

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

**REPLY COMMENTS
OF THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ respectfully submits these reply comments in response to comments filed pursuant to the Public Notice² released by the Wireline Competition Bureau (Bureau) regarding USTelecom’s Petition for Reconsideration and Clarification (USTelecom Petition). The USTelecom Petition seeks reconsideration, and clarification of, various aspects of the Commission’s Rural Health Care Reform Order (Order).³ The Order reforms the Commission’s universal service support programs for health care by transitioning its existing Internet Access and Rural Health Care (RHC) Pilot Programs into a new Healthcare Connect Fund (HCF).

I. ‘Sharing’ Network Capacity with Others for a Fee Violates the Statute’s Resale Prohibition.

Several commenters support USTelecom’s recommendation that the Federal Communications Commission (Commission) reconsider permitting and encouraging the

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² See Public Notice, *Wireline Competition Bureau Seeks Comment on United States Telecom Association Petition for Reconsideration and Clarification of the Healthcare Connect Fund Order*, WC Docket No. 02-60 (rel. April 24, 2013).

³ Report and Order, *Rural Health Care Support Mechanism*, WC Docket No. 02-60, (rel. Dec. 21, 2012) (*Order*).

speculative installation and resale of excess capacity. The Order contradicts the clear language in the statute which expressly prohibits Healthcare Providers (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.⁴ AT&T expresses support for the USTelecom Petition, and methodically disassembles the flawed logic contained in the Commission's Order.⁵ Each of the bases utilized by the Commission in its Order – fair share, HCPs retention in ownership in network capacity, and resale value – were widely discredited in the various comments filed.

With respect to the Commission's justification based on the HCP paying its "fair share," AT&T notes that the agency ignores 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."⁶ The Montana Telecommunications Association (MTA) states that the use of Rural Health Care funds to build infrastructure which could compete with existing infrastructure funded in part by the High Cost mechanism "potentially pits one universal service program against another, resulting in a waste of precious universal service funds."⁷ As noted in the USTelecom Petition, the statute does not create a carve-out for HCPs that use the payments from reselling network capacity to others in a certain manner, or for HCPs that charge a certain amount for their excess network capacity.⁸

⁴ 47 U.S.C. § 254(h)(3). Section 254(h)(3) explicitly provides that "[t]elecommunications services and network capacity provided to a public institutional telecommunications 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."

⁵ AT&T Comments, pp. 2 – 4.

⁶ *Id.*, p. 3.

⁷ Montana Telecommunications Association Comments, p. 2.

⁸ USTelecom Petition, pp. 9 – 10.

Similarly, commenters support USTelecom’s argument that cost sharing violates the statutory prohibition on resale even if HCPs retain ownership of the excess capacity.⁹ For example, AT&T agrees that the inclusion of “resold” in the statute demonstrates that “Congress intended to prohibit such scenarios as an HCP retaining ownership of the network capacity while leasing its use to a third party.”¹⁰ Both AT&T and MTA correctly note that in addition to prohibiting the “sale” or “resale” of excess capacity, Congress also prohibited *any* transaction that “otherwise transfer[s]” capacity or services in exchange for money or any other thing of value.¹¹ Accordingly, the “plain language of the statute thus encompasses any transfer of capacity or service regardless of how such transfer is characterized.”¹²

As noted by one commenter, the Commission’s attempt to create a distinction between “cost sharing” and “resale” is “illusory.”¹³ The MTA states that it “fails to see how the construction and sale of excess capacity, the proceeds from which may be used by health care providers to ‘sustain’ their network operations, are not prohibited activities under the law.”¹⁴ MTA correctly notes that the Commission’s framework established in the Order will discourage further investment in High-Cost Fund-supported network infrastructure and that “by siphoning away anchor institutions from the public network, high-cost telecom providers have less to invest in their networks and to serve their hardest-to-serve consumers.”¹⁵ Moreover, MTA correctly notes that this disinvestment problem will be “exacerbated,” since it will allow rural health care

⁹ See, AT&T Comments, p.2, MTA Comments, p. 3.

¹⁰ AT&T Comments, p. 3.

¹¹ AT&T Comments, p. 3, MTA Comments, p. 2.

¹² AT&T Comments, p. 3.

¹³ *Id.*, p. 2.

¹⁴ Montana Telecommunications Association Comments, p. 2.

¹⁵ *Id.*, p. 3.

providers “first to remove themselves from the public network and then to sell excess capacity to even more anchor institutions.”¹⁶ Such an outcome runs counter to the purposes of both the High Cost Fund and the Healthcare Connect Fund, neither of which is intended to fund alternative providers.

Comments supporting the Commission’s approach in this regard engage in creative semantics which ignore the statute’s plain meaning. For example, by relying on the accompanying Conference Report (while ignoring the unambiguous statutory language), the Nebraska Healthcare Network argues that the prohibition contained in Section 253(h)(3) applies only in instances of “monetary gain.”¹⁷ Despite the fact that such an interpretation ignores well established Supreme Court precedent,¹⁸ the Nebraska Healthcare Network would have the Commission believe that a “monetary gain” does not accrue to the HCP when it receives a payment from a customer. As AT&T noted, such an interpretation of the statute “renders Congress’ prohibition on resale meaningless.”

The Nebraska Healthcare Network also is incorrect to assert that the USTelecom Petition fails to meet the Commission’s standards for a petition for reconsideration because the Petition “simply repeats arguments that were previously considered and rejected” by the Commission.¹⁹ The rule cited by the Nebraska Healthcare Network gives the Bureau the authority to dismiss a petition for reconsideration that relies on “arguments that have been *fully* considered and rejected

¹⁶ *Id.*

¹⁷ Nebraska Healthcare Network Comments, p. 5.

¹⁸ *Chevron U.S.A. Incorporated v. Natural Resources Defense Council, Incorporated, et al.*, 467 U.S. 837 (1984).

¹⁹ Nebraska Healthcare Network Comments, p. 3 (citing 47 C.F.R. § 1.429(l)(3)).

by the Commission. . . .”²⁰ There is no question that the Commission failed to “fully consider[.]” commenters’ concerns.²¹ Instead of offering a detailed analysis for why cost sharing is permissible under Section 254(h)(3), which it is not, the Order merely repeats a statement made in its NPRM (on which it had sought comment) and legally erroneous findings contained in its 2007 Pilot Program Order.²² Because the Commission failed to fully consider commenters’ concerns on this issue, there is no question that the USTelecom Petition is procedurally proper.

Finally, comments in the proceeding correctly dispute the Commission’s view that cost sharing does not constitute resale since the Commission requires “payments for that excess capacity . . . [to] be used to support sustainability of the network.”²³ Simply stated, such a 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.²⁴

II. Commenters Correctly Assert that HCPs Should Not Receive Support for Dark Fiber.

USTelecom’s position that dark fiber is neither a telecommunications service, advanced telecommunications service nor an information service, and cannot be included in the permissible uses of HCF funding, received broad support from various commenters. As noted in the USTelecom Petition, the HCF is designed to ensure that healthcare providers have access to cutting edge communications services, and is not designed to put medical providers in a position

²⁰ 47 C.F.R. § 1.429(l)(3) (emphasis added).

²¹ *See, e.g.*, AT&T Reply Comments, WC Docket No. 02-60, at 8-12 (filed Sept. 23, 2010).

²² Order, ¶ 80 (citing NPRM, ¶ 82 & 2007 Pilot Program Order, ¶ 107).

²³ Order, ¶ 80.

²⁴ *See*, AT&T Comments, p. 4, USTelecom Petition, pp. 3 – 4.

to build, operate and resell their own communications networks, which is what HCF support for dark fiber would engender.

AT&T correctly states that the relevant statutory sections address various services covered by the statute, each of which includes a transmission capability through which any telecommunications service is provided. In 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,”²⁵ and as such should not be eligible for support. While AT&T notes that the Commission’s decision is consistent with findings in its E-rate proceedings, USTelecom agrees that the Commission “should not compound its error by extending that finding here, to its new Healthcare Connect Fund.”²⁶ As AT&T observes, “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.”²⁷ USTelecom shares the concern that, since seemingly any type of device that enhances access to information services (such as a computer or server) could be deemed a ‘service’ under the Commission’s broad interpretation, the effect of that interpretation would mean the statute “no longer offers any meaningful limitation on what the Commission may decide to support through its RHC program.”²⁸

III. Several Aspects of the USTelecom Petition are Unopposed and Should be Expediently Granted by the Commission.

Several of the issues raised in the USTelecom Petition were unopposed by commenters, and should be promptly addressed by the Commission. Favorable action by the Commission on

²⁵ AT&T Comments, p. 4.

²⁶ *Id.*, p. 5.

²⁷ *Id.*

²⁸ *Id.*

these issues will clarify areas of ambiguity to improve the administration and integrity of the program.

First, the Commission should ensure that any enforcement actions relating to the recovery of federal funds should be directed to the party or parties responsible for the violation in question. No parties opposed USTelecom's recommendation that the Commission clarify that any enforcement actions seeking recovery for current and past violations in all RHC programs be directed solely at the responsible party (or parties).²⁹ In supporting this aspect of the USTelecom Petition, AT&T notes that 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."³⁰ AT&T further notes that in some instances, the HCP is no longer a customer of the service provider, and it is therefore "no simple matter for the service provider to demand that the HCP reimburse it for the amounts recovered by USAC." The Commission should therefore grant this aspect of the USTelecom Petition, thereby ensuring that equitable mechanisms are in place during cost recovery enforcement actions, and thereby ensuring increased integrity of the fund.

Second, the Commission should clarify whether its competitive bidding rules regarding gifts apply in the RHC context. USTelecom's request for clarification on the Order's treatment of RHC competitive bidding rules regarding gifts was also unopposed. AT&T correctly notes that such clarification would benefit both HCPs and vendors.³¹ Absent such clarification, the current ambiguity will undercut the Commission's desire for a fair and open competitive bidding process. The most straightforward solution to the problem of a service provider being unable to

²⁹ USTelecom Petition, pp. 6 – 7.

³⁰ AT&T Comments, p. 6.

³¹ *Id.*, pp. 6 – 7.

determine whether an entity is a potential RHC participant is to place the obligation to comply with the gift restrictions on HCPs only.³² If the Commission is reluctant to adopt this approach, it should limit the applicability of the gift restriction rule to HCPs that are clearly identified as RHC participants on USAC's web site.

Third, the Commission cannot compel service providers to disclose particular metrics to HCPs. There was no opposition to USTelecom's argument that the Commission's failure to seek comment on its service provider broadband metrics reporting rule denied parties the opportunity to suggest less burdensome reporting alternatives.³³ The Commission 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 AT&T noted could be "extensive documentation that is costly and burdensome to collect."³⁴ The Commission's failure to request comment on this rule violated the Administrative Procedure Act,³⁵ and this aspect of the USTelecom Petition should be granted.

Finally, the Commission should clarify that HCPs must meet a reasonable and appropriate timeline for sending invoices to the service provider. No parties opposed USTelecom's recommendation that the Commission clarify certain aspects of its Order regarding certification and invoicing requirements for the HCF program. Absent such modifications, the Commission's HCF invoicing procedures will leave service providers at risk of not being reimbursed in a timely manner – or at all – through no fault of their own.³⁶ As AT&T notes, any

³² AT&T Comments, p. 7, USTelecom Petition, n. 23.

³³ USTelecom Petition, pp. 9 – 10.

³⁴ AT&T Petition, p. 8.

³⁵ USTelecom Petition, p. 9.

³⁶ *Id.*, p. 11.

unnecessary delays could create cash flow problems for some service providers.³⁷ The Commission should therefore institute a timeframe for HCPs to create, approve, and submit their invoices to service providers that does not exceed 90 days, which is “more than a reasonable amount of time” for HCPs to complete this process.³⁸ Agreements between vendors and HCPs should have the flexibility to recognize a shorter timeframe.

IV. Conclusion

The Commission should expeditiously grant the USTelecom Petition, based both on the petition’s merits, and the comments filed in support. The Commission’s Order approving the ‘sharing’ of network capacity for a fee and installation of dark fiber contradicts the clear language in the statute which expressly prohibits 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.

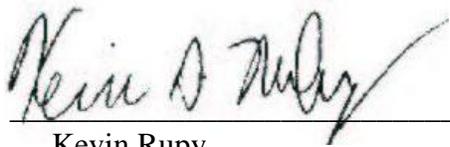
Several issues raised in the USTelecom Petition were unopposed by commenters, and should be promptly addressed by the Commission. The Commission should ensure that enforcement actions relating to the recovery of federal funds are directed to the party or parties responsible for the violation in question; clarify whether its competitive bidding rules regarding gifts apply in the RHC context, and that HCPs must meet a reasonable and appropriate timeline for sending invoices to the service provider. Finally, the Commission should confirm that it cannot compel service providers to disclose particular metrics to HCPs.

³⁷ AT&T Comments, p. 10.

³⁸ *Id.*

Respectfully submitted,

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