

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

In the matter of)
) WC Docket No. 02-60
Rural Health Care Support Mechanism)

**COMMENTS OF THE RURAL NEBRASKA HEALTHCARE NETWORK IN
OPPOSITION TO THE PETITION FOR RECONSIDERATION AND CLARIFICATION
OF THE UNITED STATES TELECOM ASSOCIATION**

Pursuant to Public Notice released on April 24, 2013 in the above-captioned proceeding, the Rural Nebraska Healthcare Network (“RNHN”) respectfully submits these comments in opposition to the petition submitted by the United States Telecom Association (“USTelecom”)¹ for reconsideration and clarification of certain decisions in the Commission’s Healthcare Connect Fund Order (“Order”),² viz., the Commission’s decisions allowing (i) shared use of excess capacity and (ii) dark fiber as an eligible service.³

INTRODUCTION

RNHN is a non-profit consortium of nine non-profit and public hospitals and their twenty supporting clinics in the Panhandle of Nebraska that are connected to each other, to major medical centers in Denver, to Internet2 and to twelve additional non-profit hospitals in eastern Nebraska. RNHN’s network is a combination of services and dark fiber that it built and lit with funding from the Commission’s Rural Healthcare Pilot Program and from revenue generated by

¹ United States Telecom Association Petition for Reconsideration and Clarification, WC Docket No. 02-60 (filed Apr. 1, 2013) (“Petition”); *Petition for Reconsideration of Action in a Rulemaking Proceeding*, 78 Fed. Reg. 24147 (Apr. 24, 2013).

² *In re Rural Health Care Support Mechanism*, Report and Order, 27 FCC Rcd 16678 (2012) (“Order”).

³ USTelecom also asks the Commission to clarify: (1) that it will seek cost recovery under rural health care programs from the party responsible for the rule violation; (2) the rural health care program bidding rules regarding gifts; (3) broadband metrics reporting; and (4) certain certifications and invoicing requirements.

the separate funding and sale of excess capacity.⁴ As a result, RNHN has been able to convert an antiquated and expensive network of carrier-provided T-1 lines (1.544 Mbps) to a state-of-the-art network that is currently designed to provide 100 Mbps of capacity at each healthcare provider location with the ability to increase capacity to 1 Gbps at each such location. Lives which heretofore were in jeopardy are now given a far better opportunity to receive timely diagnosis and treatment. Yet, under the guise of alleged legal infirmities, USTelecom wants to deny such lifesaving abilities for the transparent reason of supporting its for-profit, incumbent carrier members. Could anything be more troubling and contrary to the public interest?

USTelecom asks the Commission to reconsider its decisions allowing shared and dark fiber as an eligible service under the Healthcare Connect Fund (“HCF”). In particular, USTelecom argues that permitting rural health care providers (“HCPs”) to install and share excess capacity with ineligible entities violates section 254(h)(3) of the Act because it is resale⁵ and that dark fiber is ineligible for support because it is not a service.⁶

USTelecom’s Petition is deficient. It relies on facts and arguments that, as shown by these comments, “have been fully considered and rejected by the Commission” in this proceeding,⁷ yet USTelecom fails to demonstrate why the Commission’s reasoning is incorrect. Moreover, USTelecom’s arguments are legally incorrect. For either reason, the Petition should be denied with respect to these two issues.

⁴ The excess capacity was not funded with universal service funds yet it is used to provide voice and data services to underserved areas, thereby not only increasing the universality of communications service but also bringing economic development to rural communities.

⁵ Petition at 2-5.

⁶ *Id.* at 5-6.

⁷ 47 C.F.R. § 1.429(l)(3).

I. DISCUSSION

A. The Petition fails to meet the standards for a petition for reconsideration and should be denied.

Under the Commission's Rules, if a petition for reconsideration simply repeats arguments that were previously considered and rejected in the proceeding, it will not warrant reconsideration.⁸ USTelecom, without providing any additional facts or legal analysis, simply alleges that what the Commission did was wrong and that any prior decisions on those issues are no basis for continuing the practices under the HCF.⁹ Thus, the Petition simply echoes the same arguments that parties made in response to the Commission's July 2010 Notice of Proposed Rulemaking in this proceeding.¹⁰ For instance, AT&T and the Montana Telecommunications Association argued in their comments that permitting shared use of HCP-owned infrastructure violates section 254(h)(3) of the Act.¹¹ With respect to dark fiber, telecommunications service providers and their associations argued in their comments in this proceeding that dark fiber is not a service and as such is ineligible for funding under section 254 of the Act.¹²

In the face of those arguments, the Commission concluded that section 254(h)(3) of the Act is "not implicated when for-profit entities pay their own costs and do not receive discounts provided to eligible health care providers."¹³ The Commission also concluded that dark fiber is

⁸ See *In re Connect America Fund*, Sixth Order on Reconsideration, 28 FCC Rcd 2572, 2573 ¶ 3 (2013) (citing 47 C.F.R. § 1.429(l)(3)).

⁹ See Petition at n.8, n.13.

¹⁰ *In re Rural Health Care Support Mechanism*, Notice of Proposed Rulemaking, 25 FCC Rcd 9371 (2010) ("NPRM").

¹¹ See Order, 27 FCC Rcd at 16715-16 ¶ 80 and n.223.

¹² See, e.g., Comments of Qwest Communications International Inc. ("Qwest Comments") at 5-6, 8; Comments of Montana Telecommunications Association ("MTA Comments") at n.26; Comments of Verizon and Verizon Wireless at 9-10; Comments of AT&T at 11-14; Comments of National Cable & Telecommunications Association ("NCTA Comments") at 2-4.

¹³ Order, 27 FCC Rcd at 16715 ¶ 80; see also *id.* at 16760-62 ¶¶ 179-181.

eligible for universal service support because, consistent with its earlier decisions, dark fiber is a service.¹⁴ The Petition is therefore defective and should be denied with respect to these issues.¹⁵

Even assuming that the Petition relies on facts or arguments that were not fully vetted by the Commission, USTelecom has not demonstrated why its arguments relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission, were unknown to USTelecom until after its last opportunity to present them to the Commission, that USTelecom could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity, or are, as the Commission may determine, required in the public interest.¹⁶

Nor could it. Nothing has occurred and no circumstances have changed since the Petition was filed that would necessitate Commission reconsideration of its prior conclusions. Moreover, USTelecom has not demonstrated how or why the consideration of its arguments is required in the public interest. Accordingly, the Commission should deny USTelecom's petition to reconsider its decisions to permit rural HCPs participating in the HCF program to install and resell excess capacity and to receive support for dark fiber.

B. Allowing cost sharing is not resale.

USTelecom argues that permitting eligible and ineligible users to cost share violates section 254(h)(3) of the Act, which prohibits the sale, resale, and transfer of telecommunications

¹⁴ *Id.* at 16735-36 ¶ 123. With respect to the cost sharing issue, *see, e.g., In re Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9073 ¶ 564, 9146-48 ¶¶ 719-721 (1997) ("First Universal Service Order"); *In re Federal-State Joint Board on Universal Service*, Sixth Order on Reconsideration, 14 FCC Rcd 18756, 18789-91 ¶ 55 (1999) ("Sixth Universal Service Order on Reconsideration"); *In re Rural Health Care Support Mechanism*, Report and Order, 22 FCC Rcd 20360, 20416 ¶ 107. With respect to dark fiber being a service, *see, e.g., In re Schools and Libraries Universal Service Support Mechanism*, Sixth Report and Order, 25 FCC Rcd 18762, 18769 ¶ 12 (2010); *In re Implementation of Non-accounting Safeguards of Sections 271 and 272*, Second Order on Reconsideration, 12 FCC Rcd 8653, 8683 n.110 (1997).

¹⁵ 47 C.F.R. § 1.429(l)(3).

¹⁶ *Id.* § 1.429(b).

services purchased using universal service funds.¹⁷ USTelecom asserts that there is no difference between “cost sharing” and resale. In a similar vein, USTelecom also takes issue with ineligible entities sharing in the use of excess capacity built by HCPs. USTelecom complains that because the “Commission wrongly permitted Pilot Program HCPs to resell excess capacity does not legitimize [sic] the practice now.”¹⁸

As an initial matter, the Commission has defined resale as “an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without ‘adding value’) for profit.”¹⁹ Congress had in mind the Commission’s resale definition when it drafted section 254(h)(3). In the Conference Report accompanying the 1996 Act, Congress stated that “[n]ew subsection (h)(3) clarifies that telecommunications services and network capacity provided to health care providers, schools and libraries may not be resold or transferred *for monetary gain*.”²⁰ As ordered by the Commission in this instance, excess capacity will not be offered “for profit”—ineligible entities simply pay the full undiscounted cost, hence the phrase “cost sharing.” Accordingly, section 254(h)(3) is not implicated and USTelecom’s arguments are unfounded.

Moreover, neither the Pilot Program nor the HCF program represent the first time the Commission has allowed eligible and ineligible entities to enter into joint purchasing and network sharing arrangements involving universal service funds. In the First Universal Service Order, the Commission determined (in agreement with the Joint Board) that the prohibition in section 254(h)(3) does not “restrict or inhibit joint purchasing and network-sharing arrangements

¹⁷ See 47 U.S.C. § 254(h)(3).

¹⁸ Petition at n.8.

¹⁹ *In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), modified by 62 F.C.C.2d 588 (1977), *aff’d sub nom.*, *AT&T Co. v. FCC*, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978) (involving private line resale).

²⁰ H. Rep. No. 104-458, at 133 (1996) (emphasis added).

with both public and private entities and individuals”²¹ as long as the consortia of the eligible and ineligible entities receives tariffed or market rates and the ineligible entities pay full rates for their portion of the services. In other words, no universal service funds are used to support the ineligible entities. USTelecom misses this key point. Just as in the First Universal Service Order, it is the Commission’s intent to ensure that only eligible entities receive the benefit of the universal service support mechanism.²²

Under the HCF program, ineligible entities must pay their “fair share” of the costs of the service by paying the full undiscounted cost charged to eligible users or, if there is no separate and independent cost, the full undiscounted cost must be prorated between eligible and ineligible and the ineligible entities must pay the full prorated undiscounted cost. With respect to construction of excess capacity, consortia must pay the full amount of the additional costs for excess capacity facilities that will not be part of the supported health care network. Stated differently, the additional cost for excess capacity facilities cannot be funded by any health care universal service support funds.²³ This excess capacity is the only part of the network that may be shared with ineligible entities.²⁴ Thus, similar to service costs, no universal service dollars are used to fund the excess capacity.

Central to USTelecom’s opposition of building excess capacity is a concern of overbuilding, *i.e.*, the duplication of broadband infrastructure. The Commission, however, has recognized the risk of overbuilding and has proposed rules to guard against such projects by requiring self-construction only where it is absolutely necessary to enable the HCPs to obtain the

²¹ First Universal Service Order, 12 FCC Rcd at 9146 ¶ 718.

²² Sixth Universal Service Order on Reconsideration, 14 FCC Rcd at 18791 ¶ 55.

²³ Order, 27 FCC Rcd at 16726 ¶ 103.

²⁴ *Id.*

needed broadband connectivity.²⁵ Additionally, the HCF program not only considers the building of new infrastructure where needed, but also encourages the leveraging of existing infrastructure by allowing the funding of IRUs and capital leases.²⁶

Permitting the building and sharing of excess capacity will not harm the community as USTelecom seems to suggest. Excess capacity can be made available to non-eligible entities, such as for-profit HCPs and hospitals, whose participation is vitally important to the provision of affordable health care in rural areas, which is a goal specifically recognized by the National Broadband Plan.²⁷ And the income from shared use of excess capacity can be used to sustain networks dedicated to health care, which in turn will be less of a drain on HCF funds.

It is not surprising that incumbent telecommunications carriers want to maintain the *status quo* of high prices, minimal service options, and beholden rural health care providers. Like USTelecom in its Petition, they have asserted in comments filed in response to the NPRM that funding self-construction will discourage broadband investment, displace jobs, and waste universal service funds.²⁸ These claims are unsubstantiated and for good reason. If USTelecom's members were interested in providing broadband to rural HCPs, rural HCPs would have the same ubiquitous access to broadband options available to their urban counterparts. The truth of the matter is, however, they do not. Indeed, this market failure is one of the very reasons

²⁵ *Id.* at 16712-13 ¶ 73.

²⁶ *Id.* at 16730-31 ¶ 113.

²⁷ Federal Communications Commission, *Connecting America: The National Broadband Plan* at 215 (Recommendation 10.7) (rel. Mar. 16, 2010) ("National Broadband Plan"), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf.

²⁸ See, e.g., NCTA Comments at 2-3; MTA Comments at 5-7. MTA also states that, because the FCC's Omnibus Broadband Initiative Technical Paper No. 5 concluded that the "major barrier for medium and large [health care] providers is not access—it is price," the Commission's emphasis on building infrastructure is misplaced. Federal Communications Commission, Omnibus Broadband Initiative Technical Paper No. 5, *Health Care Broadband in America: Early Analysis and a Path Forward* ("OBI Technical Paper No. 5"), at 10 (rel. Aug. 27, 2010). Even if MTA was correct, what better vehicle than an alternative network, such as a network funded under the HCP program, to reduce price? MTA Comments at 8.

underlying the need for the self-construction option under the HCF.²⁹ As to whether it is a waste of universal service funds as USTelecom suggests,³⁰ those funds are clearly needed to fulfill the broadband needs of rural HCPs who, in far too many locations to date, have not been provided with the broadband services required to bring them into the 20th century of health care.

The Commission should not fall prey to the false claims of telecommunications providers and their industry associations that somehow self-construction of fiber networks will result in overbuilds and waste universal service funds. These concerns are red herrings because the mere fact that investment has not happened in these areas in the first place necessitates the need for the self-construction option under the HCF.

C. Dark fiber is eligible for support under section 254(h)(2)(A).

USTelecom argues that dark fiber is ineligible for support under the HCF program because it is merely a facility, not a telecommunications service, advanced telecommunications service or an information service.³¹ USTelecom also asserts that the HCF program “is not designed to put medical providers in a position to build, operate and resell their own communications networks, which is what HCF support for dark fiber would engender.”³² In addition, USTelecom argues that funding dark fiber will “significantly increase the risk of additional waste, fraud and abuse.”³³

USTelecom simply echoes the same arguments raised by commenters in response to the NPRM in this proceeding and in a similar proceeding for universal support programs for schools

²⁹ Unlike these detractors, the National Broadband Plan substantiates that a large number of small health care providers face a broadband connectivity gap. National Broadband Plan, at 211. *See also* OBI Technical Paper No. 5, at 10.

³⁰ Petition at 4.

³¹ *Id.* at 5.

³² *Id.* at 6.

³³ *Id.*

and libraries, commonly referred to as the “E-rate program.”³⁴ Again, the Commission was not persuaded by those arguments and consistent with Commission precedent, found that “dark fiber is a ‘service’ that enhances access to advanced telecommunications and information services consistent with section 254(h)(2)(A) of the Act.”³⁵ The Commission also found that HCPs have shown that they are able to build and operate their own networks that utilize dark fiber.³⁶ And to ensure that there is no waste of universal service funds, the HCF will only provide support for dark fiber when it is “lit” and is actually being *used* by the HCP; it will not provide support for dark fiber that remains unlit.³⁷

USTelecom misconstrues section 254(h)(2)(A). That section is not limited to the actual provision of a finished advanced telecommunications service or an information service. It requires the Commission to “establish competitively neutral rules . . . to *enhance . . . access to*” such services (emphasis added). Dark fiber is clearly a key component that provides HCPs with the ability to access advanced telecommunications or information service, just as Congress intended.

If adoption of advanced broadband services is the goal, there is no basis under section 254 to exclude dark fiber services. Moreover, fiber solutions are the most cost-effective facilities to provide the bandwidth needed by health information technology applications now and in the future. With fiber solutions, greater amounts of data can be transferred on existing fiber networks by upgrading networking technology. For example, dense wave division multiplexing (“DWDM”) technology allows users to place and send multiple signals along a single fiber at the same time because DWDM turns a single fiber into the equivalent of a multiple circuits within

³⁴ See, e.g., Qwest Comments at 8; MTA Comments at n.26. See also Order, 27 FCC Rcd at 16735 ¶ 124 and n.334.

³⁵ Order, 27 FCC Rcd at 16735-36 ¶ 123.

³⁶ *Id.* at 16736 ¶ 124.

³⁷ *Id.* at 16735 ¶ 122.

multiple channels. DWDM systems are now being deployed that allow the creation of 160 separate channels on a single fiber cable with each channel able to transmit at speeds up to 100 Gigabits per second, up from 10 and 40 Gigabit systems used previously. And per-channel rates up to 400 Gigabits per second is now in the research and development stage.

The Commission should deny USTelecom's request to reconsider the eligibility of dark fiber for HCF support. Granting the request will impede the implementation of high-speed broadband access which can, in the most cost-effective way, provide HCPs access to advanced telecommunications and information services.

II. CONCLUSION

RNHN respectfully urges the Commission to deny the Petition and permit HCPs to install and share excess capacity with ineligible entities and support dark fiber under the HCF program. Without these capabilities, rural HCPs will be subject to limitations and pricing by carriers that will result in projects that fall short of the HCPs needs or will discourage HCPs from applying for needed funding. As a result, the HCF will suffer from the same underutilization that plagued the previous programs under the Rural Health Care Support Mechanism.

Respectfully submitted,

RURAL NEBRASKA HEALTHCARE
NETWORK

By: 

Randall B. Lowe
Richard A. Gibbs
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel: (202) 973-4200

Its Attorneys

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