed with USAC for requests for supported services. The completed form is posted by USAC on the web, and then 28 days must pass before the applicant may make a commitment with the selected service provider. Then the applicant submits Form 466 or 466-A.<sup>54</sup>, which indicates the type of service ordered by the applicant, the cost of the service, information about the service provider(s), and the terms of the service agreement. This Form 466 contains a certification by the applicant that the most cost effective method of providing the selected service was chosen. The final form is FCC Form 467, which notifies the FCC that the service provider has begun providing the supported service, or discontinued service.<sup>55</sup> USAC was directed to conduct a targeted outreach program to educate and inform selected participants on its administrative process, including filing requirements and deadlines.<sup>56</sup>

The first funding year will be Funding Year 2007, and applicants are to indicate whether they will be seeking funding in Year Two (Funding Year 2008) and/or Year Three (Funding Year 2009).<sup>57</sup>

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<sup>52</sup> Order at paras. 81-82.

<sup>53</sup> Order, at paras. 83 - 94

<sup>54</sup> See Order at para. 89 and footnote 294 for description of when to use FCC Form 466-A. Copies of contracts and service agreements with the service providers must be submitted with the Form 466-A, along with detailed line item network cost worksheets which must show for ineligible (e.g. for profit) participants will pay their fair share of network costs, source of 15% funding, and maximum funding amount. Order at para. 90.

<sup>55</sup> Order at para. 83.

<sup>56</sup> Order at para. 84.

<sup>57</sup> Order at para. 85.

One master FCC Form 465 may be submitted identifying each eligible health care provider participating in the Pilot Program, instead of submitting multiple Form 465s for each participating health care provider if desired. In its Form 465, participants must explain for each health care provider participating in the network why it is eligible under section 254 of the 1996 Telecom Act, and the Commission's rules and orders. To add, remove or substitute a health care provider in the network after a funding commitment has been made by USAC, an amended FCC Form 465 attachment must be filed to allow USAC to determine its statutory eligibility.<sup>58</sup> Participants must also submit a copy of the most recent record version of its application submitted to the FCC as of the release date of the Order, and sufficient information to define the scope of the project and network costs to enable an effective competitive bidding process. Participants may not pre-qualify service providers for the competitive bidding process.<sup>59</sup>

The FCC requires a Letter of Agency to be included with its FCC Form 465 from each participating health care facility to authorize a lead project coordinator to act on its behalf and to prove that each health care provider has agreed to participate in that network. A health care provider may not participate in more than one funded Pilot Project.<sup>60</sup>

All service providers participating in the RHC pilot program are required to have a Service Provider Identification Number (SPIN), assigned by USAC.<sup>61</sup>

### **Multi Year Contracts**

A selected participant may bid out the entire network in Year One (but is not required to), but must submit FCC Form 466-A and network costs worksheets on an annual basis if it does so. Alternatively, a selected participant may competitively bid its project in phases (e.g. Year One - network design study, Years Two and Three - network construction and installation).<sup>62</sup>

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<sup>58</sup> Order at para. 86.

<sup>59</sup> Order at para. 86.

<sup>60</sup> Order at para. 87.

<sup>61</sup> Order at para. 88 and footnote 292 (explaining a SPIN).

<sup>62</sup> Order at paras. 91-92.

## **Effective Date**

The effective date is 30 days after release of the Order in the Federal Register, subject to Office of Management and Budget (OMB) approving new information collection requirements.<sup>63</sup> On January 22, 2008, the FCC's Wireline Competition Bureau announced in a Public Notice it had received OMB approval on January 17, 2008.<sup>64</sup>

## **USAC Outreach to Selected Participants**

Within 14 calendar days after the effective date of the Order, the selected participants are to provide to USAC the name, mailing address, email address, and phone number of the lead project coordinator for the Pilot Program project or consortium. USAC is ordered to have an initial coordination meeting thirty days after the effective date of the FCC's order with selected participants. It shall inform selected participants on the administrative process, filing requirements and deadlines, and when each funding year begins.<sup>65</sup>

A process is set forth as to what should happen should USAC find network components that are ineligible for funding as to a particular pilot project. Essentially, USAC must inform the selected participant promptly in writing of the deficiencies in the funding request and the selected participant has 14 calendar days from the date of receipt of the USAC notice to revise its funding request to remove the ineligible components or facilities, or to show with additional documentation why the components or facilities are eligible.<sup>66</sup> Ministerial and clerical errors may be cured using this same USAC-notice-with-14 days-to-cure process.<sup>67</sup>

## **Disbursements of Funds**

USAC will disburse Pilot Program funds based on monthly submissions (i.e. invoices) of actual incurred eligible expenses. Data will be closely reviewed by USAC and random site visits authorized by the FCC for USAC to ensure support is being used for intended purposes. If funding is disbursed to a service provider and the approved network project is abandoned or left incomplete, the FCC permits USAC to pursue

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<sup>63</sup> Order, at para. 129 (as corrected by Errata).

<sup>64</sup> Public Notice, DA 08-140, Wireline Competition Bureau Announces Office of Management and Budget Approval of the Universal Service Rural Health Care Pilot Program Information Collection Requirements, released January 22, 2008.

<sup>65</sup> Order at para. 95.

<sup>66</sup> Order at para. 96.

<sup>67</sup> Order at para. 97.

recovery of funds from the selected participant's financially and legally responsible organization, eligible health care provider, or service provider, as appropriate.<sup>68</sup>

### **Resale Prohibited**

The FCC found that pursuant to Section 254(h)(3) of the 1996 Act, services purchased pursuant to the Section 254(h) discount for services under RHC support mechanisms may not be resold, sold or otherwise transferred by such user in consideration for money or other thing of value. The FCC found it may not waive this statutory requirement.<sup>69</sup>

### **For-Profit Network Participant May Pay "Fair Share"**

The FCC clarified that a for-profit entity could participate in a network but must pay its "fair share" of network and other costs.<sup>70</sup> The for-profit entity may not receive the discount provided to the eligible health care provider. The FCC instructed applicants to describe how for-profit network participants will pay their fair share of the network and other costs. It cited two proposals with approval: (1) one instance where for-profit entities if added would be invoiced for each service item and USAC would only receive invoices for eligible rural health care providers; and (2) another instance where, if after two years, for-profits were added, they would be required to pay 100 percent of their actual costs.<sup>71</sup>

### **Waivers of Existing RHC Rules**

A request to waive the competitive bidding rules was rejected, on grounds that the competitive bidding process is vital to the FCC's effort to ensure that the universal service funds support services that satisfy the exact needs of an institution in the most cost-effective manner. The FCC explained that using competitive bidding provides safeguards against waste, fraud and abuse.<sup>72</sup>

Section 54.601(c) of the RHC Rules are waived to allow Pilot Project funding to be extended to non-telecommunications and non-Internet access services, such as funding infrastructure deployment and network design studies.<sup>73</sup>

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<sup>68</sup> Order at para. 98.

<sup>69</sup> Order at paras. 105, 106, and footnote 317.

<sup>70</sup> Order at paras. 107, 47.

<sup>71</sup> Order at para. 47.

<sup>72</sup> Order at paras. 100-104.

<sup>73</sup> Order at para. 110.

Section 54.611 of the FCC's rules is waived to allow non-telecommunications carriers to seek funding.<sup>74</sup> Other waivers make clear that: (1) funding under the Pilot Program is not limited to telecommunications carriers, (2) funding is not limited to rural health care providers, (3) current RHC support mechanisms (which limits support to maximum support distances) are deemed inapplicable to the pilot program, and (4) rules for support calculation under RHC support mechanisms do not apply to the pilot program.<sup>75</sup>

### **No Duplication**

Selected participants may not receive funds for the same services under the Pilot Program and either the existing universal service programs (such as the RHC support mechanism, E-Rate, the High-Cost program, and Low Income Program) or other federal programs (such as federal grants, awards or loans). The usual RHC rules for calculation of support (the difference between urban rate and rural rate) will *not* apply to Pilot Program participants.<sup>76</sup>

### **Audit**

Each Pilot Program is subject to audit by the FCC's Office of Inspector General. Further, funds used improperly may be required to be recovered by USAC through adjustments in normal processes. Failure to comply with FCC rules and orders or filing to submit timely filings may subject the selected participant to FCC forfeitures. Any selected participant or service provider who willfully makes a false statement can be punished by fine or forfeiture under Sections 502 and 503 of the Communications Act, or fine or imprisonment under Title 18 of the United States Code, including but not limited to criminal prosecution pursuant to section 1001 of the USC.<sup>77</sup> We note that in the past, carriers and RHC program participants have been fined or imprisoned for intentionally fraudulent activities.

### **FCC Report at Program End**

At the end of the program, the FCC will issue a report as to the results of the Pilot Program, status and recommended changes. Quarterly

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<sup>74</sup> Order at para. 114-115.

<sup>75</sup> Order at para. 118-122.

<sup>76</sup> Order at para. 123.

<sup>77</sup> Order at para. 125.

reports from selected participants will be required as a result, beginning in two quarters from the effective date of the order.<sup>78</sup>

Please let me know if you have any further questions.

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<sup>78</sup> Order at para. 126-127.