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

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

COMMENTS OF THE
HEALTH INFORMATION EXCHANGE OF MONTANA
Regarding
THE UNITED STATES TELECOM ASSOCIATION'S
PETITION FOR RECONSIDERATION AND CLARIFICATION

The Health Information Exchange of Montana ("HIEM"), by its attorneys, and pursuant to the Public Notice issued by the Wireline Competition Bureau ("WCB" or "Bureau"),[1] hereby submits these comments regarding the Petition for Reconsideration and Clarification filed by the United States Telecom Association ("USTelecom") on April 1, 2013 ("Petition"). The Petition challenges as unlawful provisions of the Rural Health Care reform order ("Order") that permit health care providers to lease dark fiber or construct new facilities in situations where existing providers cannot or will not offer equivalent facilities or services at less overall cost than leasing or constructing new. The arguments raised by USTelecom were thoroughly considered in the Order and the Commission should again reject them.

I. BACKGROUND

HIEM is a not-for-profit collaboration of healthcare providers in communities across northwest and north central Montana, established to develop and share electronic health information and to improve patient care throughout a shared service area. The HIEM shared

[1] *Wireline Competition Bureau Seeks Comment on United States Telecom Association Petition For Reconsideration and Clarification of the Healthcare Connect Fund Order*, WC Docket 02-60, Public Notice, DA 13-864 (rel. Apr. 24, 2013).

service area spans both sides of the Continental Divide and features difficult terrain, harsh and unpredictable weather, and sparse population. HIEM is the recipient of a $13.6 million Rural Health Care ("RHC") Pilot Program ("Pilot" or "Pilot Program") funding award and one of the successful infrastructure projects in that program.

Through the competitive bidding process, HIEM discovered that the most cost-effective means of implementing its network was to build middle- and last-mile fiber to its health care members' facilities. By avoiding uncompetitive offers to lease network facilities or services from commercial providers, HIEM was able to stretch RHC Pilot Program funds and save substantial universal service funds. HIEM's experience conclusively shows that limiting or reducing competitive options will result in increased costs to health care providers and will waste limited universal service funding.[2]

II. LEASING FIBER OR CONSTRUCTING NEW FACILITIES SHOULD BE PERMITTED WHERE COMPETITIVE BIDDING SHOWS IT TO BE MORE COST EFFECTIVE THAN AVAILABLE ALTERNATIVES

Allowing health care providers to lease or construct facilities is ultimately about competition – USTelecom apparently wants less of it. Indeed, USTelecom asks the Commission to change Healthcare Connect Fund rules so that fiber builders and alternative providers such as railroads or power companies with dark fiber will not be allowed to offer lower cost alternatives to traditional providers. Granting USTelecom's request will reduce competition and runs against the Commission's long-standing commitment to and recognition of the benefits of competition in the Rural Health Care program.[3]

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[2] Additional background is available in HIEM's previous comments in WC Docket No. 02-60.

[3] As the Commission explained sixteen years ago in the First Report and Order:

> We adopt a competitive bidding requirement because we find this requirement should help minimize the support required by ensuring rural health care providers are aware of cost-effective

A. Competition Stretches Limited Universal Service Funding

The Healthcare Connect Fund rules on dark fiber and health care provider-owned facilities were rightly modeled on the Pilot Program which the Bureau recognized brought increased competition – in part from these alternative providers. This increased competition resulted in lower rates, higher bandwidth, and better service quality for applicants.[4] Effective competition in the Pilot stood in marked contrast to the lack of competition that is the norm in much of the legacy Telecommunications Program.[5] USTelecom's request should be rejected because granting it would immediately reduce the number of potential bidders for the Healthcare Connect Fund[6] – particularly in areas where few providers exist and where prohibitive pricing is mostly likely to occur.

The record in this proceeding shows that HIEM's network is in a remote and isolated area of the country and that HIEM received prohibitively high priced bids from existing providers. These bids were so high that competing offers from fiber builders to construct new facilities capable of providing equivalent services were much lower. This allowed HIEM to save its

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> alternatives. . . . [T]his approach "ensures that the universal service fund is used wisely and efficiently."

See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, ¶ 688 (1997) (internal citation omitted) (*First Report and Order*); *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45 and 97-21, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5426, ¶ 185 (1997) (*Fourth Order on Reconsideration*) ("We have attempted to design the universal mechanisms so that schools, libraries, and rural health care providers utilize, and obtain the advantages of, competition, to the fullest extent possible.") (emphasis added).

[4] *See Wireline Competition Bureau, Evaluation of Rural Health Care Pilot Program*, WC Docket 02-60, Staff Report, DA 12-1332, ¶¶ 81, 83 (rel. Aug. 13, 2012).

[5] *See Wireline Competition Bureau Seeks Further Comment on Issues in the Rural Health Care Reform Proceeding*, WC Docket 02-60, Public Notice, DA 12-1166, at ¶ 11.b, n.52 (2012) (*RHC PN*) (between 2006 and 2010, outside of Alaska, only 11% of applicants in the legacy RHC program received competitive bids in response to requests for services).

[6] *Cf. Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan For Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, FCC 10-175, ¶ 11 (2010) (*E-Rate Sixth Report and Order)* (concluding that "broadening the scope of potential suppliers of broadband increases competitive options, which in turn enhances choice and reduces cost").

members money and conserved and stretched the impact of its Pilot Program award. The Commission, by including similar competitive options in the Healthcare Connect Fund, wisely chose to make these potential benefits available to others.

The Healthcare Connect Fund rules do not require health care providers to build or even encourage them to do so. Indeed, the new rules merely help constrain providers from pricing services in excess of the cost necessary to construct and maintain new facilities capable of providing those same services over an equivalent period of time. As a result, actual construction of new facilities should rarely be necessary. But the *option* to construct is important – particularly where there is little or no competition. The new rules simply require vendors put forward their best offer when bidding to meet the needs of rural health care providers. Because no less should be expected, the Commission should reject USTelecom's request which would reduce the salutatory effects of competition on bidding behavior.[7]

USTelecom's concerns about overbuilding are misplaced and refuted by HIEM's first-hand experience. As HIEM commented in the Healthcare Connect Fund proceeding, HIEM encountered one carrier that freely expressed an intention to use program funds to overbuild its own fiber links, despite the fact that carrier had ample installed dark fiber available to provide the requested service. This unabashed willingness by an existing carrier to use universal service funds to overbuild its own network undercuts purported concerns about health care providers unnecessarily duplicating carrier facilities.

[7] As HIEM has previously noted, there should be no reason why carriers who have received millions in High Cost support and who have access to subsidized RUS loans cannot make facilities available at reasonably competitive prices.

Finally, USTelecom's claim that constructing new facilities undermines existing carriers by taking away anchor institution customers is also unfounded.[8] In the Healthcare Connect Fund proceeding, those who asserted this claim offered no actual evidence to back it up. In HIEM's case, excess capacity is being provided to existing providers who are then able to provide new services and serve more customers. Excess capacity has thus been a win-win-win – for existing providers, for HIEM, and for rural communities receiving more and better services. USTelecom offers no new information and can point to nothing in the record suggesting otherwise.

B. Health Care Providers Leasing Out Their Own Facilities Does Not Violate the Prohibition on Reselling Carrier-Provided Network Capacity or Services

USTelecom's claim that the Telecommunications Act resale prohibition (section 245(h)(3)[9]) restricts the installation of excess capacity misunderstands the applicable Healthcare Connect Fund rules. USTelecom disregards the fact that the excess capacity at issue <u>must be paid for in full by a health care provider</u> and thus is not funded through the Rural Health Care program – in this important respect it is effectively outside of the program.[10] Nothing in the Telecommunications Act precludes transactions among private parties using private funds to build private networks.

Moreover, as HIEM noted in the Healthcare Connect Fund proceeding, the installation of excess capacity in some cases will reduce program costs. For example, when the number of fibers needed for program-supported health care use is less than the number of fibers in an

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[8] Petition at 4.

[9] *See* 47 U.S.C. § 254(h)(3) ("(3) Terms and conditions [:] Telecommunications services and network capacity provided to a [health care provider] user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.").

[10] *See* 47 C.F.R. § 54.633(d)(2) ("The applicant must pay the full amount of the additional costs for excess capacity facilities that will not be part of the supported health care network."). HIEM recognizes as appropriate all of the limits section 54.633(d) places on the use of excess capacity proceeds such as the requirement that such proceeds be used only to support network sustainability.

industry standard fiber bundle, failure to install excess capacity will increase overall costs and increase expenditures from the universal service fund. It makes no practical or economic sense to preclude health care providers from paying for this excess capacity – especially when it may avoid having to strip fiber from a standard configuration and thereby save program funds.[11]

Finally, the purposes of Section 254(h)(3) are not implicated in connection with those facilities owned by health care providers that are funded by with universal service funds. Section 254(h)(3) prevents health care providers from reselling a discounted service at an undiscounted rate – effectively converting the universal service discount into a cash benefit (or other benefit unrelated to the program). In contrast, health care providers that establish a network with dark fiber or infrastructure supported by universal service funds are self-provisioning services, not reselling them.

C. Commission Precedent Long Establishes that Dark Fiber is a Service

Finally and perplexingly, USTelecom attempts to reopen the question of whether dark fiber is a "service" which enhances access to advanced telecommunications and information services pursuant to Section 254(h)(2)(A).[12] Whether dark fiber is a service was decided long-ago and reaffirmed by the Commission in 2010 when dark fiber was again made eligible for E-Rate program support.[13] Whether dark fiber increases access to advanced communications and information services is similarly settled.[14] USTelecom presents no basis for reopening either of these issues here.

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[11] *See HIEM Comments*, WC Docket 02-60, at 7-10 (filed Sep. 8, 2010).

[12] Petition at 5-6.

[13] *See E-Rate Sixth Report and Order*, ¶ 12 ("Commission precedent refutes the contention that leasing dark fiber is not a 'service.'") (citation omitted).

[14] *Id.* (finding that "dark fiber does enhance access to advanced telecommunications and information services consistent with section 254(h)(2)(A)").

III. CONCLUSION

Competition is the most effective and reliable way to ensure cost effective use of universal service funding. For that reason the Commission should reject USTelecom's request to prohibit health care providers from considering competitive offers from providers of dark fiber or new network facilities – and accepting those offers when it proves more cost effective to do so. In addition, HIEM's experience in the RHC Pilot Program demonstrates that installation of excess fiber – at no cost to the universal service fund – benefits rural communities and has not been shown to have any ill effects on carriers. Further, such excess fiber, because it is paid for solely by health care providers, does not violate the Telecommunications Act's resale prohibition. Finally, the issues USTelecom raises regarding the eligibility of dark fiber were conclusively resolved in the E-rate program.

Respectfully submitted,

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May 9, 2013