

441 G St. N.W.
Washington, DC 20548

B-333167

April 26, 2021

The Honorable Maria Cantwell
Chair
The Honorable Roger Wicker
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Frank Pallone, Jr.
Chairman
The Honorable Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: Federal Communications Commission: COVID-19 Telehealth Program; Promoting Telehealth for Low-Income Consumers

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Federal Communications Commission (Commission) entitled “COVID-19 Telehealth Program; Promoting Telehealth for Low-Income Consumers” (FCC 21-39). We received the rule on April 1, 2021. It was published in the *Federal Register* as a “final rule; denial of petition for partial reconsideration” (final rule) on April 9, 2021. 86 Fed. Reg. 18459. The effective date is April 9, 2021.

According to the Commission, this document establishes rules and processes to further distribute funding through the Coronavirus Disease 2019 (COVID-19) Telehealth Program (Program) to health care providers, in response to the COVID-19 pandemic, to build on the initial round of funding of the Program and implement Congress's direction under the Consolidated Appropriations Act, 2021 (CAA) for additional relief. See Pub. L. No. 116-260, 134 Stat 1182 (Dec. 27, 2020). The Commission stated that CAA funding is distributed through the Program to the health care providers who need it most, as determined by objective metrics.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. §§ 553(b)(3)(B), 808(2). Specifically, the Commission stated it found good cause to waive notice and comment procedures under section 553(b)(3)(B) of the Administrative Procedure Act because notice and comment procedures would be impracticable and contrary to public interest considering the unprecedented nature of this

pandemic and the need for immediate action. On this basis, the Commission also waived the 60-day delay in the effective date under 5 U.S.C. § 808(2).

Enclosed is our assessment of the Commission's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Ryan Palmer
Chief, Telecommunications Access
Policy Division, WCB
Federal Communications Commission

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
FEDERAL COMMUNICATIONS COMMISSION
ENTITLED
“COVID-19 TELEHEALTH PROGRAM;
PROMOTING TELEHEALTH FOR LOW-INCOME CONSUMERS”
(FCC 21-39)

(i) Cost-benefit analysis

In its submission to us, the Federal Communications Commission (Commission) indicated that it considered preparation of an analysis of the costs and benefits of this final rule; denial of petition for partial reconsideration (final rule) to be not applicable.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

In its submission to us, the Commission indicated that it did not prepare a Regulatory Flexibility Analysis.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

As an independent regulatory agency, the Commission is not subject to the Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

According to the Commission, on January 6, 2021, the Wireline Competition Bureau (Bureau) released public notice¹ that sought comment, as required by the Consolidated Appropriations Act, 2021 (CAA),² on improvements to the Telehealth Program (Program) and lessons learned from the initial round of funding (Round 1). The Commission stated that in its first Coronavirus Disease 2019 (COVID-19) Report and Order³ it determined that additional notice and comment was not necessary for two independent reasons. First, the Commission asserted that additional notice and comment procedures would be impracticable and contrary to the public interest under the Administrative Procedure Act's good cause exception. Second, all or nearly all of the Program was a logical outgrowth of its Connected Care Notice, FCC 18-112.⁴ The Commission also stated that it reached a similar determination here. The Commission stated further that this

¹ 86 Fed. Reg. 8356 (Feb. 5, 2021).

² See Pub. L. No. 116-260, 134 Stat 1182 (Dec. 27, 2020).

³ 85 Fed. Reg. 19892 (Apr. 9, 2020).

⁴ FCC, *Notice of Inquiry: Promoting Telehealth for Low-Income Consumers*, 33 FCC Rcd 7825 (Aug. 2, 2018).

final rule is a logical outgrowth of the Connected Care Notice because this final rule constitutes a second round of the very same program for which the Commission properly proceeded to an Order in April 2020.⁵ Thus the Commission asserted that it found the Administrative Procedure Act's good cause exception to notice and comment was satisfied.

The Commission notes that CAA specifies that it must issue public notice with request for comment within 101 days after its enactment. The Commission believes that it satisfied this directive when it sought comment through a Bureau-level public notice released in January 2021.⁶ According to the Commission, it found that there was good cause to seek comment through a Bureau-level public notice because of the unprecedented nature of the Covid-19 pandemic and the need for immediate action, and the fact that issuing a Commission-level public notice would have necessitated a delay in committing funds to providers who are addressing the COVID-19 pandemic. Lastly, the Commission stated that issuing a notice of proposed rulemaking in these circumstances would be unnecessary and therefore not required under the good cause exception of 5 U.S.C. § 553(b)(3)(B).

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

The Commission stated that pursuant to section 903(e) of CAA, the collection of information sponsored or conducted under the regulations promulgated in this final rule is deemed not to constitute a collection of information for the purposes of PRA.

Statutory authorization for the rule

The Commission promulgated this final rule pursuant to sections 201, 254, 303(r), and 403 of title 47, United States Code; and division B of the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136, and division N of the Consolidated Appropriations Act, 2021, Public Law 116-260.

Executive Order No. 12866 (Regulatory Planning and Review)

As an independent regulatory agency, the Commission is not subject to the Order.

Executive Order No. 13132 (Federalism)

As an independent regulatory agency, the Commission is not subject to the Order.

⁵ 85 Fed. Reg. 19892 (Apr. 9, 2020).

⁶ 86 Fed. Reg. 8356 (Feb. 5, 2021).