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Excess Bandwidth and Excess Capacity Scenarios

Scenario 1: *Participant Owns 100% of Dedicated Network; No-Excess Bandwidth or Excess Capacity for Use by Other Network Members or Non-Network Members*

The participant contracts with vendor to construct dedicated network capacity for current eligible HCP members¹, with the participant getting ownership of the fiber or an IRU. The participant owns 100% of the fiber, or an IRU. The participant pays not less than 15% of the eligible costs for the IRU, and universal service funds pay for not more than 85% of such eligible costs.

An IRU is for the specified bandwidth/number of fibers only, and excess capacity is not likely to be an issue. Any capacity paid for by universal service funds belong to the participant.

In the case of an IRU, the participant does not control how much additional capacity the vendor builds on its own, because the price paid by the participant for the IRU is set by competitive bidding.⁽²⁾ However, in reviewing bids, a participant should receive sufficient information to determine whether it is paying construction costs. See Scenario 7. If the price is based on construction costs and the participant is paying more than a fair share of construction costs, an IRU would not be appropriate, and the participant should obtain ownership (possibly joint ownership) of what is being constructed.

The participant must certify selection of the most cost-effective bid and USAC will verify that cost was a primary factor in selection.

¹ The term “eligible health care providers” (eligible HCPs) is defined in section 254(h)(7)(b) of the Communications Acts of 1934, as amended, 47 U.S.C. § 254(h)(2)(A); see *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 22 FCC Rcd 20360, at 20395-96, para. 71 (2007) (*2007 RHC PP Selection Order*).

² See *2007 RHC PP Selection Order*, at 20412-20415, paras. 100-104 (discussing competitive bidding requirements).

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Scenario 2: *Participant Owns 100% of Dedicated Network; Excess Bandwidth is owned by Participant for Current or Future Use by Other Network Members*⁽³⁾

Same as Scenario 1 above, except the participant requests that the vendor construct excess bandwidth for dedicated network growth.⁽⁴⁾ Such excess bandwidth (or an IRU for such excess bandwidth) may be covered by universal service funds and will be owned by the participant. The participant pays not less than 15% of the eligible costs for the dedicated network (including excess bandwidth) and universal service funds pay for not more than 85% of such eligible costs (including excess bandwidth). Future network members may be either eligible HCPs or other network members.

Subject to an agreement with the participant and so long as it is consistent with the *2007 RHC PP Selection Order*, an eligible HCP: (i) may join and use the dedicated network; and (ii) may become a part owner of the dedicated network facilities. Such eligible HCPs may be required by the participant to: (i) pay a fair share of ongoing costs; and/or (ii) pay an equitable portion of the participant's minimum 15 percent match contribution.

Other network members may join the dedicated network if they pay fair share to join and use the dedicated network (ensuring that universal service funds are not used to benefit other network members).⁽⁵⁾ Such other network members may not gain an ownership interest in the dedicated network facilities. Both the eligible HCPs and other network members must use the dedicated network for health-related purposes as set forth in participant's application and as permitted by the *2006 Pilot Program Order* and the *2007 RHCPP Selection Order*.⁽⁶⁾

Arrangements for use of excess capacity by non-network members must be arm's length. All revenues the participant receives from such future network members (other network members or eligible HCPs) must be used for the sustainability of the dedicated

³ See Letter from Dana Shaffer, Chief, Wireline Competition Bureau, to Scott Barash, Acting Chief Executive Officer, Universal Service Administrative Company, WC Docket No. 02-60 (dated Oct. 24, 2008) (*October 24 Letter*), at 3 ("mixed used" discussion).

⁴ For purposes of these scenarios, the term "excess bandwidth" refers to excess fiber (or other facilities) to be used for the dedicated network by eligible HCPs and other network members, and the term "excess capacity" refers to excess fiber (or other facilities) that will be used by non-network members.

⁵ Participants have the obligation to document how fair share was determined. *October 24 Letter* at 3.

⁶ *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 21 FCC Rcd 11111 (2006) (*2006 Pilot Program Order*); *2007 RHC PP Selection Order*.

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network. Network costs may include administration, equipment, software, telecommunications, legal fees, or other costs not covered by the Pilot Program, as long as they are relevant to sustaining the network.

In this scenario there is no excess capacity available for use by non-network members.

Scenario 3. *Participant Owns 100% of Dedicated Network and Pays “Incremental Cost” for Excess Capacity*

Same as Scenario 2 above, except that during the construction phase, in addition to paying at least 15% of the cost for the dedicated network facilities, the participant pays the *incremental cost* for excess capacity facilities that will not be part of the dedicated network. The dedicated network portion of the project will be used by network members as described in Scenario 2.

The incremental cost for excess capacity facilities is not part of the participant’s minimum 15% contribution and cannot be funded by universal service funds. In addition, the inclusion of excess capacity facilities cannot increase the funded cost of the dedicated network in any way.

The participant controls the excess capacity facilities and can make such facilities available for use by non-network members at market price. The participant may not sell the excess capacity facilities. Non-network members may use the excess capacity for any purpose (i.e., it is not required to be used for health-related purposes).

All revenues to the participant from excess capacity must be used for sustainability of the network. Network costs may include administration, equipment, software, telecommunications, legal fees, or other costs not covered by the Pilot Program, as long as they are relevant to sustaining the network.

Scenario 4. *Participant Owns 100% of Dedicated Network and Pays “Fair Share” for Excess Capacity*

Same as Scenario 3 above, except that the participant pays *fair share* for excess capacity facilities that will not be part of the dedicated network.

For example, if the dedicated network facilities consist of twelve (12) fibers, and the participant has the vendor or contractor install another twelve (12) fibers for use by non-network members, the participant’s fair share of the network cost would be at least 50%. Such contribution would not be part of the participant’s minimum 15% contribution for eligible costs, so the participant would be required to pay at least 57.5% of the total project costs.

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All construction costs, including trenching costs, must be allocated; the participant must demonstrate that the eligible (funded) costs for the dedicated network have not increased as a result the excess capacity; and the participant must identify how the fair share amount for excess capacity facilities was paid for by non-Pilot Program funds.⁽⁷⁾

The participant has full control of the excess capacity and can sell or lease it as it determines, including to non-network members, or to a vendor. Because the participant paid *fair share* for the excess capacity, this excess capacity is outside the Pilot Program and revenues from such sale or lease of excess capacity need not be retained in the network and can be used as the participant chooses. Non-network members may use the excess capacity for any purpose (i.e., it is not required to be used for health-related purposes).

Scenario 5. *Participant Shares Ownership of Dedicated Network with Other Network Members*

Same as Scenario 2 above, except that the dedicated network will be owned in part by the participant and in part by other network members. The other network members must pay their fair share for such ownership interest (including construction costs). All costs must be allocated between eligible HCPs and other network members in proportion to the ownership interest, with universal service funds paying not more than 85% of the participant's eligible costs. Pilot Program funds cannot pay for any portion of the other network members' share of costs.

Scenario 6. *At Participant's Request, Vendor Constructs Excess Capacity*

Same as Scenario 1 above, except that the participant requests or requires the vendor to construct excess capacity facilities (at the vendor's expense) into each community where the participant has requested service.

If the vendor only pays *incremental costs* for excess capacity facilities, such facilities must be retained by the participant and eligible HCP entities (because the bulk of the costs are funded by universal service funds). The vendor must be able to demonstrate to USAC, an auditor, or the FCC, that costs for such excess capacity facilities did not increase the eligible costs for the dedicated network.

⁷ See *October 24 Letter* at 2-3.

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If the vendor pays *fair share* for such excess capacity facilities, it may retain ownership of such facilities. It may sell the excess capacity to future customers. This situation requires substantial documentation, as the vendor must be able to demonstrate to USAC, an auditor, or the FCC, that it paid fair share.

This Scenario may arise when a participant has local or state requirements that the project include economic development. It is advisable in such situations, to seek USAC and/or FCC guidance on meeting such economic development requirements.

Scenario 7. *Vendor, On Its Own Initiative, Lays Down Excess Capacity*

In an IRU or lease situation, the participant is paying only for the requested capacity, priced by competitive bidding. In a construction situation, the participant should ensure that the contract makes clear that ALL facilities, excess or otherwise, are owned by the participant or that the vendor is paying fair share. In short, it is imperative that universal service funds not be used to pay for the vendor's costs or to provide assets for the vendor. The participant is charged with knowing the specifics of what is built and installed in a construction contract; in an IRU or lease situation, the participant must exercise due diligence in contracting for the dedicated network, and although pricing is established by competitive bidding, participants should be able to demonstrate to USAC, an auditor, or the FCC, that there was no misuse of universal service funds, especially in a competitive bidding situation with only one bid.

Scenario 8. *Participant Uses Future Revenues from Excess Capacity as Source of 15% Match*

Same as Scenario 3, except that the participant uses the future revenues from the excess capacity facilities as the source of the participant's minimum 15% match.⁽⁸⁾ Same results as Scenario 3, except that for the minimum 15% contribution to be considered as having come from "eligible sources," the following restrictions apply in addition to the competitive bidding requirements⁽⁹⁾:

- (i) The prepaid amount paid for use of the excess capacity facilities (IRU or lease) should be placed in an escrow account. The participant can then use this escrow account as an asset that qualifies for the minimum 15% contribution to the project.

⁸ See 2007 RHC PP Selection Order, 22 FCC Rcd at 20399-400, para. 77 (discussing eligible sources for 15% match).

⁹ For competitive bidding requirements, see 2007 RHC PP Selection Order, at 20412-20415, paras. 100-104.

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- (ii) The lease or IRU between the participant and the non-network member must be an arm's length transaction. To ensure this is an arm's length transaction, the participant cannot lease or grant an IRU to the vendor that installed the excess capacity facilities.
- (iii) All revenue to the participant from use of the excess capacity facilities by the non-network member must be used for sustainability of the network.

Scenario 4 is not applicable in these situations. Any participant unable to pay its minimum 15% match upfront should not take on the additional financial burden of paying fair share for excess capacity.

Scenario 9. *Participant Enters Into a Prepaid Lease*

Excess capacity is not likely to be an issue in prepaid leases. The participant must exercise due diligence in contracting for the dedicated network, and although pricing is established by competitive bidding, participants should be able to demonstrate to USAC, an auditor, or the FCC, that there was no misuse of universal service funds, especially in a competitive bidding situation with only one bid. Prepaid leases should have specific service quality provisions, and provisions to require the return of unearned lease payments by the vendor if the vendor is in breach of the lease. If the cost of the lease includes significant one-time charges (for construction of fiber, such as last mile connections), then the participant should consider a combination of owning the fiber (or an IRU on the fiber), and a prepaid lease for services.