Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

COMMENTS OF AT&T IN SUPPORT OF USTELECOM'S PETITION FOR RECONSIDERATION AND CLARIFICATION

AT&T Inc., on behalf of its operating company affiliates (collectively, AT&T), files these comments in support of USTelecom's petition for reconsideration and clarification of the Commission's *Rural Health Care Reform Order*.[1] AT&T commends the Commission for adopting rules to bring its outdated rural health care (RHC) program into the 21st century by establishing the Healthcare Connect Fund. This fund will facilitate broadband access, which has become an essential part of today's medical care, to unserved and underserved health care providers (HCPs) across the country. *Order* at ¶ 1. However, AT&T shares USTelecom's concern that, in its zeal to establish this new broadband-focused health care fund, the Commission overreached in several instances and, in doing so, exceeded its statutory authority. In other areas, AT&T agrees with USTelecom that the Commission could have been clearer and all parties would benefit by the Commission making certain clarifications. We support all of USTelecom's requests and urge the Commission to grant the Petition in its entirety.

[1] *See* Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket No. 02-60 (filed April 1, 2013) (Petition); *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, FCC 12-150 (rel. Dec. 21, 2012) (*Order*).

I. The Commission's Decision to Permit HCPs to "Share" Network Capacity with Others for a Fee Violates Congress's Prohibition on Resale.

In section 254 of the Act, Congress prohibited HCPs from selling, reselling, or otherwise transferring in consideration for money, or any other thing of value, telecommunications services and network capacity obtained through the Commission's RHC program. 47 U.S.C. § 254(h)(3).[2] Notwithstanding this clear prohibition, in its *Order*, the Commission seems to be encouraging participating HCPs to do just that. Specifically, the Commission suggests that consortia of HCPs that construct their own networks using universal service support should "put in extra fiber strands during construction and make the excess capacity available to other users." *Order* at ¶ 180. The Commission asserts that, as long as the HCP charges a high enough fee for the excess network capacity, retains ownership of the excess network capacity, and uses these revenues to support its network, this transaction is not "resale." *Order* at ¶¶ 80, 180. USTelecom challenges the Commission's rationale and explains why the distinction the Commission attempts to create between what it calls "cost sharing" and "resale" is illusory. Petition at 3-4. We agree with USTelecom. The Commission's interpretation of the statute, as explained in its *Order*, renders Congress's prohibition on resale meaningless.

Fair share. The Commission contends that if a for-profit entity pays the HCP its "fair share of network costs attributable to the portion of network capacity used," the HCP is permitted to "share" excess network capacity with the third party. *Order* at ¶ 180. The Commission contrasts this type of transaction with "sell[ing]" network capacity, which it acknowledges is prohibited by section 254(h)(3). *Id.* (citing 2007 *Pilot Program Selection Order* at ¶ 107). Of course, the statute prohibits both resale as well as the outright sale of USF-funded

[2] The statutory prohibition on resale also applies to schools and libraries participating in the Commission's E-rate program.

services and network capacity. Furthermore, Congress did not establish any exception from the resale prohibition for HCPs that are successful in obtaining a "fair price" from their customers. While the Commission deems a "fair price" to be one that is not discounted by USF dollars (*Order* at ¶ 180), such an approach seems to overlook the fact that, in the absence of significant universal service support, consortia of HCPs never would have constructed their own networks and the excess network capacity would not exist. As a result, third parties are still getting the benefit of RHC-discounted networks irrespective of the rate they are paying the reselling HCPs. Moreover, this benefit could be reflected in "fair prices" that are markedly lower than what a competing broadband provider might charge the third party. Allowing HCPs to resell capacity to businesses and anchor institutions in rural areas at artificially low rates diminishes the ability of existing broadband providers to serve residential customers in these marginally profitable areas and should prompt the Commission to reconsider this decision. *See* Petition at 4.

HCPs retain ownership of network capacity. The second basis offered by the Commission for why cost sharing does not violate the statutory prohibition on resale is that "HCPs would retain ownership of the excess capacity." *Id.* at ¶ 80. As USTelecom explains, by including the term "resold" in the statute, Congress intended to prohibit such scenarios as an HCP retaining ownership of the network capacity while leasing its use to a third party. Petition at 3. Otherwise, Congress would have omitted "resold" from section 254(h)(3) and limited the prohibition to "sold," which is generally understood to involve a transfer of ownership. *Id.* Moreover, the statute not only prohibits the "sale" or "resale" of capacity or services but also prohibits any transaction that "otherwise transfer[s]" capacity or services in exchange for money or any other thing of value. The plain language of the statute thus encompasses any transfer of capacity or service regardless of how such transfer is characterized.

Resale revenues earmarked for the consortium's network. The Commission's last justification for why cost sharing is not "resale" is that the Commission requires "payments for that excess capacity . . . [to] be used to support sustainability of the network." *Order* at ¶ 80. Again, this Commission rationale cannot be supported by the plain reading of the statute, which prohibits all resale, not just those resale transactions where the beneficiary uses its resale revenues for some non-network sustainability-related purpose. *See also* Petition at 3-4.

Consistent with its obligations under section 254(h)(3), the Commission should prohibit – not encourage – HCPs from reselling or otherwise transferring their USF-supported network capacity, which the Commission refers to as "cost sharing." Accordingly, AT&T asks that the Commission grant USTelecom's Petition and reconsider its cost sharing decision.

II. HCPs Should Not Receive Support for Dark Fiber.

In the *Order*, the Commission concludes 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." *Order* at ¶ 123. USTelecom asks the Commission to reconsider that finding because "dark fiber" is not a "service" at all. Petition at 5. We share USTelecom's concern. The relevant statutory provisions – section 254(c)(3) and (h) – discuss "services" available to health care providers, such as telecommunications services and information services. These services include a transmission capability through which telecommunications is provided. By contrast, dark fiber is nothing more than a physical facility that can only be used to provide a "service" if electronics are attached to it. *See also* Petition at n.13 (describing what is entailed in lighting dark fiber). By itself, dark fiber simply cannot "enhance[] access to advanced telecommunications and information services." *Order* at ¶ 123.

The Commission states that its dark fiber decision in the *Order* is consistent with its precedent. *Id.* It is true that the Commission reached the same erroneous conclusion in its E-rate program. However, the Commission should not compound its error by extending that finding here, to its new Healthcare Connect Fund. If an unlit facility can be deemed a "'service' that enhances access to advanced telecommunications and information services," it is unclear what would not qualify under that standard. Computers and servers that are not used exclusively for network management certainly enhance access to information services.[3] Could the Commission label these items a "service" and thus make them eligible for support? Just as we are concerned that the Commission interpreted Congress's resale prohibition right out of the statute, here too, we are concerned that the Commission's interpretation of "service" is so broad that the statute no longer offers any meaningful limitation on what the Commission may decide to support through its RHC program.

AT&T appreciates the Commission's desire to "help HCPs obtain broadband in the most cost-effective manner available in the marketplace." *Order* at ¶ 123. As one of the largest contributors to the universal service fund, AT&T shares that goal. However, AT&T believes that the Commission could achieve this goal while remaining in compliance with section 254 of the Act. For these reasons, AT&T recommends that the Commission grant this aspect of USTelecom's Petition.

III. The Commission Should Recover All Funds Disbursed in Violation of the Commission's RHC Rules from the Responsible Party.

In the *Order*, the Commission applies its 2007 decision governing recovery of support disbursed in violation of a Commission rule to its new Healthcare Connect Fund. *Order* at ¶

[3] *See Order* at ¶ 167 (listing such computers and servers as currently ineligible for support).

339. In that 2007 order, the Commission explained that support disbursed in violation of a Commission rule will be recovered and those recovery efforts will be directed at the party responsible for the violation. *Id.* (citing *Program Management Order*, 22 FCC Rcd 16372, ¶ 30 (2007)). USTelecom asks the Commission to clarify that, since at least 2007, this rule also has applied to the Commission's existing RHC program. Petition at 6-7. AT&T supports USTelecom's request and urges the Commission to make this clarification. Over the past several years, AT&T and other providers have been the subject of USAC's recovery actions due to violations committed solely by HCPs. *Id.* at n.16 (citing pending appeals filed by AT&T and Verizon). Even though the service provider had no knowledge about any HCP violation and could exercise no control over the HCP (i.e., the responsible party), USAC stated that it lacks the authority to seek recovery from HCPs absent clarification by the Commission. In addition to failing to deter rule violations by HCPs, USAC's current practice of seeking recovery only from the service provider is inequitable to the service provider and in conflict with the Commission's 2007 order. In some cases, the HCP is no longer a customer of the service provider so it is no simple matter for the service provider to demand that the HCP reimburse it for the amounts recovered by USAC. AT&T asks the Commission to remedy this current inequity by granting the Petition.

IV. Both HCPs and Vendors Would Benefit by the Commission Clarifying Whether and to What Extent Gift Restrictions Apply to the RHC Program.

Nowhere in the *Order*'s discussion of competitive bidding requirements does the Commission mention restrictions on gifts. This is odd since, as USTelecom notes, the Commission identifies numerous similarities between its E-rate competitive bidding requirements and those set forth in the *Order*. *See, e.g., Order* at ¶¶ 231-33 & nn.590-96; Petition at 7-8. If it was the Commission's intent to permit service providers to offer

participating HCPs the very gifts that are prohibited under the Commission's E-rate rules,[4] it should clarify that it intended the two programs' competitive bidding rules to be different on this issue. On the other hand, if the Commission intended to restrict gifts in the RHC program as it has done in its E-rate program, then the Commission should be clear about that, too. We agree with USTelecom that the status quo – uncertainty – undercuts the Commission's desire for a fair and open competitive bidding process. Petition at 8. If the Commission opts to clarify that it *did* intend to apply similar gift restrictions on RHC participants, AT&T asks the Commission to address the implementation issues identified by USTelecom. *Id*. at n.23 (e.g., explaining why, unlike in the E-rate program, service providers may not know whether an entity is a potential RHC participant). We agree with USTelecom that the straightforward solution to the problem of a service provider being unable to determine whether an entity is a potential RHC participant is to place the obligation to comply with the gift restrictions on HCPs only. *Id.* If the Commission is reluctant to adopt this USTelecom suggestion, AT&T recommends that the Commission limit the applicability of the gift restriction rule to HCPs that are clearly identified as RHC participants on USAC's web site.

V. The Commission Should Revisit its Broadband Metrics Reporting Requirements.

The *Order* compels service providers to produce "all information and documents regarding supported equipment, facilities, or services that are necessary for the health care provider to submit required forms or respond to Commission or Administrator inquiries" as a condition of receiving support from USAC. 47 C.F.R. § 54.640(b).[5] The consequence of failing

[4] 47 C.F.R. § 54.503(d).

[5] *See also Order* at ¶ 119 (requiring service providers to disclose "required [bandwidth] metrics to their HCP customers").

to comply could be significant: USAC may withhold reimbursements otherwise payable to the service provider. *Id.* USTelecom correctly points out that the Commission failed to request comment on this rule, in violation of the Administrative Procedure Act. Petition at 9. According to USTelecom, the Notice of Proposed Rulemaking only sought comment on whether to require HCPs to "annually identify the speed of the connections supported by the [RHC] Support mechanism …." and did not propose to require service providers to produce what could be extensive documentation that is costly and burdensome to collect. *Id.* The rule that the Commission ultimately adopted on beneficiary data collection and reporting, 47 C.F.R. § 54.647, offers service providers no indication about what information or documentation will be required of them, which is troubling since their reimbursement payments could be at stake.[6]

We agree with USTelecom that, by failing to seek comment on its service provider reporting rule, the Commission denied parties the opportunity to suggest less burdensome reporting alternatives. Petition at 9-10 (explaining, for example, that service providers could provide to HCPs the advertised speeds of the broadband offerings purchased by the beneficiaries in lieu of conducting expensive broadband performance testing of individual HCP circuits). Additionally, it would be inaccurate to say that service providers essentially agree to the reporting obligations in section 54.640(b) when they affirmatively decide to participate in the Healthcare Connect Fund program. Under the Commission's new rules, a service provider may end up being a Healthcare Connect Fund vendor because the HCP opts to take services out of an existing government Master Services Agreement (MSA) (*Order* at ¶¶256-58), Pilot Program MSA (*id.*at ¶ 260), evergreen contract that is designated as evergreen under the Healthcare

[6] The rule simply provides that consortia are required to file annual reports "with the information and in the form specified by the Wireline Competition Bureau." 47 C.F.R. § 54.647(a).

Connect Fund (*id.* at ¶ 265), or an E-rate master contract (*id.* at ¶ 267).[7] It cannot be said that these service providers affirmatively accepted the vendor reporting burdens in exchange for participating in the Healthcare Connect Fund. For the foregoing reasons, we ask the Commission to grant USTelecom's Petition and reconsider or clarify the scope of this reporting rule.

VI. The Commission Should Establish a Deadline by Which HCPs Must Submit Invoices to Service Providers.

AT&T shares USTelecom's concerns that, left unmodified, the Commission's Healthcare Connect Fund invoicing procedure leaves service providers at risk of not being reimbursed in a timely manner – or at all – through no fault of their own. Petition at 11. The Commission requires "all [Healthcare Connect Fund] invoices [to] be received by the Administrator within six months of the end date of the funding commitment." *Order* at ¶ 305. In order for these invoices to be submitted in a timely manner to USAC, an HCP must create and approve an invoice for the services it has received from the service provider. The HCP must certify that it paid its contribution to the service provider and the service provider must certify, in turn, that the invoice is accurate. *Id*. at ¶¶ 304-05. These steps must occur before the invoice can be submitted to USAC and before USAC can reimburse the service provider for having provided discounted service to the HCP. *Id.* at ¶ 305.

Unfortunately, as USTelecom explains in its Petition, there is no deadline on the HCP to create and approve the invoice, and there may be little incentive for the HCP to act quickly to do so since it has already paid the service provider its contribution. Petition at 11. Absent a deadline on HCPs, the service provider could go many months before being reimbursed by

[7] *See also* 47 C.F.R. § 54.642(h).

USAC for the significant discounts it provided previously to HCPs. AT&T has experienced this problem in the Pilot Program, the invoicing procedures from which formed the basis for the Healthcare Connect Fund's invoicing procedures. *Order* at ¶ 304. This delay could create cash flow problems for some service providers. To address this problem, AT&T agrees with USTelecom that the Commission should impose a reasonable deadline on HCPs to create, approve, and submit their invoices to service providers for their review and approval. Petition at 11. We also agree that 90 days is more than a reasonable amount of time for HCPs to complete their invoicing tasks. *Id.*

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For the reasons provided above, AT&T urges the Commission to grant USTelecom's Petition in its entirety.

Respectfully Submitted,

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May 9, 2013

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